NOVA SCOTIA COURT OF APPEAL
Citation: ***Zinck v. Fraser***, 2006 NSCA 14

Date: 20060209
Docket: CA 249933
Registry: Halifax

Between:

Crystal Zinck

Appellant

v.

Steven Fraser

Respondent

Judges:	Bateman, Saunders and Hamilton, JJ.A.
Appeal Heard:	January 30, 2006, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Bateman, J.A.; Saunders and Hamilton, JJ.A. concurring.
Counsel:	Fergus Ford, for the appellant Amy Sakalauskas, for the respondent

Reasons for judgment:

[1] This is an appeal by Crystal Zinck from the order of Justice Moira C. Legere-Sers of the Nova Scotia Supreme Court (Family Division) dated June 22, 2005, varying the day-to-day care and access arrangements for the parties' child Austin.

BACKGROUND:

[2] The parties began a common law relationship in February 2000. They separated in late May 2002. Austin Douglas Gladue-Fraser was born February 4, 2001. In May 2003 Ms. Zinck gave birth to another child by a different father. After the parties' separation and until the judge's decision, Austin was in his mother's day-to-day care with regular access by his father.

[3] These parents have a history of litigation surrounding Austin's care. Shortly after separation Mr. Fraser made an application to prevent Ms. Zinck from moving with Austin to live in Calgary, Alberta, as was her intention. On September 30, 2002, an interim order issued restraining the move, but permitting Ms. Zinck to take Austin to Calgary for a visit. At that time, each parent claimed custody of Austin. Both were represented by counsel. Pending trial of the custody and relocation claims further interim orders issued, regulating access and providing for home studies and psychological assessments of both parties. On July 15, 2003 they agreed, by interim consent order, that Mr. Fraser would have access on alternate weekends as well as on Tuesday and Thursday evenings. On January 7, 2004 they settled the outstanding custody and mobility claims. A consent order evidencing their agreement was signed that date but not issued until January 29. The order was detailed and carefully crafted, providing for joint custody and setting out the times when Austin would reside with each parent. While Austin was to continue in the day-to-day care of his mother, Mr. Fraser would have regular and frequent access. Significantly, for this appeal, the order contained a requirement of 90 days notice should either parent propose to relocate with Austin outside the Halifax Regional Municipality.

[4] Thirteen days after the signing of the consent order, indeed before the order was issued, Ms. Zinck gave Mr. Fraser notice of her intent to move to Calgary with Austin. He did not consent, resulting in Ms. Zinck's application to the Court for

permission to move (formal application dated February 18, 2004). Mr. Fraser countered with an application for sole custody of Austin. The disposition of those applications precipitated the order which is on appeal. The judge ordered that Austin continue in the joint custody of his parents but in Mr. Fraser's day-to-day care and control. Access by Ms. Zinck was detailed in the order.

GROUNDS OF APPEAL:

[5] Ms. Zinck says the judge erred in two material respects:

(i) in varying the existing custodial and access terms when there had not been a material change in circumstances; and
(ii) in considering evidence which pre-dated the consent order of January 29, 2004 in order to determine whether there had been a change of circumstances.

STANDARD OF REVIEW:

[6] In **D.L.W. v. J.J.M.W.** (2005), 234 N.S.R. (2d) 366; N.S.J. No. 275 (Q.L.), this Court confirmed the exacting standard of review in custody cases:

> **[31]** The narrow scope of appellate review is explained by the judgment of Justice Bastarache in **Van de Perre** [**Van de Perre v. Edwards** (2001), 2001 SCC 60]:
>
> > As indicated in both **Gordon** (**Gordon v. Goertz**, 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. M.(A.)** (2005), 232 N.S.R. (2d) 121; 737 A.P.R. 121; 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] N.S.J. No. 416 (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.

ANALYSIS:

[7] For the reasons which follow, I am not persuaded that Justice Legere-Sers erred at law or made a palpable or overriding error of fact.

