NOVA SCOTIA COURT OF APPEAL
Citation: Ross-Johnson v. Johnson, 2009 NSCA 128

Date: 20091211
Docket: CA 313772
Registry: Halifax

Between:

Heidi Ross-Johnson

Appellant

v.

Christopher Johnson

Respondent

Judges:	MacDonald, C.J.N.S., Roscoe and Oland, JJ.A.
Appeal Heard:	December 2, 2009, in Halifax, Nova Scotia
Held:	Appeal is dismissed, per reasons for judgment of Roscoe, J.A.; MacDonald, C.J.N.S. and Oland, J.A. concurring. Costs payable by the appellant to the respondent in the amount of $2,250.
Counsel:	David A. Grant, for the appellant Brian Bailey, for the respondent

Reasons for judgment:

[1] This is an appeal by the mother of a nine year old boy, from an order placing him in the custody of his father who lives in Arkansas. After hearing two days of evidence in June 2009, Justice Legere Sers granted the father's application for a variation of custody by order issued July 3, 2009. The decision under appeal is reported as 2009 NSSC 210.

Background

[2] The parties were married in 1999, separated in 2002, and divorced by order of the Supreme Court Family Division on September 15, 2006. The child was born in April 2000. The mother has two older children from a previous relationship. The corollary relief judgment granted primary day-to-day care of the child to the mother with very detailed specific access to the father. The access periods included half of school holidays, twenty-two additional days per year, two weeks in the summer of 2007 and four weeks in the summer of 2008. The father was allowed to bring the child to the United States during his summer access and to have unrestricted telephone access.

[3] The father filed an application to vary in April 2008 asking that the child be placed in his custody and, in response, the mother sought an order restricting access to Nova Scotia. A custody and access assessment report was prepared by Michael S. Donaldson. The parties filed affidavits and, at the hearing of the application, the evidence of the parents, the father's present wife, the assessor and the mother's sister was presented. In addition, the court listened to audio recordings of voice mail messages left by the mother on the father's telephone and taped telephone conversations between the parents, some of which included the child.

Decision under appeal

[4] In coming to the determination that it was in the best interests of the child to be placed in the custody of his father, the learned judge reviewed the extensive history of difficulties the father had encountered in attempting to exercise access. She accepted the opinion of Mr. Donaldson that the mother had intentionally not adhered to the terms of the court order, and that the mother is the only obstacle to

the effective reinstatement of appropriate contact between the father and son. The trial judge's conclusion is based upon numerous findings of fact and credibility. It is necessary to quote from the decision at some length to set the conclusion reached in its proper context:

> [24] Notably the assessor indicated that "Heidi's anger towards Chris and her jealousy regarding Chris' relationship with his new partner is palpable". He found she had a need to punish the father for his refusal to reconcile with her. He found that [J.]'s best interests rarely took precedent(sic) in regard to his relationship with his father. He found that from the mother's perspective the father's involvement with the child was intrusive and disruptive.
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> [25] The assessor experienced the mother's rage. He noted as follows:
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> > Her rant which lasted approximately 10 minutes, including her berating the assessor as well as Chris for "going against my wishes", as well as name calling. This was all done in front of a crushed [J.] whose excitement at seeing his father was overwhelmed by his mother's anger. It was not until she left that they recovered from the onslaught and focused on one another. Chris indicated that had the assessor not been present, the language would have been abhorrent, (she acknowledged that she cursed and swore when they interacted and Chris did not), access denied and [J.] having been exposed to all of it. A more sensitive parent would have sent the child into the house while the adults discussed the matter. These concerns permeate the interaction between Heidi, Chris and [J.] via telephone and in personal interaction. There has also been what can only be described as "taunting" him by inviting him to Halifax and after his plans were made and tickets purchased, calling and saying "if you show up here there will be hell to pay". It is my opinion Heidi has limited capacity to grasp perspective other than her own. (Emphasis added by trial judge)
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> [26] The assessor found that Heidi was opposed to the father having access to both academic and medical information.
>
> [27] In another incident taking place with the father's initial visit with [J.], the mother did not approve of the father staying at her sister's home. The assessor noted:
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> > Heidi verbally berated both Chris as well as the assessor and resorted to calling her sister names. [J.] was present throughout the exchange waiting to leave with his father. He was obviously disheartened and he, like his

