NOVA SCOTIA COURT OF APPEAL
Citation: Wedsworth v. Wedsworth, 2005 NSCA 102

Date: 20050630
Docket: CA 238283
Registry: Halifax

Between:

Deborah Louise Wedsworth

Appellant

v.

John James MacLeod Wedsworth

Respondent

Judge(s):	MacDonald, C.J.N.S., Freeman and Bateman, JJ.A.
Appeal Heard:	May 11, 2005, in Halifax, Nova Scotia
Held:	Appeal is dismissed with costs fixed at $1,000 plus disbursements, per reasons for judgment of Freeman, J.A.; MacDonald, C.J.N.S. and Bateman, J.A. concurring.
Counsel:	Jeanne Desveaux and Claire Sykora, for the appellant John James MacLeod Wedsworth, the respondent representing self

Reasons for judgment:

[1] When three boys were found to be at risk of emotional harm after seven years in their mother's custody, the Family Division of the Supreme Court of Nova Scotia varied the custody provisions of the 1998 corollary relief judgment to place them in the sole custody of their father. This is the appeal of the mother, Deborah Wedswsorth.

[2] The respondent father, John Wedsworth, had applied for the variation under s. 17 of the **Divorce Act**, alleging non-compliance by the appellant. He complained that he was being denied access to the boys, John Richard, 12, and the twins Michael and Joseph, eight, and that they were being emotionally abused.

[3] Mr. Wedsworth is an aircraft mechanic in the Canadian Armed Forces. He has married again and he and his wife Maria have a five-year-old daughter. An eleven-year-old stepson lives in the home. There is a good relationship between these children and the Wedsworth boys. Deborah Wedsworth's principal occupation has been caring for the boys. Mr. Wedsworth was self-represented; Ms. Wedsworth was represented by counsel. After a nine-day hearing in the late fall of 2004 Justice Kevin Coady carefully reviewed the evidence and the case law, focusing in turn on each of the parents and each of the boys individually. He found that while the mother was devoted to the boys and attentive to their schooling and physical needs, she remained stuck in the past of an acrimonious family relationship. Her interference with access and her emotional demands on the boys were so extreme as to constitute material changes in circumstances since the divorce. The judge found it necessary in the boys' long term best interests to place them in the sole custody of the father, despite the disruption and short term pain this might cause them. He restricted the mother's access to give the boys an opportunity to settle in to their new surroundings and set a date in April, 2005, to further consider her access provisions.

[4] The mother has raised seven grounds of appeal, including an allegation of bias on the part of Justice Coady which I find to be without merit. None of the grounds would justify this court, with its narrow jurisdiction in such matters, to interfere with Justice Coady's judgment. I would endorse his judgment and dismiss the appeal.

[5] The corollary relief judgment had attempted to address a history of conflict and litigation by stipulating a scheme of structured access for the father and imposing somewhat unusual terms. The parents were to communicate by way of a log book, not to speak badly of one another, and not to contact each other's workplace. Ms. Wedsworth was required to release school information but she was not required to consult Mr. Wedsworth on major decisions affecting the children.

[6] Justice Coady listed some 16 court orders since June of 1999, most of them related to access issues. In addition, the police were frequently involved and took the complaints seriously because of the family's volatility; assaults were alleged and occasionally charged and tried, with no convictions. There were numerous referrals, usually with inconclusive results, to child protection services of the Nova Scotia Department of Community Services (the "Agency").

[7] The last referral was in October, 2004, and came from Riolda van Feggelen, the court-appointed assessor, who reported possible emotional abuse of the children by Ms. Wedsworth. The Agency did not investigate because of the upcoming court proceeding.

[8] Ms. van Feggelen prepared a custody and access assessment in May, 2004, based on multiple interviews and tests with both parents and the three boys, two interviews with the step-mother, Maria Wedsworth, and interviews with 12 collateral witnesses. She is a registered psychologist and a senior member of her profession. She was qualified as an expert witness with a particular emphasis on children and the family and in particular to give opinion evidence on the "relationship and dynamics of these parents and their three children." She was called as a witness by the court and cross-examined by both sides.