(a) Change in circumstances:

[8] The hearing of the parents' competing applications was scheduled for May 10 and 11, 2005, some 17 months after the mother's application to vary. The parties, assisted by counsel, readied themselves for the hearing. On April 12, 2005 they agreed to an update of the 2003 Custody and Access Assessment, which had been completed for the earlier litigation. On April 18, 2005 Ms. Zinck's affidavit providing her evidence in support of the move was filed. However, on May 2, just days before trial, Ms. Zinck withdrew her application to relocate to Calgary. The Court proceeded to hear Mr. Fraser's custody application on the scheduled dates.

[9] Ms. Zinck says, with the abandonment of her application to relocate, there was no change in circumstances entitling the judge to vary the terms of custody and access, as is required by s. 37(1) of the **Maintenance and Custody Act**, R.S.N.S., c. 160, as amended:

> **37 (1)** The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.

[10] In **Gordon v. Goertz**, [1996] 2 S.C.R. 27 McLachlin, J. (as she then was), writing for the majority of the Court, described the change necessary to ground a variation in custody and access:

> 12 What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: *Watson v. Watson* (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.
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> 13 It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which

> materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.
>
> (Emphasis added)

[11] It is my view that the record amply supported the judge's conclusion that circumstances had changed materially from the time of the last order, notwithstanding the mother's abandonment of her relocation application.

[12] The judge concluded that with the settlement in January 2004 the father had reason to believe the mother had abandoned her plans to move the child to Calgary. She expressly found that the mother had agreed to that order in bad faith. Those factual conclusions and inferences are supported by the record and are not directly attacked on this appeal.

[13] Not only did the father testify that at the time of the consent order he believed Ms. Zinck no longer intended to move, on cross-examination it was revealed that the job offer proffered by the mother as central to her renewed plan to move to Alberta was received by her before she agreed to the January 2004 settlement. Indeed, counsel for Ms. Zinck acknowledges the proposed move was not a new plan.

[14] Clearly, on this evidence alone, the mother's hastily renewed application to move was ". . . a distinct departure from what the court could reasonably have anticipated in making the previous order." (**Gordon v. Goertz, supra**., ¶ 12, above) The carefully structured January 2004 consent order provided for joint custody, with day-to-day care and control continuing with Ms. Zinck but regular and frequent access by Mr. Fraser. It called for joint decision-making; a free sharing of medical and educational information; parental co-operation in Austin's education and upbringing; with detailed access designated for summers, Christmas, school breaks and other holidays. On any reasonable reading, the order spoke to a more stable and co-operative future relationship between the parents. While, under the order, either parent was to give ninety days notice of an intent to move from the jurisdiction with Austin, Mr. Fraser, as the judge found, could not have reasonably contemplated that in the face of agreeing to such terms, Ms. Zinck remained intent on moving to Alberta at the first opportunity. The settlement was reached with each party having the assistance of counsel. It was to resolve the litigation precipitated by Ms. Zinck's June 2002 plan to move Austin to Alberta. Austin was

only three years old. The parties have limited means. Mr. Fraser's access with Austin would be completely thwarted by the move.

[15] Notwithstanding the finding of bad faith on Ms. Zinck's part, there was ample additional evidence, post-dating January 2004, which reflected a material change in circumstances. The judge referred to the lengthy history of litigation with most issues present at the beginning of the dispute continuing to be the subject of conflict; the frequent necessity of involving the police to facilitate the father's access; and the worsening hostility between the families.

[16] A key factor was the mother's ongoing efforts to obstruct the father's access. The judge found that Ms. Zinck's professed understanding and support for a strong and enduring relationship between Austin and his father was belied by the obstacles she had presented to Mr. Fraser's exercise of access. Ms. Zinck's move to Jeddore made Mr. Fraser's exercise of weekend access with Austin exceedingly difficult and his mid-week access impossible. Ms. Zinck was neither reasonable nor flexible about access arrangements - with no sign that such would change, despite the January consent order.