> father, cowered before her. After the matter was resolved to her liking (not going to her sister's home) and [J.] and his father were away from her, their demeanor returned to normal. It was obvious she was unaware of the effect this incident had on [J.]. (Emphasis added by the trial judge)

[28] In his conclusions Mr. Donaldson noted the following:

> Heidi acknowledged through this assessment that she was not adhering to the terms of the court order, ie. demanding written notice and when this was not forthcoming, refusing access: not allowing access to educational or medical information because she felt "that's not important"; stating that she would not allow [J.] to enter the United States; withholding telephone access because what Chris and [J.] talked about was "not important" in her opinion; denying email access because "he [Chris] was saying nasty things (she was unable to provide any examples to support this accusation) and anyway email was not a good idea because [J.] was "not a very good speller"; and finally demanding that Chris only take [J.] places in Nova Scotia that she approved to(sic), despite there being no requirements that he do so.

...

[45] The mother refuses to follow the terms of this order as she did not consent to the terms. It does not appear to make a difference that the terms were imposed by the court after a contested hearing. The mother insists on following a draft prepared by her lawyer that contains provisions not in the certified judgment. When addressed in court, she held rigidly to the draft terms as correct. If the father does not comply, she refuses access. She has imputed a requirement that the notice be in writing.

[46] The mother admits she has deleted/blocked the father from the child's MSN because his conversations were boring.

...

[55] In March 2007, he flew into Nova Scotia and was not permitted by the mother to stay with any of her sisters. She allowed him to stay in her home, she left leaving him responsible for all the children.

[56] While there he gained her permission to have a web cam installed on her computer so he could communicate with his son. While she agreed, she had it removed shortly after he left Nova Scotia. Her excuse for this is that she is

protecting her son against the evils of web cam and the danger inherent in this method of communication. However she admits that early in their relationship while the father was posted away they regularly used a web cam to communicate.

[57] Telephone access is extremely difficult. Calls are not always answered. When answered it is clear the mother monitors the calls and when she wishes to speak to the father she interrupts the call. She places limits on the calls and terminates the call for various reasons.

...

[59] Any efforts to have his son visit his family or himself in the United States have been deliberately thwarted. The excuses range from the child does not want to go, he is too young to travel to the States, there are too many strangers, the father will abscond, etc. None of these excuses have been substantiated.

[60] In fact the evidence of both the mother and the father confirm the child misses the father, anxiously awaits his visits, wants to have time alone with his father and enjoys their time together. Clearly, if the mother thought there was any suggestion of concern about his parenting, she would not insist on him taking her own children as well.

[61] There are numerous incidents where the father has notified the mother of his intent to exercise access in accordance with the order, made his plans, been encouraged to come see his son, only to find she has arranged another activity and changed the times. Since he has planned his vacation around the visit, extending the visit to accommodate the mother's manipulations becomes difficult because of time off work, airline tickets already purchased, etc. The father is not without funds yet does not have sufficient excess to tolerate these added and unnecessary expenditures.

...

[75] Far more troubling is the contents of a taped telephone call during which the mother took the phone from her son and in his presence ranted at the father in an uncontrollable rage demeaning him in the son's presence, encouraging the son to relive his feelings of abandonment and anger at his father, and enforcing how this exemplified the father's lack of concern for him. This sense of abandonment was created by the mother's version of events and do not reflect the father's serious efforts to maintain contact with his son.

[76] The mother vilified the father, reducing the child to tears. It was one of many truly manipulative and abusive conversations between the mother and father. As the assessor noted, the mother does not isolate her child from her anger. In fact, the evidence supports the fact that she actively engages the child in her anger.

...

[79] She acknowledges the terms of the order but retains the right to amend or add to the order with preconditions regarding access.

[80] She showed no insight into her behavior either with the assessor or when confronted in court with her rages during the telephone contact. She expressed that she felt her anger was justified and was not inappropriate or adverse to the child's interests.

[81] The assessor's report was in January 20, 2009. Both parents had access to the report and knew of his recommendations. In particular, it was clear that the assessor recommended that if the mother continue to fail to comply with court-ordered access, the court may consider changing custody.

