NOVA SCOTIA COURT OF APPEAL

Citation: ***Weatherby v. Muise***, 2015 NSCA 42

Date: 20150505
Docket: CA 431382
Registry: Halifax

Between:

Stacey Marie Weatherby

Appellant

v.

Gilles Arthur Thomas Muise

Respondent

Judges:	Fichaud, Bryson and Bourgeois, JJ.A.
Appeal Heard:	April 15, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Bourgeois, J.A.; Fichaud and Bryson, JJ.A. concurring
Counsel:	Celia J. Melanson, for the appellant Alexander L. Pink, for the respondent

Reasons for judgment:

[1] This is an appeal from an Order of Judge Michelle Christenson issued August 15, 2014. It flowed from an oral decision rendered April 3, 2014, following three days of evidence and submissions. This appeal is narrowly focused upon the trial judge's determination relating to the mobility of the parties' two young daughters, and in particular whether she erred in considering whether a proposed move was in their best interests.

Background

[2] Ms. Weatherby and Mr. Muise were married in August 2006. They are the parents of two young and dearly loved daughters: Rowan, born in March 2009, and Reese, born in June 2011. Until the marital separation in August 2013, the family resided together in the matrimonial home, just outside of Yarmouth, Nova Scotia.

[3] During the marriage both parents worked outside the home. Ms. Weatherby has been employed as a registered nurse at the Yarmouth Hospital for in excess of 10 years. She took maternity leaves following the birth of both girls, but was employed full-time at the time of the Family Court hearing. Mr. Muise is the sales manager at a Toyota dealership owned by his father. He anticipates that he will eventually take over his father's shares in that business.

[4] Mr. Muise grew up in the Yarmouth area. His parents still reside there, as well as a sister and her family. The girls enjoy a close relationship with the Muise family.

[5] Ms. Weatherby is originally from Harmony, just outside of Truro. Her mother, sister, brother and aunts still live there. She also has a sister in Fall River. Ms. Weatherby and the children have visited frequently with these family members, and as a result, Rowan and Reese are also close to the maternal side of their family. Ms. Weatherby's mother in particular has been an important source of support to her and the children. Following the marital separation, Ethel Weatherby stayed with her daughter and grandchildren in Yarmouth. However, that could not be a permanent arrangement.

[6] In October 2013, Ms. Weatherby filed an Application and Summons with the Family Court pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c.

160, as amended (the "*MCA*"). She sought an order for joint custody and primary care of the children. She also sought "permission to relocate with the children to Fall River where she has family support and a new job". Mr. Muise did not agree with Rowan and Reese moving to Fall River. He wanted to maintain the pattern of parenting time which he and Ms. Weatherby had established post-separation. For the most part, that arrangement resulted in the children being in his care four days out of every nine, those corresponding with the days in which Ms. Weatherby worked.

[7] At the hearing, Ms. Weatherby explained why she believed a move to Fall River would be in the best interests of the children. At the heart of the proposed move was Ms. Weatherby's view that it would result in the children being in the actual care of their parents more, and with third-party caregivers less. She had been offered a 75% nursing position with the Capital District Health Authority, an arrangement which she testified was unlikely to become available at the Yarmouth Hospital, given the high staffing demands at that facility. The Capital Health position would afford her the opportunity to be with the children more than her current position in Yarmouth.

[8] Also part of Ms. Weatherby's plan was to upgrade her professional qualifications. She testified she had applied to undertake educational upgrading in Halifax which would result in her achieving a designation of Nurse Practitioner. Ms. Weatherby testified she would likely undertake this programme of study which is available on a part-time basis, over three years, but it could be extended over five. In her view, this plan would eventually provide enhanced financial stability and a work schedule much more conducive to her meeting the needs of her children.

[9] Mr. Muise was of the view that a move to Fall River was not in the best interests of the children. This was primarily due to the drastic reduction of contact the children would have with him should the move be permitted, and the negative impact such would have on their relationships with his family.

[10] After hearing the evidence presented by both parties, the trial judge ordered that the children be in the joint custody of both parents, with primary care being with Ms. Weatherby. The request to relocate the children was denied, it being ordered that the parenting schedule the parties had informally put in place be continued.

