# COURT OF APPEAL FOR ONTARIO

CITATION: A.H. v. S.B., 2018 ONCA 347
DATE: 20180409
DOCKET: C63974

Hourigan, Pardu and Huscroft JJ.A.

BETWEEN

A.H.

Applicant (Respondent by Cross-Motion)
(Appellant)

and

S.B.

Respondent (Applicant by motion to change)
(Respondent in Appeal)

Ryan M. Kniznik, for the appellant

Marcy Segal, for the respondent

Heard: April 5, 2018

On appeal from the order of Justice C.S. Nelson of the Superior Court of Justice, dated February 28, 2017.

## REASONS FOR DECISION

[1] A.H., the mother appeals from a decision of Nelson J. awarding custody to the father S.B. At the time of trial, in late 2016, the children, then 12 and 11, had lived with the father in Whitby since October 2010, when a Children's Aid Society placed the children with the father, taking the position that the children were in need of protection if they continued to reside with their mother. The appellant

signed Minutes of Settlement in April 2012 agreeing that the father's home would be the principal residence of the children. At trial the Office of the Children's Lawyer supported continued residence of the children with their father.

[2] Both parties agreed that the joint custody to which they had previously agreed did not work because of the conflict between them, and each sought sole custody. The appellant wanted to move the residence of the children to Holland Landing.

[3] The appellant submits that the trial judge erred in failing to hold a *voir dire* to determine whether statements made by the children to the mother were admissible.

[4] We do not agree. The trial judge gave the mother the opportunity to investigate the possibility of a *voir dire* to assess whether the statements could be admitted on the ground that they were necessary and reliable, and gave her the opportunity to discuss this with duty counsel. At no time during this 12 day trial did the mother ever ask for such a hearing. All agreed that this was a high conflict custody dispute. The trial judge did not err by refraining from embarking on an evidentiary hearing, in the absence of any request that he do so.

[5] The appellant further submits that the trial judge erred in refusing to admit hearsay evidence of statements made by the children. She argues that the statements were necessary and reliable and should have been admitted. We do

not agree. The trial judge found that the mother's evidence about statements made by the children was not reliable, and that the evidence was not necessary,

> ... In the first place, having appointed the OCL, it was not necessary for me to hear evidence on the views and preferences of the children other than from Ms. Bleau. Also, even if a *voir dire* had been requested, given the children's involvement and exposure to the conflict between the parents, the out-of-court statements made, mostly to the mother but also to doctors and others, would have been highly unreliable."

[6] The trial judge was satisfied that the report of the OCL accurately reflected the children's wishes,

> Ms. Bleau's evidence in certain historical areas may not have been entirely accurate but she did spend far more time on this case than OCL policy suggests – close to five months rather than three months – and I am satisfied that the portion of her report dealing with what the children wanted was correct. I shall cover the mother's complaints about other portions of the evidence later in this decision.
>
> I see no reason to suspect that the views and preferences of the children were not adequately and properly put before the court.

[7] The trial judge's conclusion that the mother's statements would have been highly unreliable was amply supported by the record, including the mother's own evidence of her psychological assessment. There is no reason to believe that anecdotal evidence of statements made by the children would have had any impact on the result in this trial.

[8] The appellant also submits that the trial judge erred in refusing to admit a surreptitious recording made by her of statements made by the children. The trial judge indicated, “I would not allow her to play the tape recording, ruling that parents should be discouraged from attempting to obtain evidence from children in this matter. The mother submitted that the taping was surreptitious. That to me compounds the difficulty in attempting to get the tape recordings placed before the court.”

[9] We are not persuaded that the trial judge erred in making this decision. More importantly, all of the necessary evidence about the children’s reaction to an incident involving their father was otherwise before the court.

[10] The appellant submits that the trial judge should not have awarded sole custody to the father, but rather should have awarded sole custody to her on the ground that the father was less attentive to the medical needs of the children than she was. The appellant argues that the trial judge gave too much emphasis to the long term status quo.

[11] The trial judge’s reasons reflect a thorough and sensitive weighing of the children’s best interests. He considered the evidence of the parties about the care taken by each parent to obtain medical treatment for the children, and acknowledged that the mother was quicker to respond to those issues. On the

whole of the evidence, he concluded nonetheless that the children's best interests were better promoted by their continuing to reside with the respondent.

[12] This decision is owed deference and we see no basis to intervene.

[13] The appellant also seeks leave to appeal from the $35,000 in costs ordered for the 12 day custody trial. We see no error in principle on the part of the trial judge which would justify granting leave.

[14] Accordingly, the appeal is dismissed, and leave to appeal costs is refused.

[15] The father does not seek costs of the appeal, indicating that the resources of these parties have been depleted by these proceedings. On consent, the $25,000 held as security for costs of the appeal shall be paid out to the respondent's counsel in trust for the respondent, in part payment of the trial costs awarded to the respondent.

"C.W. Hourigan J.A."
"G. Pardu J.A."
"Grant Huscroft J.A."