[82] In spite of that and even in the face of the court directing unsupervised contact for the father and child while in Nova Scotia for the hearing, the mother refused to allow overnight access and refused to allow the child to go to her sister's.

[83] In the context of Section 16(10) of *the Divorce Act* there is ample evidence to prove beyond any doubt that the mother will not abide by a court-ordered access regime unless it is one crafted by her that restricts the father's access considerably. She will not facilitate communication and will continue to sabotage the contact until this child is old enough to make his own decisions. She will continue to demean the father in the child's eyes, make disparaging remarks, inform the child the father does not care about him, is not interested enough in contacting him to make any effort and will continue to fuel his grief at his father's absence in his life.

[84] Having concluded that the mother is unlikely to change her behavior and in recognition that Section 16(10), while important is not in itself the sole justification for a change in custody, I move to a consideration of the best interests.

...

[92] The father began two years ago to tape conversations between himself and the mother. He did so because when he makes arrangements to visit he then finds himself in constant conflict. What he says and what the mother believes he said are usually at odds. He advised when they have an argument about what he has said either by way of e-mail or telephone, he has referred her to the tapes and the e-mail to confirm the accuracy of his discussions.

[93] There was no objection to the admission of these voice mails. There was no suggestion by the mother that these conversations did not take place or that the voice was not her own. She does advise that there were many more voice mails that would present her in a far more calm manner and that these do not reflect the vast majority of the discussions.

[94] It is difficult to believe the intensity and the content of the discussions were it simply his testimony against hers. One has to listen to the subject matter to believe and observe how an innocent conversation with his son can escalate into a blind barrage of verbal abuse involving both the father and the son. One has to experience the nature and extent of the mother's emotional abuse to believe it happens as the father indicates.

[95] The mother has left messages on the father's telephone alleging in 2007 (some 6 years after her separation) that his wife stole her husband. She speaks of the father being involved in tax fraud and suggests she is sending papers to the IRS to have him arrested. She taunts his girlfriend (now his wife) about having conjugal visits in jail as a result of income tax fraud.

...

[101] These rages seriously impact the child and his ability to connect in a meaningful way to his father. The father admits he speaks and acts in such a way that he can avoid any confrontation with the mother and to try to avoid any negative consequences on his son.

[102] When questioned about these rages, the mother showed no insight into their effect on her son. If this is what happens when the mother knows she is being taped, what happens when there is no one around to hear her?

...

[114] I find as a fact that the mother is engaged in a conscious effort to alienate the child from his father. I find this is accomplished by changing plans, denying

access, placing unrealistic demands on the father, and deliberately acting contrary to court order. She is unable to move beyond her extreme anger at the dissolution of the relationship. In his absence, she attacks the father's character and deliberately sabotages the child's view of his father.

[115] I find as a fact that she was physically abusive to the father. I find that she is engaged in significant emotional abuse against the father and the son, involving them in a degree of verbal abuse that is crippling.

...

[118] I conclude that the father is not returning emotional abuse in kind. He simply responds in such a way as to wait through the storm of abuse quietly just so he can still connect to his son. There is no evidence to support a finding that the father is likewise impulsive. He has persisted despite many sabotaged visits to carve out as much contact as he can with his son.

[119] I am satisfied that there is a change of circumstances. The original order contemplated a cooperative approach to parenting with each parent facilitating appropriate contact with the other to address the child's best interests. The facts as they now stand could not be further from that original contemplation.

[120] The son has lived with the mother for 8 years. I rest with the knowledge that if the court allows the child to remain with the mother, the father will with certainty be cut out of his life until he is of age to find him on his own. The damage to the child should this happen is not one I can calculate.

...

[124] Losing either parent is undesirable. The father is prepared to facilitate contact with the mother. I find this assertion credible simply because of the abuse he has taken to obtain contact himself. He has done so without retaliation. He has tried to protect his son from these discussions.

[125] There is no evidence before me to suggest that contact between an eight-year-old boy and his father should be regarded as less important than contact with his mother.

[126] In this case, there is every possibility of a healthy relationship with the father, a valuable relationship, one that has all appearances of stability. At the same time, the father presents as a peaceable parent, a patient parent, hard working and diligent in his efforts to keep in contact with his son.