[17] The judge was further concerned that Ms. Zinck had persisted in advancing the planned relocation to Alberta, until a week before trial, although the details of her job in Calgary, her living arrangements and daycare for Austin had not been developed with any clarity or reliability. Her actions in so doing exemplified her failure to appreciate that the move was of no apparent benefit to Austin yet would result in the loss of connection with his father and paternal extended family. Indeed, as the judge noted, the evidence surrounding the plan was sufficiently flawed to justify its withdrawal by Ms. Zinck, just days before trial. The mother provided no reason for her abrupt change of plans, save to say that it was on the advice of counsel. The judge reasonably inferred that the intended move was a further attempt to frustrate access between father and child.

[18] Mr. Fraser, she found, had been dedicated to establishing consistent and predictable contact with Austin despite the obstacles placed in his way. The ongoing litigation had been costly for Mr. Fraser, depleting his limited resources, but had come at no cost for Ms. Zinck, who has publicly funded counsel. In summary, the judge concluded that as matters had unfolded since January 2004, the existing day-to-day care and access arrangement was unworkable and not serving Austin's best interests.

[19] All of these factors, taken together, established a material change in circumstances grounding the judge's jurisdiction to vary the January order. The entry into the consent joint custody order signalled the parties' intent that their ongoing relations would be, if not cordial, at least harmonious, and recognized the important role of each parent in Austin's life. The mother's ongoing actions in thwarting Mr. Fraser's contact with Austin ran completely counter to the spirit of the order.

[20] This Court's recent judgment in **D.L.W. v. J.J.M.W., supra**, exemplifies circumstances where ongoing conflict and undermining of access by the primary care parent was found to constitute a material change in circumstances.

(b) The consideration of evidence pre-dating the January 2004 consent order:

[21] The mother says that the judge incorrectly relied upon evidence pre-dating the January 2004 order in determining that there had been a material change in circumstances. I disagree. Her reference to the prior evidence provided a necessary comparison point to enable the judge to assess, contextually, whether the plans now proposed by each parent advanced Austin's best interests. She said, for example:

> [200] The mother's counsel argues that the Court ought not to consider historical data. One of the critical considerations in predicting future conduct is past conduct. Absent change in behaviour, the historical pattern becomes a relevant consideration. It allows the Court to have an overview of the child's life and determine whether a plan maintains the status quo and meets the child's needs, improves or is better when weighed with the alternate plan or deteriorates, which can only be detrimental to the child's best interests.

[22] The necessity of a retrospective inquiry, once a material change is established, was recognized in **Gordon v. Goertz, supra**, where McLachlin, J. approved as equally applicable to custody variations the earlier comments of that Court in **Willick v. Willick**, [1994] 3 S.C.R. 670 at pp. 734-35:

> Once a sufficient change that will justify variation has been identified, the court must next determine the extent to which it will reconsider the circumstances underlying, and the basis for, the support order itself. For the reasons below, I believe that it is artificial for a court to restrict its analysis strictly to the change which has justified variation.

> Moreover, while a variation hearing is neither an appeal nor a trial *de novo*, where the alleged change or changes are of such a nature or magnitude as to make the original order irrelevant or no longer appropriate, then an assessment of the entirety of the present circumstances of the parties and the children which recognizes the interrelationship between the many factors to be considered is in order.
>
> (Emphasis added)

[23] The Chief Justice said in **Gordon,** referring to the above quote:

> 21 The same principle holds true when an applicant is able to demonstrate a material change in circumstances in a custodial variation proceeding. In order to determine the child's best interest, the judge must consider how the change impacts on all aspects of the child's life. To put it another way, the material change places the original order in question; all factors relevant to that order fall to be considered in light of the new circumstances.
>
> (Emphasis added)

[24] I am not persuaded the judge used the pre-January 2004 evidence to establish the material change. As stated above, the evidence of the continuing conflict following the January consent order fully supported the conclusion that there had been a material change.

DISPOSITION:

[25] I would dismiss the appeal with costs to the respondent in the amount of $2000.00 plus disbursements as taxed or agreed.

Bateman, J.A.

Concurred in:

Saunders, J.A.

Hamilton, J.A.