[11] Ms. Weatherby now appeals to the Court of Appeal, challenging the trial judge's decision respecting the mobility of the children.

Issues

[12] How Ms. Weatherby framed the issues to be determined by this Court undertook a transformation from the Notice of Appeal to the Appellant's factum. Ms. Weatherby originally set out eight specific grounds in her Notice, six of which alleged the trial judge "erred in law and in fact in failing to place sufficient or any weight" on a variety of factors supporting the relocation. In her factum, Ms. Weatherby puts forward two issues for determination:

1. Did the learned trial judge err in law and in fact by failing to properly apply the factors set out in the *Maintenance and Custody Act*, R.S.N.S. 1985, c. 160, as amended, to the facts established in the evidence?
2. Did the learned trial judge err in engaging in speculation and making findings of fact in the absence of evidence?

[13] As both parties structured their written and oral arguments in response to the above questions, I will frame my analysis accordingly.

Standard of Review

[14] The appropriate standard of review is not controversial. Justice Oland recently set out in **Doncaster v. Field**, 2014 NSCA 39, the following:

> [27] In *Haines v. Haines*, 2013 NSCA 63, Farrar, J.A., for the Court stated:
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> > [5] This Court has consistently stressed the need to show deference to trial judges in family law matters. In the absence of some error of law, misapprehension of the evidence, or on the award that is clearly wrong on the facts we will not intervene. We are not entitled to overturn an order simply because we may have balanced the relevant factors differently. (**Hickey v. Hickey**, [1999] 2 S.C.R. 518, ¶10-12.)
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> > [6] Findings of fact, or inferences drawn from the facts are reviewed on a standard of palpable and overriding error. Matters involving questions of law are subject to a correctness standard. When the matter is one of mixed fact and law and there is an extricable question of law, the question of law will be reviewed on a correctness standard. Otherwise, it is reviewed on a palpable and overriding standard. (**Housen v. Nikolaisen**, 2002 SCC 33.

[28] L'Heureux-Dubé J. in *Hickey* explained the reasoning behind narrow scope of appellate review in cases involving custody and access:

> 10 … [Trial judges] must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
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> ...
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> 12 There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.
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> [Underlining in decision]

Although *Hickey* involved support orders, these principles related to appellate review are equally applicable to orders concerning custody and access.

[15] In **A.M. v. Children's Aid Society of Cape Breton-Victoria**, 2005 NSCA 58, Justice Cromwell succinctly explained:

> [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

Did the learned trial judge err in law and in fact by failing to properly apply the factors set out in the MCA to the facts established in the evidence?

[16] Ms. Weatherby submits that by referencing only factors relevant to a custody determination contained in case law, and not the *MCA*, the trial judge erred in law. With respect, I cannot agree.

[17] In her oral decision the trial judge referenced two well-known authorities - **Gordon v. Goertz**, [1996] 2 S.C.R. 27 and **Foley v. Foley**, [1993] N.S.J. No. 347 (S.C.). She structures her decision regarding the best interests of the children by blending factors cited within both. The trial judge did not make specific reference to the "relevant circumstances" contained in s. 18(6) of the *MCA*. Ms. Weatherby asserts this was a fatal oversight.

[18] It is helpful at this point to more closely consider the *MCA*. Sections 18(5) and (6) are particularly relevant, and provide:

> **(5)** In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall give paramount consideration to the best interests of the child.
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> **(6)** In determining the best interests of the child, the court shall consider all relevant circumstances, including
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> (a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;
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> (b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;
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> (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;
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> (d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
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> (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
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> (f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;

(g) the nature, strength and stability of the relationship between the child and each parent or guardian;

(h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;

(i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and

(j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on

(i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and

(ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

[19] Although the trial judge also did not specifically reference s. 18(5) of the *MCA*, it is clear that she was keenly aware that the best interests of Rowan and Reese must be her paramount consideration. In the introductory paragraph of her decision she notes:

> This is a mobility case and **Gordon and Goertz** established the principles which guide the determination of mobility applications. Those principles were summarized in paragraph 49 of the majority reasons. Based on them, my inquiry is limited to what is in the child's best interests, considering all of the relevant circumstances relating to their needs and their parents' ability to meet their needs.