> [127] The mother clearly engages in emotionally abuse and will not facilitate such contact so as to preserve this child's connection to both parents. Delaying this further will certainly escalate the costs with little hope for change. Further litigation will be necessary to resolve the issue.

[5] The judge granted sole custody of the child to the father with block access to the mother during Christmas, March break and summer vacation, provided the contact is healthy and appropriate to the child's needs. As well, the mother is entitled to supervised telephone and online contact via computer with the child. She also recommended that the mother have a psychological assessment to assist her in gaining insight into the impact of her actions and to address her anger and emotionally abusive behaviour. The judge retained jurisdiction over the matter and scheduled a review hearing on November 16, 2009.

Issues

[6] The appellant states the grounds of appeal as follows:

> 1. The honourable trial judge erred in law in defining and determining the best interest of the child by failing to take into account the childs relationship with its mother, siblings, and the community at large and the effect upon the child of a break in thses(sic) relationships.
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> 2. The honourable trial judge erred in law in defining and determining the best interest of the child by failing to take into account the report of the parental assessor and in particular the reasons why such a change in custody should not occur.
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> 3. The honourable trial judge erred in law in defining and determining the best interest of the child by using the change in custody as a penalty for the appellant for violations of a previous court order when the rules provide for other penalties for such a breach or violation rather than a change in custody.
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> 4. The honourable trial judge erred in law in defining and determining the best interest of the child by failing to find a change in circumstances as required by law to vary the corollary relief order.
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> 5. The honourable trial judge erred in law in defining child of the marriage in such a way that it excluded the siblings of [J.] being the other two children of the appellant.

Standard of Review

[7] The standard of review in this matter is as set out recently in **Gallant v. Gallant**, 2009 NSCA 56:

> [9] The parties agree that the standard of review is that set out in **Van de Perre v. Edwards**, 2001 SCC 60, [2001] 2 S.C.R. 1014, where the Court emphasizes the narrow scope of review (commencing at para. 11). Summarizing, appellate intervention is warranted only if it is demonstrated that there has been material error by the trial judge. An appeal is not a retrial. An appellate court can only reconsider the evidence where there is a reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected her conclusion.
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> [10] Cromwell, J.A., as he then was, succinctly summarized this standard in **Children's Aid Society of Cape Breton-Victoria v. M.(A.)**, 2005 NSCA 58, (2005), 232 N.S.R. (2d) 121:
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> > [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: [citations omitted]

Analysis

1. Best interests of the child

[8] The appellant submits that the trial judge erred in determining the best interests of the child by failing to take into account the child's relationship with his mother and siblings, and the disruption of leaving his community as required by **Gordon v. Goertz**, [1996] 2 S.C.R. 27. She says that there is no evidence to

support a finding that her anger affected the child's relationship with his father. Furthermore, she alleges that the child's views should have been taken into account. Counsel suggests that the evidence favourable to the mother was ignored or misinterpreted.

[9] With respect to the child's relationship with his mother and his siblings, the trial judge did consider the little evidence presented by the appellant on these factors. For example, she noted:

> [85] I know little of the child's circumstance with the mother. I know he is doing well in school. I have little reliable evidence from collateral sources other than the assessor. The file materials does not disclose the ages of the other children.
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> [86] This child is attached to both parents. There is no contra-indication regarding the father's ability to parent. Indeed the mother wants him to care for her two children for overnights and extended periods.
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> ...
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> [103] The assessor was asked about the effect of separating the siblings. He acknowledged that he did not assess the two older children. He did advise that were it not for the sibling connection, his recommendation would have been different. Clearly by his report he was calling the mother to some responsibility and recommending she be given a chance to mend her behavior to facilitate meaningful contact with both parents and preserving for their child contact with her.
>
> ...
>
> [111] ... Indeed, I have very little evidence about these two children including their stage of development, grade level, etc.

[10] The appellant did not present any evidence about the relationship of the child with herself or her older children. Other than the fact that they went camping in the summer, there was a paucity of evidence about how they spend their time together as a family unit. Neither party presented evidence about the wishes of the child other than that mentioned by the trial judge in ¶ 59-60 of her decision, quoted above.