[9] She testified that the *status quo* could not continue because the boys were at risk of lasting damage and needed to be "rescued." Justice Coady accepted her opinion that the *status quo* was not in the boys' best interests.

[10] The alternatives were joint custody or sole custody to Mr. Wedsworth. Ms. van Feggelen testified that if the father had sole custody, Ms. Wedsworth's access required supervision because she was a flight risk who might do something irrational. Justice Coady rejected joint custody as not in the boys' best interests "in any configuration" because of the couple's history and the damage already done.

[11] Justice Coady summarized her assessment:

> The import of Ms. van Feggelen's evidence is that the boys' relationship with their mother is unhealthy. She concludes that they are insecure, dependent, isolated and that they are likely to have relationship difficulties as adolescents.
>
> The assessment does not raise questions concerning Ms. Wedsworth's ability to provide for the boys physical well-being. They present well and outwardly do not appear in distress. There is also no question concerning Mr. Wedsworth's ability to parent as a sole custody parent. The critical question is whether the boys' life with their mother is sufficiently harmful to demand a change in custody after seven years.

[12] The judge considered some 25 separate points from Ms. van Feggelen's evidence germane to this question, including the following:

* The boys live with their mother at an address unknown to their father and go to a school, the location of which he is not supposed to know. This is a burden for all three children.

* There is no telephone contact between the boys and their father. Extended access is not encouraged.

* There is no indication that the boys have any significant contact with their mother's extended family.

* Ms. Wedsworth is largely negative in her comments about Mr. Wedsworth and such an attitude is apparent to the children.

* Ms. Wedsworth told the assessor that she could not live without the boys and they could not live without her.

* The mother feels the only appropriate home for the boys is with her and the less time they spend elsewhere the better.

* Ms. Wedsworth is unwilling to let go of any issues from the past.

[13] Justice Coady then moved on to consider evidence addressing the question whether "a change in custody would be in the boys' best interest given their strong emotional bond to their mother and their stated aversion to such a change." He listed a number of factors in support of such a change.

[14] He said most of the probative evidence came from the parties and the assessor, but both parties called secondary witnesses. Justice Coady reviewed and summarized their testimony in his judgment, noting that in some instances it contradicted Ms. Wedsworth's evidence which "was not always trustworthy."

[15] He said he had concluded on the entirety of the evidence that both parents loved their children. Ms. Wedsworth wanted to do what "she thinks is best for the boys." Mr. Wedsworth was "committed to doing what is in the boys' best interests."

[16] Ms. Wedsworth had allowed her personal feelings and attitudes to cloud her judgment as to what is in the boys' best interests and was attempting to preserve as much of her family past as possible; she perceived herself as a victim. Mr. Wedsworth had shown he knows what is best for the boys; he had moved on since separation. Ms. Wedsworth had limited the father's access and created difficulties and obstacles. Justice Coady said she defended her choices by using accusations that Mr. Wedsworth was physically abusive to her as "a tool to defend otherwise indefensible positions . . . I cannot conclude, on the evidence, that Ms. Wedsworth has been at risk from Mr. Wedsworth since the Corollary Relief Judgment."

> I do not find that Mr. Wedsworth suffers the same limitations. He is a parent in a very functional family unit, has the support of extended family and is very comfortable in his present community. I find that he can control his frustrations and makes an effort to shield the boys from parental conflict. He is not prone to outbursts and he maintains effective relationships. I have no concerns about Mr. Wedsworth's ability to accept and live by court orders.

[17] Justice Coady cited s. 17 of the **Divorce Act** and considered whether there had been a material change of circumstances since the corollary relief order. Citing **Rose v. Rose** 22RFL (3d) 72, he found facilitation of access was an important consideration.

> I must accept that the original Corollary Relief Judgment, and its subsequent variations, was correct and appropriate at the time it was made.

> **Gordon v. Goertz** (1996), 19 RFL (4th) 177 (S.C.C.). A comprehensive access schedule was put in place. That anticipated access has fallen away and all that is left is a tortured remnant of what was attempted. I find that to be a material change in circumstances. I also find that the boys' mental health has deteriorated over the years and that amounts to a material change. . .
>
> I find that the Section 17(5) threshold test has been met and that I must now enter upon a fresh assessment of the best interests of these children. **Francis v. Francis** (1972), 8 RFL 209 (Sask. C.A.)

