C.A. No. 132690

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Hart and Chipman, JJ.A.

Cite as:R.K. G. v. M.A.G., 1997 NSCA 40

BETWEEN:

R. K. G. Appellant	)	Paul Graham for the Appellant
- and -	)	Stephen M. Robertson for the Respondent
M. A. G. Respondent	)	Appeal Heard: February 20, 1997
	)	Judgment Delivered: February 24, 1997

THE COURT: Appeal dismissed per reasons for judgment of Hart, J.A.; Clarke, C.J.N.S. and Chipman, J.A. concurrng.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

HART, J.A.:

R. K. G. and M. A. G. commenced a common law relationship in Nova Scotia in 1978. They moved to Alberta in 1983 and lived there until 1988 when they moved to Ontario where they stayed until 1993. In 1990 they were married in * and in 1993 they returned to Alberta to live.

Three children were born of this union in 1983, 1989 and 1995.

There are allegations of physical and psychological abuse of the wife and children by Mr. G. during the marriage and allegations of incompetence as a mother of Mrs. G. by her husband. They both admitted that there had been drug usage and separations from time to time.

One of these separations took place in 1994. The husband feared that his wife would take the children back to Nova Scotia and so he applied to the Alberta Court for interim custody of the children and an order preventing their removal from the jurisdiction. He obtained the Order but the parties reconciled and no permanent order was ever granted.

On February 23, 1996, Mrs. G. filed a Petition for Divorce in the Alberta Court and obtained an "ex parte" Order for sole custody of the children and restraining her husband from any contact with his wife or his children. The Order was to remain in force until March 18, 1996, when it was to be reviewed by the Court. This review hearing never took place, however, as Mrs. G. left the province in February and took the children with her to Nova Scotia.

Mr. G. was not served with the Divorce Petition or the "ex parte" Order.

On September 20, 1996, Mr. G. applied to the Alberta Court of Queen's Bench to obtain an order directing his wife to return the children to Alberta. Mrs. G.

was not present or represented at the hearing and the Order was granted by Madam Justice Trussler upon affidavits. She declared that the Alberta Court had jurisdiction, granted custody to the father and directed that the children be returned to the province. Her ruling was based primarily on the need to discourage people from removing children from the court's jurisdiction without approval by the court.

Mr. G. then came to Nova Scotia and sought the assistance of the Nova Scotia Courts and the R.C.M.P. to enforce this Order for the return of the children. Mrs. G. applied to the Nova Scotia Supreme Court to stay the operation of the Alberta Order.

The matter came on for hearing before Mr. Justice Scanlan at Truro, Nova Scotia, on September 25, 1996. He acknowledged that the Alberta Order was properly registered and enforceable in Nova Scotia. He agreed with Madam Justice Trussler that all courts should discourage the removal of children in custody cases from a province having jurisdiction. He was being asked by the mother, however, to exercise his '*parens patriae*" jurisdiction to stay the motion until a proper hearing could be held to determine whether it would be in the best interest of the children to return them to Alberta.

The only evidence before the Chambers judge was in the form of affidavits of the parties and two social workers from the Pictou County area. Although the parties were present with the wife being represented by Legal Aid and the husband by Alberta counsel on a phone hook up, there had been no opportunity for cross-examinations dealing with the allegations of abuse and the fear of harm to the children should they be returned. Mr. Justice Scanlan, therefore, decided to grant an interim order and afford the parties the opportunity to be fully heard at a later date. In his oral decision he stated:

"Mrs. G. in her affidavit outlines at length the living arrangements that she now has in place as regards the children. She outlines at length the schooling arrangements, the counselling arrangements and the fact that she is indeed receiving support not only from the various official organizations, but also from her family in this area.

The main concern the court has in this application relates to the best interests of the children. I am concerned, based on the affidavit evidence before me, that if I were to blindly enforce the order of Madam Justice Trussler and send these children back to Alberta the children would be at risk, if it turns out that the allegations as made by Mrs. G. are indeed correct. In this regard I again refer to the affidavit evidence of Ms. Skidmore. She is not a party to this action but she is an independent witness that has had an opportunity, through Tearmann House, to interview and assess these children.

