NOVA SCOTIA COURT OF APPEAL

Citation: ***Gallant v. Gallant*****,** 2009 NSCA 56

Date: 20090602
Docket: CA 303368
Registry: Halifax

Between:

Darrell Gallant

Appellant

v.

Lucille Gallant

Respondent

Judges: Bateman, Hamilton and Fichaud, JJ.A.

Appeal Heard: May 13, 2009, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Bateman, J.A.; Hamilton and Fichaud, JJ.A. concurring.

Counsel: Ralph W. Ripley, for the appellant
Candee McCarthy, for the respondent

Reasons for judgment:

[1] Darrell Gallant appeals from the custody and access disposition contained in a Corollary Relief Judgment dated December 3, 2008. The judgment followed a contested Divorce hearing held before Justice M. Clare MacLellan on May 1 and 2, 2008. The reasons for judgment are reported at 2008 NSSC 347; [2008] N.S.J. No. 564 (Q.L.).

BACKGROUND

[2] As the full history of the parties' relationship is canvassed in the trial judge's reasons I will review their circumstances only in brief. The parties were married in December of 1997 and separated in early September 2006. The mother did not move out of the matrimonial home until November 11, 2006.

[3] Although the mother had initially been at home with the child, she returned to work before the separation. Both parties were working full time at the time of the divorce hearing. Their only child who was born in January, 2004 - just short of three years old at the time of separation - was in day care.

[4] They entered into a *de facto* shared custody arrangement for the child. According to that arrangement, the child would be in the care of each parent for two or three days at a time, resulting in each having care of him for a total of seven days over a two-week period.

[5] It was the mother's view that the existing shared parenting arrangement was not working in the child's best interests. The parties agreed that custody would be joint. The judge was called upon to determine the amount of time the child would spend in the care of each parent. The father continued to advocate for equal time sharing. It was the mother's position that the child needed to move between the parents less frequently and to spend more time in her care. There was no dispute that the child began exhibiting behavioural problems after separation. The parties did not agree on the cause of the behavioural issues.

[6] The judge confirmed the parents' joint custody agreement but determined that the child would be in the mother's primary care. He would spend every second weekend in his father's care as well as every Wednesday from the time the

father was free from his work to 8 p.m. The father would have the child with him for two weeks in the summer of 2009 increasing to two two-week periods in the summer of 2010 and then to four consecutive weeks, as the child matures. The parties would alternate care annually for the school March Break. The judge fixed defined periods of care for each parent on holidays and other special occasions. The father would have daily telephone access. In addition he would have the child in his care at such other times as the parties could agree.

[7] The father appeals saying that the he was granted insufficient time with the child.

ISSUES ON APPEAL

[8] The notice of appeal lists numerous grounds alleging error. The key issues as developed at the hearing include:

> Contrary to s. 16(9) of the **Divorce Act**, R.S.C. 1985, c. 3 (2nd Supp.) (the "**Act**"), the judge wrongly took into account the husband's "conduct" in cohabiting with a new partner very soon after the parties' separation;
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> The judge failed to give appropriate weight to evidence that the mother had, on two occasions shortly after the birth of the child, acted roughly with him;
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> The judge erred in determining the reasons for the child's behavioural acting out in the absence of expert evidence on that issue;
>
> The judge erred in relying upon a text book reference cited in her decision.

STANDARD OF REVIEW

[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.

[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:

> [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

[11] In discussing the propriety of the agreed joint custodial arrangement, the judge considered the parties' ability to work together as parents. Referring to the decision of J. Michael MacDonald, A.C.J.S.C., as the then was, in **Godfrey-Smith v. Godfrey-Smith** (1997), 165 N.S.R. 245, [1997] N.S.J. No. 544 (Q.L.) she said:

> [52] Associate Chief Justice concluded that the pivotal feature to examine in making an award is whether or not the parties are able to work through custodial arrangements. Again I specify that he indicates there is a great difference between unwilling or unable. The late Doctor Steinhauer, 1993 in **The Least Detrimental Alternative**, a text which in family law is the equivalent to the **Criminal Code** in criminal law. I take judicial notice of this fact. However, Dr. Steinhauer was writing in a different area somewhat, a child is in need of protective services. However, <u>he does indicate when one is examining risk and best interests for children that one of the best indicators of how people will parent in the future is how they parented in the past unless they are willing to be self critical and make concerted efforts to change</u>. He is one of the foremost authorities on risk in children.

(Emphasis added)

[12] Neither party had referred to the Steinhauer book. The father says this reference constitutes material error. He cites the decisions of this Court in **Nova Scotia (Minister of Community Services) v. B.F.**, 2003 NSCA 119; **Children's Aid Society of Cape Breton/Victoria v. G.L.**, 2003 NSCA 112 and **Children's Aid Society and Family Services of Colchester County v. E.Z.**, 2007 NSCA 99. In each of those cases we concluded that the judge erred in resorting to extrinsic textual authority. In **B.F.** the text was used as a substitute for an expert opinion and central to the judge's analysis; in **E.Z.** the text was used to address a perceived gap in the evidence which was dispositive of the issue before him; in **G.L.** the judge, coincidentally MacLellan, J., referred to the Steinhauer text in her introductory remarks. The Court observed that the judge had based her decision on the evidence before her and the textual reference had minimal impact on the result. Appellate interference was not warranted.

