

COURT OF APPEAL FOR ONTARIO

CITATION: Austin v. House, 2023 ONCA 55

DATE: 20230126

DOCKET: C70674

Feldman, Lauwers and Roberts JJ.A.

BETWEEN

Jenna Ashley Austin

Applicant (Respondent in Appeal)

and

Benjamin House

Respondent (Appellant)

Michael H. Tweyman, for the appellant

Nolan Wilson, for the respondent

Heard: January 20, 2023

On appeal from the order of Justice David A. Broad of the Superior Court of Justice, dated April 19, 2022, with reasons reported at 2022 ONSC 2349.

REASONS FOR DECISION

[1] The parties are the parents of 6-year-old twin girls. The father initiated a trial seeking joint custody and equal parenting time. At the outset of the trial, the parties agreed that the mother would have sole custody of the children (now called decision-making responsibility), and that there would be a trial to determine the issue of parenting time. That trial lasted 17 days between May 15, 2018 and

December 18, 2018 before Baker J. of the Ontario Court of Justice. On January 25, 2019, Baker J. ordered parenting time to the father on alternating weekends plus a weekly midweek visit. On March 8, 2019, Baker J. reopened the trial at the request of the mother and ordered that the exchange location was to be the local police station. On April 29, 2019, Baker J. ordered the father to pay \$175,000 in costs to the mother for the trial, with ten percent to be enforced by the Family Responsibility Office, which amount represents the only costs ordered against the father that he has paid.

[2] The father initially appealed all of these orders. When he was ordered to pay security for costs of the appeal in the amount of \$20,000, he did not pay the ordered security or proceed with the appeal but instead brought a motion to change followed by a motion for an assessment under s. 30 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12.

[3] On October 20, 2021, Baker J. granted summary judgment dismissing the father's motion to change and his motion for a s. 30 assessment. Costs of the motion in the amount of \$20,000 were ordered payable by the father to the mother on December 16, 2021. The father served a notice of appeal on November 19, 2021 but did not perfect the appeal in accordance with the rules.

[4] The mother brought an application under s. 140 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 seeking an order prohibiting the father from instituting any

proceeding or continuing any proceeding previously instituted in any court except with leave of a judge of the Superior Court of Justice. The father opposed the application and sought an extension of time to appeal the decisions of Baker J. granting summary judgment and costs.

[5] The mother's application for a vexatious litigant order and the father's motion for an extension of time to appeal were heard together by Broad J., who granted the application declaring the father a vexatious litigant and dismissed the motion for an extension of time to appeal.

[6] This is an appeal from those orders.¹ At para. 14 of his reasons, Broad J. stated his conclusion and explanation for why he made the vexatious litigant order:

For the reasons that follow, I am satisfied that the father has persistently and without reasonable grounds conducted court proceedings in a vexatious manner. I also find that it is appropriate to make a remedial order to protect the mother from further harassment and to protect scarce judicial resources from being unduly monopolized by proceedings initiated by the father and conducted in a vexatious manner, so that cases of other litigants may proceed in a timely fashion. Such a remedial order would not prevent the father from having any access to the court to deal with the best interests of the parties' children. He would just be required to obtain leave to bring any fresh proceedings.

[7] In support of his conclusion, Broad J. quoted 17 findings made by Baker J. about the father's unreasonable behaviour in the litigation from her reasons for

¹ For clarity, Appellant's counsel on this appeal was counsel only on the present proceeding. The appellant was represented by different counsel at the original trial and on the first appeal.

awarding \$175,000 in costs against the father following the trial. Two of those findings were:

The [father] adopted a very aggressive approach to this litigation, by commencing numerous pretrial motions, re-visiting the same issues adjudicated previously, serving voluminous materials, serving materials including videotapes that were then not relied upon and calling extraneous and at times, irrelevant evidence. All of this protracted the trial into a 17 day campaign. He continued his 'no stone unturned' offensive despite the admonitions of the court, urging counsel to focus on the narrow issue at hand.

...

I find that the [father] conducted his case generally in an unreasonable fashion. This at times rose to the level of bad faith, as it was apparent that the [father's] conduct was causing the [mother] major financial harm without justification.

[8] Following the trial, and after serving 14 volumes of materials for the appeal of the trial decisions, the father did not proceed with the appeal but instead commenced a fresh motion to vary the trial orders regarding parenting time, decision-making responsibility and place of exchange. The appeal was therefore dismissed with costs ordered against the father of \$40,000, again not paid.

[9] Justice Broad rejected the submission that the court should limit any order against the father to proceedings against the mother, and that the order not be made under s. 140 of the *CJA* because of the stigma and disadvantage to the father from being labelled a vexatious litigant. That submission was renewed on

this appeal. Justice Broad rejected that submission because the father had initiated “harassing extra-judicial proceedings against [the mother’s] former partner and her spouse” leading him to conclude that a tailored order would not solve the problem.

[10] Justice Broad also considered whether the vexatious litigant order should apply to and therefore preclude the appeal of Baker J.’s summary judgment, and concluded that the result of the motion to extend the time to perfect the appeal would inform whether the appeal should be carved out from the vexatious litigant order.

[11] Justice Broad concluded that in the unique circumstances of the case, the justice of the case called for the extension of time to be denied. He found that the mother would be severely prejudiced financially by such an extension. Because the father had not paid more than \$200,000 in outstanding costs awards and chose not to pay security for costs of the appeal of the trial, Broad J. concluded that “there is no realistic prospect that, if successful in responding to the appeal, the mother would be able to collect any award of costs which might be made in her favour.”

[12] He then considered whether the potential merits of the appeal should tip the balance in the father’s favour, but found that the potential merits of the appeal were not sufficiently compelling. We agree.

[13] On this appeal, the appellant sought to introduce fresh evidence of facts regarding the children that occurred recently, and which evidence he submits

impugns the mother. She filed evidence in response denying the father's assertions.

[14] While we accepted the fresh evidence for review in accordance with our procedure, that evidence is not admitted. It would not have affected the outcome of the summary judgment motion as it is similar to other evidence led by the father that was not given effect by the motion judge, and therefore does not meet the fourth *Palmer* criterion: *Palmer v. The Queen*, [1980] 1 S.C.R. 759. Adherence to the *Palmer* criteria for the admission of fresh evidence on appeal, particularly in cases involving children, was reiterated by the Supreme Court of Canada in its recent decision in *Barendregt v. Grebliunas*, 2022 SCC 22, 469 D.L.R. (4th) 1.

[15] Justice Broad gave thorough and comprehensive reasons for his conclusions. We see no error in the analysis or in the conclusions reached by Broad J. denying the extension of time to appeal the summary judgment order and declaring the appellant to be a vexatious litigant.

[16] The appeal is therefore dismissed with costs to the respondent in the agreed amount of \$7,500 inclusive of disbursements and HST.

“K. Feldman J.A.”

“P. Lauwers J.A.”

“L.B. Roberts J.A.”