Because I have concerns as regards the best interests of the children, I am not prepared to enforce the order of Madam Justice Trussler. I refer to the fact that, according to her decision, she was concerned with the need to discourage parents from taking children and disappearing without the court having an opportunity to fully canvass issues in the jurisdiction where the children are living. I refer to the typed transcript of her decision in that regard. She says at page 3

> On the basis that the mother did not extend her ex-parte order in Alberta, although she did commence proceedings here and on the basis that she disappeared without any notice and no longer has a custody order for the children that is valid under the Petition that remains in force, I am going to direct that the children to be returned forthwith to the Province of Alberta.

As I have indicated, I am not prepared to blindly enforce that order and take steps that would simply attempt to send the message home to the parties that you do not remove the children from the jurisdiction so as to make a point. The point is, the best interests of the children must come to the forefront. The children are going to remain in this jurisdiction until the matter can be dealt with at greater length."

The following Order was then granted:

"**IT IS HEREBY ORDERED THAT:**

1. THAT the Supreme Court of Nova Scotia has jurisdiction over the three children of this marriage all of whom are residing in Nova

Scotia with the mother; namely: A. L. G., born June *, 1983, M. R. G., born January *, 1988, and J. J. G., born February *, 1985.

2. THAT based on this Court's review of all of the affidavit evidence and based also upon the submissions of Counsel, this Court expressly declines to enforce the Interim Order of Madam Justice Trussler of the Court of Queen's Bench of Alberta filed and dated September 20, 1996 at the Law Courts in Edmonton, Alberta and subsequently registered with the Prothonotary of the Supreme Court of Nova Scotia.

3. THAT to facilitate and assist the Court in determining the issue of custody and to ensure that the children's best interests are indeed being looked after by the present care-giver, the Applicant mother, It is ordered that a home study be carried out on both the mother's and the father's home by the proper professionals/psychologists/social worker.

4. THAT the Respondent, R. K. G., shall continue to exercise regular telephone access with his children and that neither party at any time shall make derogatory comments about the other to the children.

5. THAT the Children's Aid Society of Pictou County shall continue to monitor this family.

6. THAT any access that the Respondent shall have with his three children shall be supervised through the Children's Aid Society of Pictou County personnel in Pictou County, Nova Scotia.

7. THAT the Applicant shall have sole custody of the infant children until the matter is further reviewed by a court of competent jurisdiction."

Mr. G. now appeals from this Order and the sole ground of appeal is that Mr. Justice Scanlan erred in failing to send the children back to Alberta to be dealt with in accordance with the Order of that Court.

The **Reciprocal Enforcement of Custody Orders Act**, 1976 S.N.S., ch. 15 states:

"3. A court, upon application, shall enforce, and may make such orders as it considers necessary to give effect to, a custody order made by a tribunal in a reciprocating state.

4 (1) Notwithstanding Section 3, where a court is satisfied

that a child would suffer serious harm if the child remained in or was restored to the person named in a custody order, the court may vary the custody order or make such other order for the custody of the child as it considers necessary.

(2) In varying a custody order or making another order pursuant to subsection (1), the court shall

(a) give first consideration to the welfare of the child regardless of the wishes or interests of any person seeking or opposing the variation or other order; and

(b) treat the question of custody as of paramount importance and the question of access or visitation as of secondary importance."

In my opinion, Mr. Justice Scanlan was correct in assuming jurisdiction in this matter and refusing to enforce the Alberta Court Order. He had a genuine concern for the safety of the children and concluded that it would not be in their best interest to force their immediate return to that Province before a full hearing could be held to settle that concern. Under the Statute he was authorized to vary the custody order or make such other order as necessary and this is what was done. He did not err as alleged.

I would, therefore, dismiss this appeal.

Hart, J.A.

Concurred in:

Clarke, C.J.N.S.

Chipman, J.A.

C.A. No. 132690

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

R. K. G.

Appellant)

- and -) REASONS FOR JUDGMENT BY:

M. A. G.) HART, J.A.

Respondent)