

**SUPERIOR COURT OF JUSTICE**

B E T W E E N :

YASMIN NAKHUDA

Plaintiff

- and -

STORY BOOK PRIMATE SANCTUARY  
SHERRI DELANEY

Defendants

R E A S O N S F O R R U L I N G

BEFORE THE HONOURABLE JUSTICE M. BROWN  
on December 21, 2012, at OSHAWA, Ontario

APPEARANCES:

T. Charney

Counsel for the Plaintiff

K. Toyne

Counsel for the Defendants

FRIDAY, DECEMBER 21, 2012

R E A S O N S   F O R   R U L I N G

5 BROWN, J. (Orally):

10           These are my oral reasons with respect to the terms of the adjournment. Before me is a motion for an interim order for recovery of possession of personal property, namely a Japanese macaque monkey named Darwin who is currently in the possession of the defendants.

15           The defendants in this case have asked for an adjournment of the motion to permit them to file their own material and also to cross-examine the plaintiff on the affidavit material they have filed. Both the plaintiff and defendants agree to an adjournment of the motion until sometime in January 2013. However, the parties do not agree on the terms of any such adjournment. So, today I must set those terms.

25           There is no doubt, having read the material and observed the proceedings yesterday, that both the plaintiff and the defendants have great affection for Darwin. Quite understandably, as with many animals, it is not unusual that such affection as in this case is quite profound and real. That being said, it must be remembered that Darwin is not a human being and the rules of our court regarding the custody and access of children do not apply to Darwin. The law, as both counsel

30

have recognized, treats Darwin as personal property. And, therefore, in approaching this case that is how I have to approach the matter as well.

Because I will be hearing the matter in January on the basis of a more complete record than is before me today, I do not think it is appropriate for me to comment extensively about the facts, notwithstanding the thorough arguments presented to me by counsel yesterday. I am mindful that this is an adjournment for what should be a relatively short period of time to allow the parties to compile a complete record to be placed before me for the hearing in January.

In essence, the plaintiff Ms. Nakhuda is asking for temporary possession of Darwin over the holidays pending the hearing in January. The defendants object to Ms. Nakhuda having possession of Darwin during that time, although they have suggested some terms for Ms. Nakhuda visiting Darwin in the interim. In a situation like this dealing with personal property one of the most important factors is the preservation of the personal property pending the hearing. To the extent possible any order that I make today should attempt to ensure that the personal property, in this case Darwin, is not harmed or damaged in any way pending the January hearing. Ms. Nakhuda says that the longer she is away from Darwin, the weaker the bond will be between her and Darwin so

5 that if she does eventually get him back, the relationship she had with Darwin will be impaired. In a situation such as this on an adjournment request I must balance the rights of both parties on an interim basis. In essence, it involves balancing the relative risks of granting or withholding the remedy the plaintiff seeks, in this case the return of Darwin to her.

10 It is too early to assess the strength of the plaintiff's case based on the limited materials I have before me. However, I can say without hesitation that there is a serious question to be tried regarding the issue of possession of Darwin, and the plaintiff's claim is neither frivolous nor vexatious. That being said, until I am able to hear full argument on a full record in this matter in January, I am of the view that the balance of convenience favours a maintaining of the status quo in this case until January. In other words, I am of the view that until the hearing in January Darwin should remain in the possession of the defendants. I say this because on the limited evidence I have before me Darwin appears to have been well looked after by the defendants since 15 Darwin came into their possession on December the 10<sup>th</sup>, 2012. Any concerns that Ms. Nakhuda has about bonding with Darwin can be addressed by an order permitting her regular visits with Darwin. Given that we are only talking about an adjournment of about a month's time, I do not think there will be any irreparable harm to Darwin 20 25 30

5  
10  
15  
20  
25  
30

or his relationship with Ms. Nakhuda in the interim. As to the issue of the plaintiff moving to Kawartha Lakes and whether not having Darwin in her possession now will foreclose that possibility in the future, I can only say that the state of that evidence is so tenuous at this stage that it would not be appropriate for me to rely on it at this stage of the proceedings. It may well be there is more evidence on that point in the future and at the January hearing, and I will deal with it at that time if necessary.

I do want to stress that this is only a temporary order until January and that after hearing full argument on a full record in January I may well come to a different view of where Darwin should reside pending the trial in this matter.

Accordingly, this motion will be adjourned to a date to be fixed sometime in January 2013. Costs of yesterday's appearance and today's appearance are reserved to the January hearing. In the interim Darwin will remain in the possession of the defendants. The plaintiff will have every right to make regular visits to see Darwin during that time.

Now, Ms. Nakhuda, I am sure my ruling today is disappointing to you, but I have to do my very best to balance the interests of all the parties on this temporary basis.

## Reasons for Ruling - Brown, J.

Now, counsel, I do not want to have to impose terms of the visits, but obviously if you cannot agree on them I will impose them. I have to say I am not going to let you leave today without some understanding of what the rules of engagement are. I just do not think that is a healthy way of leaving it. But having said that, I have confidence that if you attempted to put your heads together, we might come to at least some understanding of what at least you are disagreeing about so that I can then make the order, and then you can make further submissions. So, what I am going suggest to you, if that is okay, is we take a half an hour now - 20 minutes, I do not care - and the two of you see if you can come to some understanding at least about what you are prepared to agree on, what you cannot agree on, and then I will make the decision. Okay. I just do not want to leave today and then have a situation develop between now and January that is unfortunate. Okay. And I understand there are different views. I have read the letters. I have read the correspondence, and I want you to try to do your very best to come to an understanding. And if you cannot, I will make the decision. Okay. And, presumably, I hope that in the interim you also had the chance to speak to each other about a timetable and I will incorporate that into an order. So, take about a half an hour now. Take an opportunity to speak to each other, unless you have got an agreement. I do not know. Yes, I think you need time to speak about it. And I will

6.

Reasons for Ruling - Brown, J.

come back and if you cannot agree, you can at least tell me what you are agreed to and I will make the decision on visits by Ms. Nakhuda. Okay. Thanks very much.

...

M A T T E R   A D J O U R N E D

5

10

15

20

25

30

FORM 2

CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 (2))

*Evidence Act*

I, **Lisa Buchanan**

*(Name of Authorized Person)*

certify that this document is a true and accurate transcript of the recording of

**Nakhuda v. Story Book**

*(Name of Case)*

in the **Superior Court of Justice**

*(Name of Court)*

held at **150 Bond Street East, Oshawa, Ontario.**

*(Court Address)*

**2812-208-400736-  
20121221-0947**

, which has been certified in Form 1.

taken from Recording \_\_\_\_\_

*January 17, 2013*

*(Date)*

*L. Buchanan*

*(Signature of Authorized Person(s))*

**Legend**

[sic] - Indicates preceding word has been reproduced verbatim and is not a transcription error.

(ph) - Indicates preceding word has been spelled phonetically.