CITATION: Kerr v. Hauer, 2010-04-06 ONSC 1995
COURT FILE NO.: 08-1125-00
DATE: 20100412

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sheila Kerr, Applicant Mother

AND:

Gil Hauer, Respondent Father (Moving Party)

BEFORE: M. P. Eberhard

COUNSEL: Gary Gottlieb, for the Applicant Mother

Judith Nicoll, for the Respondent Father

HEARD: March 30, 2010

ENDORSEMENT

[1] The Respondent Father moves for implementation of the parenting recommendations of Dr. Sol Goldstein, in his report delivered in September 2009. The Applicant Mother moves that the motion be dismissed in the face of a trial date set for the three week sittings commencing May 17, 2010. Her counsel estimates that three weeks will be required for trial and submissions predict that the focus will be on cross examination and challenge to Dr. Goldstein's report.

[2] The parties have lived separate and apart since 2008. Neither seeks joint custody as there has been conflict such that neither expects to be able to engage effectively in joint decision making.

[3] Dr. Goldstein's recommendations address both decision making and parenting schedule.

[4] The Respondent Father submits that the recommendations have been clear and urgent since September 2009. Both counsel ask me to draw inferences from the intensive case management involvement of Justice Graham since then, invested in the express effort to bring these parents to resolution rather than adjudication. Both counsel argue the same principles of caution in granting interim relief but Applicant Mother's counsel urging no action in expectation of trial within weeks and the Respondent Father's counsel doubting that the trial will be reached and submitting that the onus has been satisfied to bring this matter into the exception where relief ought to be granted now.

[5] Caselaw review commences with the general principles many times summarized and explained thereafter:[1]

> 15 There are two principles of law at play in this case. The first is that, generally, the status quo will be maintained on an interim custody motion in the absence of compelling reasons indicative of the necessity of a change to meet the children's best interests. This is so, whether the existing arrangement is *de facto* or *de jure*: See *McEackern v. McEachern* (1994), 5 R.F.L. (4th) 115 (Ont. Gen. Div.); *Papp v. Papp* (1969), [1970] 1 O.R. 331 (Ont. C.A.).
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> 16 The second principle is set out in *Genovesi v. Genovesi* (1992), 41 R.F.L. (3d) 27 (Ont. Gen. Div.), where Granger J. states at p. 32:
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> > An assessment report is usually ordered for use at a trial as opposed to being used at an interim proceeding. In rare cases the information obtained by the assessor might require immediate scrutiny by a judge to determine if there should be some variation of the existing custody arrangement.
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> I7 Granger J. goes on to say at p. 33 that the general rule that the assessor's recommendation ought not to be acted upon without a full trial should be followed except in exceptional circumstances where immediate action is mandated by the assessor's report.

[6] *Winn v Winn*[2] is an interesting example of how the practical realities may impact upon the principle of forbearance. With trial in the offing, it was better to wait but when the reality of trial lists delayed that option, the court did not leave the unresolved issues hanging in limbo.

[7] *Forte v Forte*[3] Corbett J. commented:

> 7 Sandro argued that this court should not consider and should place no weight upon the report from Dr. Janzen. There is authority that assessment reports ought to be used at trial but not on interim motions: see Mayer v. Mayer, [2002] O.J. No. 5303, per D. Gordon J., Grant v. Turgeon, [2000] O.J. No. 970, per V. Mackinnon J., and Genovesi v. Genovesi (1992), 41 R.F.L. (4th) 27

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[1] Grant v Turgeon [2000] O.J.No. 970 page 4
[2] [2008] O.J.No. 4854, [2009] O.J.No. 5913
[3] [2004] O.J.No. 1738 para 7

> (Ont. Gen. Div.) per Granger J. I agree that an assessment report ought to be approached with caution prior to trial. The court cannot delegate its decision-making authority to an assessor from the Office of the Children's Lawyer. That is trite law.
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> 8 However, I cannot accept that the court is precluded from considering all of the evidence that is available in coming to a determination of the best interests of the children. In particular, in this case, I do not accept that the court cannot consider the statements made by the children to the assessor. It is not the report's recommendations, but its substance and analysis that are of value.

[8] Because of the argument brought before me that I should draw inferences from the case management effort, I wish to comment on the new reality of family litigation, at least as it plays out in the region where this matter is heard that now has several years of familiarity with Family Law rules emphasizing judicial conferencing.

[9] The model of Application, one or more interim motions and then trial no longer applies. The court sees disputes, at the very least, in case conference as a precondition of motion and settlement conference as a precondition of trial. Happily many of those occasions result in Minutes of Settlement that advance the parenting arrangements in accordance with the parties' progress. The conferencing judge frequently infuses considerable persuasive content into such resolution.

[10] Some disputes do not resolve. That may be because of genuine triable issues. The court does not draw back from its adjudicative role. However, some other disputes do not resolve because one party or another cannot accept a reality within a range that will inevitably result once the matter is adjudicated.

[11] In this new family court model, when progress and evolution are encouraged and finessed along their course towards finality, it would be absurd if the one time a judge must refrain from pushing the matter onward is on the occasion of the interim motion because a trial is expected sometime thereafter.