[18] He described the list of factors relevant in Nova Scotia to determining children's best interests set out in **Foley v. Foley** (1993), 124 N.S.R. (2d) 198 as a tool for guidance. He considered each factor individually before arriving at his conclusions.

[19] The Supreme Court of Canada, considering the use of similar factors in a British Columbia case, **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014, stated:

> In preparing reasons in custody cases, a trial judge is expected to consider each of these factors in light of the evidence adduced at trial; however, this is not to say that he or she is obligated to discuss every piece of evidence in detail, or at all, when explaining his or her reasons for awarding custody to one person over another.

[20] Following his review of the evidence and the law Justice Coady reached his decision:

> I am granting Mr. Wedsworth's application to vary the Corollary Relief Judgment, and the variations therein, respecting custody. Upon the release of this judgment Mr. Wedsworth will have sole care and custody of all three boys.
>
> These children have lived with their mother for seven years. It is a rare case where custody and primary care changes after such a lengthy period. There is no doubt that the boys will experience some immediate trauma and grief. However, I am satisfied that they will warm up to their new home and immediate family within a reasonable period of time. The evidence has shown that the longer the children are in Mr. Wedsworth's home, the more relaxed and comfortable they become. Once they no longer feel compelled to please Ms. Wedsworth I expect that they will be more receptive to their new family and home. The boys do love their dad but have been stifled in their expression of their love. They have a good relationship with Maria Wedsworth but she has been

> demonized by Mrs. Wedsworth.They love their stepbrother and little sister. There is a varied and extensive lifestyle available in Mr. Wedsworth's military community.

[21] Justice Coady found access by Ms. Wedsworth to be "very problematic." The **Divorce Act** encouraged as much access as possible under ordinary circumstances, but Justice Coady shared the assessor's concerns that Ms Wedsworth would run with the children or do something "irrational" involving them. He found the best interests of the children, the paramount concern, "demand that I interfere with access between Ms. Wedsworth and all three children." He explained:

> I am ordering that there be no ongoing access by Ms. Wedsworth to the boys for a period of four weeks. This is necessary to allow the boys to become comfortable in their new home. Access would likely become a vehicle for Ms. Wedsworth to prevent the children from settling into their new life. I will order two supervised contacts per month starting in February, 2005 . . . for a period of two hours every second Saturday or Sunday afternoon. . . . This case will return to me in mid-April, 2005 for a review of access by Ms. Wedsworth. This will not be an appearance to re-visit custody.

[22] Ms. Wedsworth's notice of appeal alleged that the trial judge erred in failing to consider the cross-examination of the assessor; in failing "to consider and give credence to the evidence of collateral witnesses; in failing to consider the wishes of the children, and as a separate ground, the trauma to them of changing custody; and in determining there had been a material change in circumstances. It also alleged bias on the part of Justice Coady "as a result of the filing of untested evidence in the form of letters provided by the respondent."

[23] The appellant's factum fails to explain what is meant by bias resulting from "the filing of untested evidence in the form of letters provided by the Respondent." It said records of pre-trial conferences were not part of the trial evidence but the trial judge "did make reference to the children being 'at risk' prior to the actual trial occurring." It was submitted that the trial judge "exhibited bias at various points to the Appellant during the trial."

[24] Ms. Wedsworth's appellate counsel filed a supplementary appeal book containing transcripts of pre-trial proceedings. While we accept these as part of the record, they provide no support for the allegations of bias.

[25] After a lengthy quotation from **B.(J.B.) v. B.(J.A.)** 1992 CarswellNS 414, 113 NSR (2d) 60, 309 A.P.R. 60 discussing judicial bias, the appellant's factum concluded her submissions on this ground as follows:

> The test for bias is an objective one. Would a reasonable person think that the Judge had made his decision prior to hearing all of the evidence? The comments previously made in the materials previously filed by the Respondent which were before the Learned Trial Judge appeared to have some effect upon him and was brought out in his later comments to the Appellant during the trial process (Appeal Book, Volume II, Pages 845, 857, 863, 874, 877, 881, 890, 891, 898, 899). As such, it is respectfully submitted that there is a reasonable apprehension of bias and the appeal should be allowed on this basis.