And later:

> The ultimate question in every case is what is in the best interest of the child in all of the circumstances. The focus is on the children and not on the interests and rights of the parents.

[20] The trial judge structured her best-interests analysis by canvassing a number of factors, to which she applied the evidence. These included:

- the children's relationship with each parent and their extended family;
- the desirability of maximizing potential contact with both parents;
- the disruption to the children likely to arise from a proposed move;

- the reasons for moving;
- physical environment, discipline and role model;
- religious and spiritual guidance;
- time availability of each parent;
- cultural development;
- financial contribution to the welfare of the children and financial consequences of custody;
- emotional support to assist the children in developing self-esteem and confidence; and
- the support of extended family.

[21] Although the trial judge did not specifically cite s. 18(6), nor use the precise wording contained in the legislation, it is clear from her thoughtful analysis, that she did fully consider the "relevant circumstances" as outlined within the *MCA*. Assessing what is in the best interests of a child is not a rigid exercise which obligates a trial judge to undertake a magic incantation of strictly worded considerations. Justice Bateman's comments in **Burgoyne v. Kenny**, 2009 NSCA 34 with respect to a trial judge's adherence to lists of factors, are particularly insightful:

> [25] The list does not purport to be exhaustive nor will all factors be relevant in every case. Each case must be decided on the evidence presented. Nor is determining a child's best interests simply a matter of scoring each parent on a generic list of factors. As Abella J.A., as she then was, astutely observed in **MacGyver v. Richards** (1995), 11 R.F.L. (4th) 432 (Ont. C.A.):
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>> 27 Clearly, there is an inherent indeterminacy and elasticity to the "best interests" tests which makes it more useful as legal aspiration than as legal analysis. It can be no more than an informed opinion made at a moment in the life of a child about what seems likely to prove to be in that child's best interests. Deciding what is in a child's best interests means deciding what, objectively, appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention. Because there are stages to childhood, what is in a child's best interests may vary from child to child, from year to year, and possibly from month to month. This

> unavoidable fluidity makes it important to attempt to minimize the prospects for stress and instability.
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> 28 . . . the only time courts scrutinize whether parental conduct is conducive to a child's best interests is when the parents are involved in the kind of fractious situation that is probably, in the inevitability of its stress and pain and ambiguity, least conducive to the child's or anyone else's best interests.
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> 29 Deciding what is best for a child is uniquely delicate. The judge in a custody case is called upon to prognosticate about a child's future, and to speculate about which parenting proposal will turn out to be best for a child. Judges are left to do their best with the evidence, on the understanding that deciding what is best for a child is a judgment the accuracy of which may be unknowable until later events prove -- or disprove -- its wisdom.

> [26] The judge must determine in which parent's custody the children's future will best be served on the basis of the available evidence relevant to the children's emotional and physical well-being. This is a discretionary decision deserving of deference provided it is not premised on material error of fact and is informed by the application of proper legal principles.

[22] I cannot accept Ms. Weatherby's assertion that the trial judge failed to consider a necessary factor in the course of her analysis. In my view, what lies at the heart of Ms. Weatherby's discontent, is that the trial judge failed to weigh the various factors as she would have liked. Satisfied that the trial judge considered all "relevant circumstances", it is not this Court's function to critique the weight she assigned to them.

Did the learned trial judge err in engaging in speculation and making findings of fact in the absence of evidence?

[23] Ms. Weatherby says the trial judge improperly engaged in speculation on three fronts:

- when the court concluded that Ms. Weatherby's plan to undertake a Master's program would impact on the time she had available for one-on-one time with the children;
- when the court noted that "[i]t's hard to think of few children that are excited about any three hour car ride, let alone a six hour one"; and

- when the court indicated that despite a lack of evidence, that "there is at least a potential for an increased cost of living in Fall River" for Ms. Weatherby.

[24] A court considering competing parenting plans must to a degree, engage in speculation. There are always unknowns, most notably when a plan involves the move of a child to a new community. Speculation becomes problematic when there is no evidentiary basis upon which conclusions can be made, or from which reasonable inferences can be drawn.

[25] I have carefully considered the record. I am satisfied that there was an ample evidentiary basis for the trial judge to reach the above conclusions, either directly, or by way of inference.

[26] I would dismiss the appeal, without costs.

Bourgeois, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.