[12] Indeed, in the several cases cited by the parties where the court emphasized the notion of forbearance at an interim stage, an order was simultaneously made to change some aspect of the status quo.[4]

[13] In making this general observation about how cases proceed through the courts, I do not suggest that the dispute before me today has an inevitable final result after trial exactly as Dr. Goldstein's has recommended. There is dispute raised about Dr. Goldstein's recommendations that may be shaped upon cross examination.

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[4] *Grant v Turgeon* supra page 5

[14] However, the very process of which I speak above is active in the present case. The parties have been able to agree to a summer parenting schedule that maximizes the time each of these parents will have the children in their respective care. I am able to incorporate those Minutes of Settlement in my endorsement today.

[15] The dynamic process has therefore succeeded in a very significant evolution based, no doubt, on the impact of Dr. Goldstein's recommendations on the parties' thinking as well as on the intensive case management effort put forward by Graham J. of this court and the realistic and conscientious response of counsel and the parties to this process.

[16] So, while I naturally accept and follow the caselaw calling for caution at an interim stage when trial is potentially imminent, I also analyze what genuine triable issues should be left alone till more is revealed through evidence at trial and other issues that should be adjudicated on a motion to advance the progress that is ongoing in conferenced based model.

[17] A court participating in conferences must maintain the integrity of its persuasive role by moving on to adjudication when resolution is illusive because of an impasse that the parties just cannot get beyond by agreement.

[18] In the present case the parties have demonstrated they are capable of considering practical parenting schedules. Their material and argument is somewhat thin on the practical factors for the most convenient and uncomplicated division of their parenting time. Dr. Goldstein has recommended basically that the Respondent Father parent on school days and the Applicant Mother have every weekend. With the mother's law school schedule and the father's college schedule, without details of the children's current and potential activities and interests, without considering the impact of other factors affecting the parents' personal schedules such as employment or relationships, I am left without the tools to rule on the particulars of when each parent should assume care of the children. If the parents cannot themselves resolve how to maximize the parenting time of each of them during the school year, as they have now done for the summer, then a court will need evidence. This is an issue where I should exercise caution on an interim motion.

[19] But the other issue argued was decision making. There have been no previous orders. There have been many conflicts. Most significant is dispute as to the approach to the boys' special needs. As diagnosis of ADHD is a current concern, the approach and management of medication is important and, frankly, an issue upon which reasonable people can differ. However, the difference in parental approach can and has resulted in one sabotaging the efforts of the other. There are also obvious social adjustment issues for the boys that need to be addressed and in this too, the parents differ as to approach.

[20] Broadly speaking, and particularly in this case, these concerns are mental health concerns. The analysis and testing and method of addressing the concerns are the stuff of mental health professionals. The strengths of one parent or another to manage the issues include the soundness or suitability of their own mental health make up.

[21] Dr. Goldstein is a psychiatrist. The evidence required for the court to determine the issue is mental health evidence that a psychiatrist, particularly one credentialed to address parenting issues, is an appropriate expert to explore. His opinion took into account parental interviews, testing and observation, as well as input from important collaterals such as the prescribing paediatrician.

[22] This is not a case where the court is delegating its adjudication about parenting to an assessor but one where a relevant expert has provided essential evidence, based on the method and expertise of his discipline.

[23] The change that would result from an order at this time would be to impose a certainty as to which parent would take responsibility for these decisions. It would not impede the other parent from offering input to the clinicians who are making treatment, dosage and management recommendations, nor would it entitle the decision-making parent to ignore the recommendations of the clinicians. To the children, such change would be, if the parents are responsible in their silence, almost invisible.

[24] Neither party intends a change in treating clinicians.

[25] If changes in management of the children's needs result from this order, then opportunity to assess the impact of such change would be available should a trial still be necessary or should any trial demonstrate, after cross examination, that Dr. Goldstein's psychiatric opinion was unfounded.

[26] Dr. Goldstein's opinion is that the Respondent Father can exercise more balance in his approach to the special needs. He recommends that the Respondent Father take on the decision making role.

[27] I am persuaded that this recommendation made last September ought to be implemented now.

[28] In coming to this view, I add parenthetically, I am not influenced by Dr. Goldstein's recent affidavit stating that he has no update but thinks his recommendations should have been implemented. Once an expert gives an opinion and has no further assessment to rely on, why would he not stand by his earlier views? This affidavit filed by the Respondent Father was redundant.

[29] I leave it to counsel to draft the terms about such details as how children are to be taken for appointments, who will make appointments, how information will be made available so that both parents employ the same management, what should constitute an emergency that will allow the Applicant Mother to access treatment without the Respondent Father's prior agreement.

[30] Until such nuances are addressed by agreement, the effect of this interim order is that the Respondent Father shall have the immediate responsibility of decision making as to the boys' needs but where such decisions have impact that require the cooperation of the mother, he shall make such decisions after consultation as to her views. The success the

parents have managing this change will no doubt impact the parenting schedule that must eventually be organized to accomplish the decisions made for the children. Dr. Goldstein opined that this would be best done by having the children with the Respondent Father during the school week but perhaps experience will open the possibility for other scheduling models.

[31] If the parties cannot agree on the issue of costs of this motion, written costs submissions of no more than 2 pages may be exchanged and submitted within 15 days of the release of this order, along with a bill of costs, through the judges' secretaries at Barrie.

EBERHARD J.

Date: April 12, 2010