[13] Here, the judge made a single reference to the Steinhauer work in a decision spanning some 81 paragraphs. She referred to it only to illustrate the common sense proposition that past parenting is often reflective of future parenting. Indeed, s.16(9) of the **Act** provides that reference to past parental conduct is relevant to the extent that it impacts upon a party's ability to parent a child. I am satisfied that, as in **G.L.**, the judge based her decision upon the evidence before her and that the Steinhauer work played no material role in the result. That said, I would urge judges to refrain from making such references lest the impact be misconstrued. Decisions must be based upon the evidence before the court and not influenced by resort to extrinsic aids not forming a part of the evidence.

[14] The father's concerns about the mother's alleged rough handling of the child when he was an infant was addressed in detail by the trial judge. She concluded that at the time of the incidents the mother was depressed and dealing with a colicky baby while the father was working long hours. The evidence was that the mother recognized her situation and sought and followed medical help and had continued to be the child's principal caregiver for some time. The record supports the judge's conclusion that these past incidents had no bearing on the mother's current ability to parent.

[15] A significant topic at the hearing was the fact that since the parties' physical separation in November of 2006 the child was exhibiting behavioural problems

both at home and at day care. There was much discussion about the exact time that the problems had commenced, relative to the date of separation. Evidence on this issue was heard from the mother, the father, and two day care workers. Having considered that evidence the judge found, as a fact, that the behavioural problems started after the separation and became marked in January and February, 2007 which was contemporaneous with the father's new companion moving into the former matrimonial home. She opined that the presence of the stepmother may have been a contributing factor. That finding was supported by the record.

[16] Contrary to the father's submission, the judge did not conclusively or solely attribute the child's acting out to the fact that the father was in a new relationship. She did not take his "conduct" in this regard into account contrary to s.16(9) of the **Act**. Indeed, on this issue she said:

> [37] . . . When [D.] turns 5 he will be better able to verbalise and there are certain ways to deal with children at that age to get to the root of what it is that is bothering him. Is it the breakup of the family, is it the presence of a step mother, is it something else, is it based on some medical condition? All we know is that his acting up is contemporaneous to the breakup of the family and the insertion of a new person in the family home.
>
> [38] However, it is clear from all the evidence and from reading the day care notes that there has to be substantial change if [D.] is to become a healthy, happy, well adjusted 5 year old achieving his full potential . . .

[17] Nor do I find merit in the father's submission that the judge was precluded from considering the possible reasons for the child's acting out in the absence of expert evidence. Neither party sought to tender expert opinion evidence on any issue. The judge was tasked with making her determinations on the basis of the evidence before her.

[18] The father says, as well, that the judge erred in concluding that he showed disrespect for the mother and, in any event, citing s.16(9) of the **Act**, he says the relationship between the parents was irrelevant to the best interests of the child.

[19] It was the mother's evidence that the father does not listen to her views and does not respect her <u>as a parent</u>. Citing examples from the evidence the judge did indeed find that, at times, dating from the separation and thereafter the father had acted disrespectfully and insensitively to the mother. The judge observed that it

was important that each parent encourage the child to respect the other. This, she concluded, the father did not do. In addressing this factor the judge explicitly referenced s. 16(9) of the **Act**. She did not err in finding his attitude toward the mother as a parent to be conduct relevant to the father's parenting ability.

[20] The father makes much of a factual error in the judgment. The mother had asked the father to allow the child to convalesce at her house after a medical procedure where the child had tubes inserted in his ears. The procedure occurred while he was in the father's care. The father refused the mother's request but permitted her to come to his home to be with the child. The judge misconstrued this evidence as the father's refusal to permit the mother to attend at the hospital. I am not persuaded that this error was material to the result. It was but one piece of evidence within the multitude of factors causing the judge to conclude that the child would be better served in the mother's primary care.

[21] The father complains that the disposition did not give effect to the "principle of maximum contact", referring to s. 16(10) of the **Act**. However, contact with each parent is to be determined only to the extent consistent with the child's best interests:

> 16(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[22] Here the judge found that the equal time sharing schedule was not working in the child's best interests. She did not err in so concluding.

[23] A number of factors informed the disposition including the child's upset since the separation; the parties' differing parenting styles; their distinct approaches to discipline; the father's rigidity and insensitivity; the mother's willingness to consult the father and the fact that the judge found the mother to be more sensitive to the child's needs and to put those needs above her own. The parties had submitted comprehensive written final submissions on the custody/access issues, canvassing the so-called *Foley factors* (**Foley v. Foley**, [1993] N.S.J. No. 347 (Q.L.)(S.C.)), each of which the judge reviewed and weighed in her reasons. In an exercise of her discretion the judge concluded that it

was in the child's best interests that he be in a more settled situation, in the primary care of his mother, without the frequent back and forth between homes.

[24] As we said recently in **Burgoyne v. Kenny**, 2009 NSCA 34:

> [25] . . . 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.
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> [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.

DISPOSITION

[25] Finding no material error, I would dismiss the appeal. The father shall pay to the mother costs in the amount of $2000 plus disbursements as taxed or agreed.

Bateman, J.A.

Concurred in:

Hamilton, J.A.
Fichaud, J.A.