In the Court of Appeal of Alberta

Citation: D.H. v. L.P.1, 1987 ABCA 200

Date: 19871005
Docket: 18515
Registry: Calgary

Between:

D.H. and E.H.

Appellants

- and -

L.P.1, by her next friend L.P.2 and R.R.1, by his next friend, R.R.2

Respondents

The Court:

The Honourable Mr. Justice Stevenson
The Honourable Mr. Justice O'Leary
The Honourable Mr. Justice Irving

Memorandum of Judgment
Delivered from the Bench

COUNSEL:

G. Mungan, for the Appellants

L. Sparling, and G. Hotzel, for the Respondent

MEMORANDUM OF JUDGMENT DELIVERED FROM THE BENCH

STEVENSON, J.A. (for the Court):

[1] The appellants, guardians, appeal (by leave of the Court of Queen's Bench) an order that they pay costs of the respondents, natural parents.

[2] The respondents are the natural parents of a child whose custody was in issue at trial. The young mother had given up the child for adoption and her solicitor had consented to an order of guardianship in favour of the guardians. A short time later, supported by the young father, she changed her mind and sought the return of the child.

[3] The trial judge, in a careful, sensitive judgment found it was in the best interest of the child to set aside the guardianship order, returning guardianship to the mother and father (who had married the mother by the time of the trial). Significantly, the trial judge attached no "blame" and found no shortcomings in the guardians. The decision was not an easy one and showed a very careful weighing of the factors to be considered.

[4] The trial judge did not give any reasons for his cost award. The failure to discuss the question of costs is particularly troubling in the light of the fact that the parents were separately represented at trial and costs were given to each. The parents presented a united approach so far as the guardians were concerned, whatever factors may have led to separate representation as between themselves. Moreover, there were suggestions of "pressure" on the mother which were clearly not brought home to the guardians. We are told there was some discussion in chambers about costs. The father's counsel, in his factum, refers to economic oppression as having been mentioned. The evidence and findings do not support that suggestion. Counsel also suggested that the guardians had a greater ability to pay - a factor which we do not see as relevant in a case of this kind.

[5] In these circumstances we feel obliged to appraise the question of costs, de novo.

[6] There is no general rule respecting costs in custody questions. We think it significant that the guardians were maintaining a consent order, and, on the judgment, were genuinely seeking a judicial determination of what was in the best interest of the child. That determination clearly was not an easy one. It required a very careful assessment of the evidence and a nice balancing of the competing interests. No party can be said to have improperly or unnecessarily invoked the court. Nor was there a question of success, having regard to the real issue - the child's welfare. It was a case that had to be heard.

[7] The proper order to be made, in our view, is that each side bear their own costs of the trial. Costs not having been sought here, the same order will be made regarding the costs of the appeal.