

75 Nfld. & P.E.I.R. 261

Murphy, Re

Newfoundland Supreme Court, Trial Division

Steele, J.

Judgment: August 12, 1983

Murphy, Re

In the matter of Tonia Murphy, Infant

In the matter of an application by Shirley Murphy (Mother) for a Writ of Habeas
Corpus

Newfoundland Supreme Court, Trial Division

Steele, J.

Judgment: August 12, 1983

Docket: Doc. 1039

Counsel: **David C. Day**, Esq., Q.C. , for Shirley Murphy, the applicant.

O. Corwin Mills, Esq. , for Wilfred and Josie Murphy, the respondents.

Steele, J. :

1 This is a habeas corpus application by Shirley Murphy, the natural mother of Tonia Murphy, infant, requesting custody of her child. The five-year old girl now resides with Wilfred and Josie Murphy at Elliston, Trinity Bay, Newfoundland. They are the parents of Shirley and the grandparents of Tonia.

2 Shirley Murphy is 27 years old, single, employed with Newfoundland Telephone Company Limited as a service representative earning \$16,000.00 annually and resides in a two-bedroom apartment at Labrador City, Labrador, Newfoundland.

3 Josie Murphy is 65 years of age and except for a hernia condition says she is otherwise in good health. Wilfred Murphy is 78 years of age and his health is very questionable. The evidence is vague but it appears that Mr. Murphy suffered either a heart attack or had severe high blood pressure during the past year necessitating hospitalization. At that time his life was in jeopardy. His medication is eight "tablets" per day. The attack, whatever its nature, was serious and Mrs. Murphy's opinion to the contrary I am satisfied that Wilfred Murphy has a serious health problem. He did not testify.

4 The infant, Tonia, has lived in both Labrador City and Elliston but mainly in Elliston with

her grandparents. I am satisfied, however, that at no time did Shirley give up custody to her parents willingly. She did permit her parents to have custody but that was due to her financial and unsettled circumstances and to be more explicit due to the extreme pressure from her parents. It is apparent that Wilfred Murphy, the grandfather, was attached to the child from the very beginning though during the past five years both grandparents have grown very fond of Tonia.

5 I am also satisfied that the mother, Shirley, has never for a moment considered putting the child up for adoption or letting her parents have custody permanently. She explained fully the circumstances of her parents having custody of Tonia for the past two to two and a half years. It has always been her intention to raise the child herself and I accept her evidence and believe her that she has a very great love for the child.

6 Mrs. Josie Murphy said that they only wanted custody for one more year and at that time Tonia would be returned to her mother. She conceded that in another year the best interests of the child would be served by Tonia going to live with her mother. She explained why the child did not want to go now but that she would be prepared to go next August. It is admitted, therefore, by the grandparents that by next August it will be in the best interests of Tonia that she go to live with her mother in Labrador City. That fact narrows the issue to the extent that we are not speaking of permanent custody as far as Mr. and Mrs. Murphy are concerned but only temporary custody for one year. The issue arising is whether Tonia go to her mother now or whether it is in the best interests of the child that she remain at Elliston for another year.

7 Both the mother, Shirley, and the grandparents have registered Tonia to start school in September in their respective areas thus a degree of urgency to have this matter settled.

8 In *Re Brenton*, 41 Nfld. & P.E.I.R. 224 and 119 A.P.R. 224 I had occasion to refer to the law and the guiding principle in custody cases. I repeat the following from page 227:

In a contest over custody of a child the law and the guiding principle are clear. In this province it is stated in the form of a statutory directive. Section 47 of the Child Welfare Act, S.N. 1972, c. 37, reads:

47. Where in any proceeding before any court, including the Supreme Court, the custody or upbringing of a child is in question, the court, in deciding that question shall regard the best interests of the child as the first and paramount consideration, notwithstanding whether, from any other point of view, the claim of the father, or any right at common law possessed by the father, or in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father.

Clearly, in Newfoundland, the general principle in deciding any issue of custody or upbringing of a child is the best interests of the child. While the court must consider all relevant factors the touchstone for any issue or question between the parties relating to custody is in the final analysis a determination of the best interests of the child.

9 In my opinion there are several compelling reasons for awarding custody of Tonia to her mother, Shirley Murphy, immediately. Starting school for the first time is an important stage in the development of a child. There can be no advantage in having her change schools and homes in a year's time; better she start and continue in the same school system.

10 Wilfred and Josie Murphy are now 78 and 65 years of age respectively and their health and endurance is in doubt. If there is to be a change in custody in one year in any event, better it be sooner than later. There is no advantage to the child in delaying it for one year.

11 The request by the grandparents that they be permitted custody for one more year on the face of it appears reasonable. With respect I must disagree. It is obvious, as I have mentioned, that they are indeed very fond of the child and will grieve very much when the day comes that the child must leave. Understandably they want that day delayed. In these circumstances another year - a final year - would inflict great stress and strain on all concerned but the greatest recipient of the building emotional wave would be Tonia herself. The consequences could very well be devastating for her; and all to no avail. The longer the delay in making the move the greater the possibility of upset and turmoil. She would be another year older and by then much more attached to her Elliston environment, her grandparents, her school and new friends. It is wishful thinking on Mrs. Murphy's part to say that in another year Tonia can be ready and willing to go to her mother in Labrador City. It just would not happen that way.

12 I concede that there is an element of truth in Josie Murphy's contention that a house and large garden in the country with a full-time "mother" sounds preferable to an apartment in a large building block with a full-time working mother. However, in the context of the whole situation that argument alone does not in my opinion outweigh the other factors that favour custody to the mother, Shirley. I am satisfied that Shirley can and will cope very well and will make a happy home for Tonia. It will take time and patience on her part but she appears to comprehend fully the difficulties. I repeat that it is better that she be given the opportunity to start now rather than wait another year.

13 I do not doubt the testimony of Josie Murphy that Tonia has expressed a wish to remain in Elliston. That is understandable in the circumstances. It is to be hoped that once the decision is known both Shirley Murphy and her parents will try to put aside the inevitable hostility of three days in court and co-operate in trying to make the transition as easy as possible for Tonia. Obviously much depends on the good will and charitable nature of the grandparents. As in virtually all custody cases bitterness and resentment is created and much is said that I suspect the parties later wish went unsaid. Unfortunately, and in my opinion unfairly, the sudden illness and near death of Mr. Murphy was attributed to Shirley's attempt to gain custody of her child. Such statements can do irreparable harm. Whatever the future may hold I trust that Shirley and her parents will co-operate to restore a happy family relationship. Continued animosity would be detrimental to Tonia and to themselves. I appreciate that it will not be easy for Mr. and Mrs. Murphy to restrain their anguish over the loss of custody of their granddaughter but from testimony heard at the trial it must be apparent to them that their daughter, Shirley, has at all times been motivated by honourable instincts.

14 Accordingly the application by Shirley Murphy for a writ of habeas corpus directed to Wilfred Murphy and Josie Murphy respecting the custody of Tonia Murphy is allowed.

15 Custody of Tonia Murphy is awarded to her mother, Shirley Murphy. It is further ordered that Wilfred Murphy and Josie Murphy deliver custody of Tonia Murphy to Shirley Murphy on or before Wednesday, the 31st day of August, 1983.

16 In the circumstances I feel that the question of access by the grandparents to Tonia can be left to the parties to settle by agreement.

17 In the exercise of my discretion I make no order as to costs.

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