IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

IN THE MATTER OF
THE *FAMILY LAW ACT*, S.B.C. 2011 c. 25

BETWEEN:

J.L.M.

APPLICANT

AND:

G.A.T.

RESPONDENT

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE S.D. FRAME

Counsel for the Applicant:	Ms. K. Dodds
Place of Hearing:	Kamloops, B.C.
Date of Hearing:	April 23, 2013
Date of Judgment:	May 1, 2013

[1] This is an application by J.L.M. for the sole guardianship of K.A.M, born [DOB]. The father of the child is G.A.T. He was served with Ms. M.'s Application on October 6, 2012 but has failed to file a Reply.

[2] Ms. M. also sought in that application an order prohibiting the Respondent from interfering with or harassing her or K.

[3] The ex-parte evidence is to the extent that Mr. T. is facing criminal charges for assault of Ms. M. There is a “no contact” order in the criminal proceedings prohibiting Mr. T. from having contact with Ms. M.

[4] The applications were filed on September 26, 2012 before the *Family Law Act* was passed and the *Family Relations Act* repealed. Ms. M. seeks an order now under s. 39 that she is the sole guardian of K. Section 39 provides:

> 39 (1) While a child's parents are living together and after the child's parents separate, each parent of the child is the child's guardian.
>
> (2) Despite subsection (1), an agreement or order made after separation or when the parents are about to separate may provide that a parent is not the child's guardian.
>
> (3) A parent who has never resided with his or her child is not the child's guardian unless one of the following applies:
>
> > (a) section 30 *[parentage if other arrangement]* applies and the person is a parent under that section;
> >
> > (b) the parent and all of the child's guardians make an agreement providing that the parent is also a guardian;
> >
> > (c) the parent regularly cares for the child.
>
> (4) If a child's guardian and a person who is not the child's guardian marry or enter into a marriage-like relationship, the person does not become a guardian of that child by reason only of the marriage or marriage-like relationship.

[5] In this case, the parents were living together at the time of the child’s birth so 39(3) does not apply. Subject to 39(2), 39(1) is the applicable provision.

[6] The child was a witness to the violence in the relationship. I must determine whether it is appropriate to make an order under s. 39(2) that provides Mr. T. is not K.’s guardian.

[7] The wording of the section is unfortunate in that it does not specifically provide the court may make a declaration of guardianship. The section would be meaningless, though, if such declaratory power were not read into the section. However, s. 31 specifically empowers either the Supreme Court or Provincial Court to make declarations a parentage. There is no such language in s. 39, and no logical reason why there would not be such language.

[8] The definition of “court” under s. 1 is of little assistance because it simply provides that “court” means:

a) the Supreme Court, or

b) to the extent that it has jurisdiction to make an order, the Provincial Court.

[9] Does the Provincial Court then have statutory authority to make declarations of guardianship or non-guardianship under s. 39?

[10] I am satisfied that, while the drafting of the legislation is not particularly good, the meaning is clear. There is no distinction contained in s. 39 between the Provincial Court or the Supreme Court. It is clear that the court, which includes the Provincial Court, may make an order that a person who was a guardian is no longer a guardian. The section would be rendered meaningless for the considerable volumes of files brought before this court daily to interpret this section otherwise. The Division as a whole deals with identifying and appointing guardians as well as setting out the responsibilities, and with terminating guardians. I am satisfied that I am empowered to make an order that G.A.T. is not a guardian of K.A.M.

[11] Ms. Dodds argued, in the alternative, that I could make an order under s. 51(b) terminating Mr. T.’s guardianship of K. While s. 51(2) provides that an application under (1)(a) to appoint a person as a child’s guardian must be supported by evidence respecting the best interests of the child as described in s. 37, no such requirement is demanded of s. 51(1)(b). Nonetheless, Ms. Dodds led evidence through Ms. M. of the family violence. She further led evidence that Mr. T., apart from the brief time that the parties were reconciled - contrary to the criminal court order prohibiting such contact - has not had participation in the parenting of K.

[12] There is some evidence as well of a Facebook posting between Ms. M. and Mr. T.’s brother that Mr. T. has expressed no interest in raising K. That evidence, being the double hearsay that it is, is largely unreliable. However, Mr. T.’s absence and his failure to even file a Reply in these proceedings knowing that Ms. M. seeks sole guardianship of K. makes it clear that he has no interest in the outcome of these proceedings or the guardianship of K. I find that it is not in K.’s best interests to continue Mr. T.’s guardianship of her. I make an order under s. 39 providing that Mr. T. is not a guardian of K. I would make an order under s. 51 terminating his guardianship if I had not found that I had jurisdiction to make my order under s. 39.

[13] The restraining order Ms. M. sought under the *Family Relations Act* is now a protection order under s. 183 of the *Family Law Act*. I am satisfied on the evidence before me that it is appropriate to make such an order. I order that G.A.T. is restrained from directly or indirectly communicating with J.L.M. or K.A.M. and is further restrained from attending at, nearing or entering a place regularly attended by J.L.M. or K.A.M., including their residence, property, business, school or place of employment.

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S.D. Frame
Provincial Court Judge