S.C.A. No. 02743

NOVA SCOTIA COURT OF APPEAL

Cite as: P.I. v. J.D., 1993 NSCA 139

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

BETWEEN:

P. I.	)	Marian Mancini
	)	for the Appellant
Appellant	)	
- and -	)	
	)	J. Michael MacDonald
	)	for the Respondent
J. D.	)	
	)	
Respondent	)	Appeal Heard:
	)	May 18, 1993
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	)	Judgment Delivered:
	)	May 18, 1993
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Editorial Notice

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

THE COURT: Appeal dismissed from custody order per oral reasons of Clarke, C.J.N.S.; Hart and Roscoe, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.;

This appeal relates to the custody of the infant SLI who was born September [...], 1989. The contest over the infant's custody is between the appellant who is her unmarried mother and the respondent who is her paternal grandmother, both of whom are native Micmacs living on a Reserve.

On October 30, 1990, a consent order was issued by the Supreme Court awarding custody to the mother with liberal access to the grandmother. In February, 1992, the grandmother applied to the Court to vary the original order. Following a lengthy hearing before Justice Ryan, at which several witnesses were called by both parties, he issued a decision and order awarding custody to the grandmother with generous access to the mother. The mother now appeals from Justice Ryan's decision and his order based thereon, alleging that he committed errors in law.

Upon considering all of the record and the written and oral arguments of counsel for both parties, we have concluded that we should respond orally to this appeal. We deem it to be in the interest of all the parties, including the child, that the resolution of this matter should not be further delayed.

To begin, there is the matter of Justice Ryan's jurisdiction. Even though the **Infant's Custody Act,** R.S.N.S. 1967, c. 145, had been repealed in the interim between the first order of the Court in October, 1990, and the second application which began before the Court on March 30, 1992, the Supreme Court and Justice Ryan retained jurisdiction. The Family Court did not have jurisdiction because the **Family Maintenance Act**, R.S.N.S. 1989, c. 160, as amended, by its s. 18(3)(c) provides that the Family Court does not have jurisdiction where there is "... an order respecting custody of or access to the child made ... by the Supreme Court or the county court or a judge thereof."

Although Justice Ryan referred, among others, to the principle of **Parens Patriae**, he had statutory jurisdiction as well to deal with the issue in any event. He

committed no error in this respect.

It is argued that Justice Ryan erred in his application of the so-called doctrine or principle of that which is in the best interest of the child.

Section 18(5) of the **Family Maintenance Act** provides:

> (5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration. R.S., c. 160, s. 18; 1990, c. 5, s. 107.

A careful review of the lengthy and considered decision of Justice Ryan reveals that the admonition in s. 18(5) was the focus of his concern. He relied, correctly in our view, on the decision of the Supreme Court of Canada in **King v. Low**, [1985] 1 S.C.R. 87, when he quoted from the decision of Mr. Justice McIntyre at page101, as we do now:

> "... I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, so that he will be equipped to face the problems of life as a mature adult."

Justice Ryan also considered the primary importance of the parental claim of the appellant as the natural mother of the child. He referred to the decision of Mr. Justice McIntyre of the Supreme Court of Canada in **King v. Low, supra,** who continued at page 101:

> "Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion where it is clear that the welfare of the child requires it, however, they must be set aside."

These principles have been restated and applied by this Court in many of

our decisions. Recent examples include **M.H. v. N.M.H.** (1992), 112 N.S.R. (2d) 332, and the latter portion of its paragraph 24, and **M.D. v. Children's Aid Society of Halifax** (1992), 113 N.S.R. (2d) 27, para. 39 ff. Justice Ryan considered in some detail the evidence of members of the Mi' kmaq community respecting the cultural background and values of the native people who live at Eskasoni. It is most appropriate that this was and should be done so that courts are better able to respond to how the native culture and its traditions impact upon Mi' kmaq families and their children.

We find no error in the manner by which Justice Ryan applied the relevant law to the issues before the Court.

The appellant argues Justice Ryan placed too much weight on the evidence of E.J., a sister of the grandmother. She was not advanced as an expert. The record indicates the judge was interested in what she had to say concerning the role of the grandmother in the culture of the Mi' kmaq. She testified with respect to what she has seen and observed in her community - more as statements of facts than opinions - although the judge asked her some questions which elicited what might be called opinion evidence. The record reveals that no evidence was advanced to undermine Mrs. J.'s statements to the Court. It appears to us that what Mrs. J. said was helpful to the Court in better understanding the Mi' kmaq way of family life. In the context of all the evidence, we are unable to conclude Justice Ryan placed undue emphasis upon the evidence of E.J..

Finally, the mother contends the judge, in various ways, misapprehended the evidence, drew incorrect inferences and reached conclusions that were not supported by the evidence.

In his written reasons, Justice Ryan carefully considered the evidence given by the witnesses. In reviewing the competing claims of these parties, he concluded the mother's present lifestyle lacks the stability, degree of maturity and

judgment necessary for the upbringing of this infant in the near term. He was concerned about the evidence concerning the mother's use of alcohol and other non-prescription drugs. He perceived difficulty in the mother maintaining a stable family unit for this second of the three children to whom she has given birth. He was to some extent comforted in his concerns by the undertaking of the grandmother that the natural mother will be given generous access to the child and her further undertaking that the child will be reared, while under the grandmother's custody, with a firm commitment to her natural mother. In addition, we should observe that this custody order does not amount to a severance of the relationship between the natural mother and her child.

These are extremely difficult cases. In **Routledge v. Routledge** (1986), 75 N.S.R. (2d) 103, this Court observed at p. 104, para. 8:

> [8] Competing claims for custody create difficult cases for trial judges. They are equally vexing on appeal. Of necessity, much weight must be given to the conclusions reached by the trial judge. In doing so, an appeal court must ascertain that he has not acted upon wrong principles and that there is evidence at trial to support the conclusions he has reached. In 1951, Lord Simonds in **McKee**, supra, put it this way at p. 360.
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> > "Further, it was not, and could not be, disputed that the question of custody of an infant is a matter which peculiarly lies within the discretion of the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence."

Concluding as we do that there was evidence to support the findings of Justice Ryan and the conclusions he reached, we dismiss the appeal, without costs.

Concurred in:

Hart, J.A.

Roscoe, J.A.