


Family Law News

Lauren Bale & Kanata Cowan

Tug of War in Ontario

Justice Brownstone, a family court judge, has been making waves in the news for the past two years since he became the first sitting judge to write a book - *Tug of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court.* The book made the Canadian best seller list and continues to be recommended reading for clients by many family lawyers. We have colleagues, who distribute the book to every new client that retains them as ground work and background to the system that they will become a part of. In addition to the book, Justice Brownstone has also started to educate people through a television program currently being aired on CHCH.

Justice Brownstone made his television debut on a weekly aired program called *Family Matters*. This show is currently being aired on Hamilton's own CHCH television network on Tuesdays at 10:30pm and Saturdays at 9:30pm. The TV program is an offshoot from an internet TV program that is available online at http://www.familymatterstv.com. We previewed a number of the episodes from the online version and found that a wide range of family law topics were covered such as, child support, collaborative divorce, mediation, prenuptial agreements and child protection. Of course, our favourite episode dealt with selecting a family law lawyer. The show is meant as public legal education and provides solid information for clients with a range of family legal issues. *Family Matters* is informative for clients and we recommend that people involved or soon to be involved in these type of situations educate themselves by viewing the episodes.

Justice Brownstone has not only been a leader in educating the public about family matters, but this past September he has also written some attention-grabbing jurisprudence varying a custody order from sole custody to joint custody to preserve the balance of power between the quarrelling parents. *Hsiung v. Tsioutsioulas*, [2011] O.J. No. 4492 is a high conflict case between two separated parents with an ill 8 year old boy. The case evokes a sense of sadness for the young boy involved and allows us to applaud Justice Brownstone for reaching a decision in these difficult circumstances that goes against the grain that was established in *Kaplanis v. Kaplanis, 2005 CanLII 1625, 194 O.A.C. 106, 249 D.L.R. (4th) 620.*

The facts in *Hsuing* can be found in the decision but a summary is provided here. In June 2008, the mother obtained a temporary order granting her sole custody but granting the father access from Wednesday at 9:00am until Saturday at 6:00pm, each week, thereby giving each parent about half of the time with the child. The father was also granted the right to receive the same third party information regarding the child as the mother had from the child's school, doctors and other service providers, as well as, be consulted about major decisions involving the child. A few months later in September 2008, a final Order was granted wherein, the consultation and right to information paragraph were inadvertently omitted in the formal issued Order but nonetheless should have been included. This unfortunate omission fuelled the mother's belief that she could exercise her custodial rights without regard for the father's role in terms of decision making consultation and access to information concerning the child.

By April of 2009, the mother brought a motion to change, seeking to reduce the child's time in the father's care. This was investigated by the Office of the Children's Lawyer and they made recommendations that were not implemented by either parent. No change in custody was made and they continued to share parenting time almost equally.

In November 2010, the child became very ill and was admitted to hospital with life threatening inflammatory brain disease. He was in a coma, and very near death but made a remarkable recovery and was discharged on June 24, 2011. Sadly, Justice Brownstone noted that for many high-conflict couples they are able to recognize the importance of such a crisis and put aside their difference, but in this case the conflict reached an all-time high resulting in this most recent litigation. One wonders how parents have time to litigate during such a difficult time.

Justice Brownstone mentioned the importance of five professional witnesses in helping him decide this case. The court was fortunate to have this professional evidence because of the lengthy self serving materials that were filed by both parties. He found the professional witnesses to be neutral, fair and child-focused and preferred their evidence when it contradicted the parent's evidence.

In *obiter dicta*, Justice Brownstone indicated that the mother exercised her custodial powers with a fiercely arrogant sense of exclusivity and entitlement with a total lack of sensitivity and appreciation for the father's role in the child's life. "This is completely unacceptable and reflective of a parent who failed to understand that one of the most important roles of a custodial parent is to appreciate and support the role of the non-custodial parent in the child's life," wrote Justice Brownstone.