[26] The appellant's allegations of bias are vague, unfocused and lacking context. In my view they are incapable of raising an apprehension of bias in any reasonable, and reasonably informed, person. A review of Justice Coady's judgment would suggest that he was scrupulously unbiased; he fairly examined all alternatives in seeking to identify the best interests of the boys. The evidence supporting his conclusions is overwhelming. I would dismiss this ground of appeal as lacking in all merit.

[27] Justice Coady repeatedly considered the wishes of the boys and the anticipated traumatic effect of the change in custody, recognizing the necessity of imposing "short term pain for long term gain." Justice Coady's duty was to render a judgment in the best interests of the boys. It was his duty to determine whether the wishes they expressed as their own reflected the emotional pressures to which they had been subjected. The determination of their best interests was for the court, not the boys themselves. I can find no material error on his part in his assessment of their best interests, and I would dismiss these grounds of appeal.

[28] The allegation that he erred in finding the material change in circumstances necessary for a change in the custody provisions of the Corollary Relief Judgment does not disclose material error. Justice Coady relied on appropriate jurisprudence in determining that interference with access and deterioration in the mental health of the subject children are instances of material changes in circumstances. I would dismiss this ground of appeal.

[29] The other grounds relate to Justice Coady's assessment of the evidence, that of the assessor and in a separate ground, the collateral witnesses. This is a matter on which he must receive profound deference from a court of appeal in the absence of material error.

[30] Ms. Wedsworth changed counsel between the preparation of the factum and the hearing. Her counsel at the hearing submitted that Justice Coady had placed unreasonable reliance on Ms. van Feggelen's assessment and testimony which had not placed sufficient emphasis on evidence of collateral witnesses favourable to Ms. Wedsworth. She asserted this amounted to judicial error. I cannot agree. Ms. van Feggelen was a duly qualified expert. Many of the collateral witnesses referred to in her report testified at the hearing, including Dr. Charles Hayes, a psychologist who had counseled John Richard from February, 1999, to September 2000. Weight of evidence is a matter for the trial judge, and I am not satisfied any material error occurred in Justice Coady's assessment of the evidence or the weight he attached to it.

[31] The narrow scope of appellate review is explained by the judgment of Justice Bastarache in **Van de Perre**:

> As indicated in both **Gordon (Gordon v. Groetz**, *supra*) and **Hickey** (**Hickey v. Hickey,** [1999] 3 S.C.R. 518) the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in **Van Mol (Guardian ad Litem of) v. Ashmore** (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

[32] This approach is followed in Nova Scotia, recently in **Children's Aid Society of Cape Breton-Victoria v. A.M.** 2005 NSCA 58:

> 26 This is an appeal. It is not a retrial on the written record or a chance to second guess the judge's exercise of discretion. The appellate court is not,

> therefore, to act on the basis of its own fresh assessment of the evidence or to substitute its own exercise of discretion for that of the judge at first instance. This Court is to intervene only if the trial judge erred in legal principle or made a palpable and overriding error in finding the facts. The advantages of the trial judge in appreciating the nuances of the evidence and in weighing the many dimensions of the relevant statutory considerations mean that his decision deserves considerable appellate deference except in the presence of clear and material error: **Family and Children's Services of Lunenburg County v. G.D.**, [2003] NSJ No. 416 (Q.L.) (C.A.) at para. 18; **Family and Children's Services of Kings County v. B.D.** (1999), 177 N.S.R. (2d) 169 (C.A.); **Nova Scotia (Minister of Community Services) v. C.B.T.** (2002), 207 N.S.R. (2d) 109; **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014 at paras. 10-16.

[33] In my view none of the grounds of appeal gives rise to a reasoned belief that the trial judge forgot, ignored, or misconceived the evidence. I would dismiss the appeal with costs which I would fix at $1,000 plus disbursements.

Freeman, J.A.

Concurring:

MacDonald, C.J.N.S.

Bateman, J.A.