[11] As can be seen from the passages of the decision quoted above, the judge was keenly aware that it was her role to determine the best interests of the child. In making that determination, the judge concentrated on the emotional welfare of the child and his relationship with his father. She found that the mother's rage was harmful to the child, was deliberately aimed at alienating the child from his father, and had in fact impaired the child's ability to have a healthy relationship with his father. These findings were clearly supported by the evidence. The trial judge did consider the option of the mother maintaining custody, but for well-grounded reasons, amply substantiated by the record, rejected that alternative. As noted above, assessing and weighing the evidence in deciding upon a child's custody is a matter on which the trial judge must receive significant deference from a court of appeal in the absence of material error. In my opinion, there is no reviewable error in the determination of the best interests of the child in this case.

2. Assessor's recommendation

[12] The appellant submits that the trial judge erred by failing to take into account the report of the parental assessor. The assessor, Michael Donaldson, completed his report on January 20, 2009. He recommended that the child be placed in the joint custody of his parents and that there be specific, generous access to his father including that the child spend all summer with him in Arkansas. The assessor stated that during the father's visit to Nova Scotia for court hearings in February 2009, he should have unrestricted, overnight access to the child. Mr. Donaldson also indicated that if the mother was non-compliant with the court's next decision that the child be placed in the day-to-day care of his father.

[13] The trial judge definitely took into account the assessor's opinions and gave significant weight to his recommendations. However, the judge was not obliged to accept the assessor's recommendation. See: **Wedsworth v. Wedsworth**, 2005 NSCA 102, ¶ 30. In the passage of her decision quoted above in ¶ 81-82, the trial judge remarked that following the receipt of the report the mother once again thwarted specific access directed by the court in February 2009. The assessor's report clearly stated that if she were to do that again the father should have custody. The trial judge made a finding of fact which is supported by the evidence that the mother deliberately denied access. Later in the decision the trial judge once again referred to the assessor's recommendation as follows:

> [121] If I impose the recommendations of the assessor giving the mother a final opportunity to change her behavior, it is with some certainty that I can predict she will not, without therapeutic intervention, change her behavior. The child will go to the father for the summer and have to return to a mother angered by the two month contact with the father.

[14] There is, in my view, no merit to the appellant's contention that the trial judge failed to consider the assessor's report.

3. Penalty for past access denial

[15] The appellant suggests that the trial judge should have resorted to use of the contempt powers of the court or required the mother to pay costs in order to ensure compliance with the access orders. No authority is offered for the proposition that these enforcement processes must be employed before consideration of a change in custody, in circumstances where a parent has breached a court order. Although the judge could have considered whether contempt and costs were appropriate, she was required on the applications before her to determine what was in the child's best interests. This ground of appeal has no merit.

4. Change in circumstances

[16] The appellant submits that there was no evidence of a material change in circumstances since the original order dated September 15, 2006. She says there was no evidence that she was not supporting and encouraging access with the father.

[17] The trial judge found that the change in circumstances was the absence of a cooperative approach to parenting contemplated by the original order (see ¶ 119 quoted above). This was a finding that was open to the judge on the evidence before her. As stated above, it is not our role to second guess the findings of fact or perform a fresh assessment of the evidence or substitute our discretion for that of the trial judge. We may only intervene if the trial judge erred in legal principle or made a palpable and overriding error in finding the facts. This court has previously accepted that interference with access could form the basis of a material change in circumstances. See: **Wedsworth v. Wedsworth, supra**, ¶ 28. There is no reviewable error disclosed by this ground of appeal.

5. The appellant's older children

[18] The appellant had filed an application for child support for her two older children. The judge found that the mother had not requested child support for those children at the time of the divorce and that the divorce petition noted only one child of the marriage. She concluded that the mother had not proven that the father stood in *loco parentis* to the older children. The appellant submits that the trial judge erred in this respect. Once again, this is a finding that requires deference from this court. The appellant has not met the burden of demonstrating material error.

Conclusion

[19] None of the grounds of appeal justify this court, with its deferential standard of review in such matters, to interfere with the trial judge's decision. I would endorse her judgment and dismiss the appeal. I would also order costs payable by the appellant to the respondent in the amount of $1,500 including disbursements, in addition to the $750 previously ordered by the Chambers judge who heard the application for a stay.

Roscoe, J.A.

Concurring:

MacDonald, C.J.N.S.

Oland, J.A.