Hospital personnel testified against the mother giving many examples wherein she acted selfishly and failed to consult with the non-custodial father and share information with him. Examples of this behaviour included; yelling at the father when he tried to say goodbye to his son, giving the child a bath right before the end of her allotted time with the child therefore intruding on the father's time, advising the nurses that she was a single mother and it would be easier if the father were not involved, and refusing to share her notebook with the father after a medical meeting so that he could copy down notes that he was unable to take because he was holding the child during the meeting. Justice Brownstone found that "She (the mother) wilfully and definitely did all within her power to exclude him (the father)".

Pursuant to Section 29 of the *Children's Law Reform Act,* a final custody order cannot be varied unless there is a so called "material change in circumstances that affects or is likely to affect the best interests of the child." In this case, it was found that there was indeed a material change in circumstance because the mother was relentless in attempting to have the father excluded from pre-decision making consultation and information sharing entitlements. Once a material change in circumstance is found, the judge can then change the custody order if it is in the best interests of the child.

Typically, when parents are unable or unwilling to demonstrate the capacity and willingness to communicate and to co-operate with each other, joint

custody is not ordered. However, Justice Brownstone points to a recent trend where joint custody has been ordered to preserve the balance of power between parents, especially where one parent has been primarily responsible for the conflict-filled nature of the relationship. An important factor in helping him reach his decision was that the child was for the most part insulated from the parental conflict. Justice Brownstone made a "detailed, structured court order that should alleviate stress by stipulating a procedure to be followed in the event that the parents are unable to agree on any issue". In the detailed court Order, he empowers the CCAS and medical professionals to assist in resolving disputes. While he does not empower a non-party to make decisions, he hopes that they will 'assist' the parties to resolve their disputes.

This case is interesting not purely based on the soap opera like fact scenario but also for the precedent setting nature of the case. A number of tips that counsel should take away from the decision also resound from within.

Interestingly, the mother's alienating behaviour backfired to the point where she was required to share joint-custody with the one person that she was trying to exclude. This should be a lesson in reasonableness for parties involved in custody litigation. Both parents must respect the other's role and involve the other no matter how much they now dislike that person. This case serves as a tale that should be told to clients if they are excluding the other parent and what the possible outcome may be.

Inadvertently omitting a consultation clause, inflamed the situation and should be a lesson to all counsel to proof read each and every Order before it is issued and entered. As we all know, we need to be very careful and detail oriented in ensuring that our clients are properly cared for. While we are sure that this omission was not the entire cause of the disputes between the parties, it certainly may have altered the course of events if it had been included in the September 2008 final Order.

Counsel should also consider the use of professional witnesses in a he-said she-said battle as the witnesses clearly went a long way to assist in reaching a fair result. The witnesses seemed more important in reaching the decision that the voluminous self-serving personal attacks made on the other side in affidavit material. Counsel might consider using witnesses wisely rather than preparing volumes of unsupported affidavits.

Most interesting in *Hsuing*, is how Justice Brownstone arrived at the finding that a material change had occurred in the circumstances. No longer does a material change need to be an extrinsic factor, such as a loss of job or death, but it can be precipitated by an intrinsic factor such as the custodial parent failing to recognize the importance of the non-custodial parent in the child's life.

One concern that we have with the outcome of the case is whether the third parties such as doctors or social workers will actually co-operate in assisting the parties to resolve their dispute. This seems to put an unfair burden on these professionals. As one could imagine, the third parties may not want to get in the middle or involved with such divergent and difficult individuals.

Justice Brownstone has been a crusader for justice through his writing, television show and jurisprudence. We hope that some of this material can be used by both your clients to steer towards settlement and that this case shows how to become a better litigator if the matter does proceed to court. ■

Lauren Bale is an associate at Ross & McBride LLP. She can be reached at:
905-526-9800
lbale@rossmcbride.com

Kanata Cowan is an associate at Sullivan Festeryga LLP. She can be reached at:
905-528-7963 x158
kcowan@sfllp.ca.