Date: 19991006
Docket: C.A. 155151

NOVA SCOTIA COURT OF APPEAL

[Cite as: Ryan v. Ryan, 1999 NSCA 111]

Glube, C.J.N.S., Hallett, Freeman, JJ.A.

BETWEEN:

THEODORE AUGUSTINE RYAN	)	(In Person)
	)	Appellant
	)	
Appellant	)	
- and -	)	
	)	
	)	
JOANNE HELEN RYAN	)	Tanya G. Nicholson
	)	for the respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	September 22, 1999
	)	
	)	Judgment Delivered:
	)	October 6, 1999
	)	
	)	

THE COURT: Appeal is dismissed as per reasons for judgement of Freeman, J.A., Glube, C.J.N.S., and Hallett, J.A., concurring

Freeman, J.A.:

[1] This is an appeal from an interim order of Justice Goodfellow of the Supreme Court of Nova Scotia settling custody and access issues between the parties pending the hearing of their divorce which is scheduled for March 27, 2000.

[2] The Ryans married in 1994, separated in August, 1996, and again after a brief period of reconciliation following the birth of their daughter Alexsandria Patrice Ryan on September 10, 1996. Ms. Ryan filed a petition for divorce in December, 1996 and they signed a Separation Agreement in March, 1997, agreeing, on an interim basis and without prejudice to a final disposition, that the wife should have primary care of the child and the husband should have liberal access.

[3] To achieve maximum effect the agreement required co-operation between the parties to facilitate one another's access when they might otherwise have called a baby sitter. Unfortunately the relationship became acrimonious, with the husband complaining the wife was restricting his access and wife complaining that the husband, who operated a security business, was having her followed.

[4] Two prior court orders attempting to make access periods more specific did little to improve the situation. When the matter came before Justice Goodfellow he was dismayed to find that police were being involved in access disputes. The parties and their counsel were before him on March 23, 1999, on applications related to ancillary matters. After "pretty well exhaustively" reviewing the issues between the parties he

found that “very, very clearly what has transpired since their final separation has not worked in the best interests of the child.”

> It’s very clear that this provision of [the] separation agreement dealing with custody and access in the existing order has to be replaced. If I achieve nothing else, I’ve got to achieve some degree of certainty. I want to make absolutely certain that there be no repeat of the police intervention of the nature and quality and kind that’s transpired and some of the other activities. It’s got to be avoided. The stress that both of you feel as parents, the child is not immune to that and I quite frankly, shudder at the emotional and financial direction both of you seem headed.

[5] He stated that the mother “shall have interim sole care, custody and control of the child” and specified liberal access rights for the father. He adopted the support program in the agreement, requiring the father to pay $200 a month plus three quarters of daycare expenses.

[6] Mr. Ryan, now self-represented, has raised thirteen grounds of appeal which he has reduced to three or four issues dealing with jurisdiction, procedure and factual interpretations.

[7] Mr. Ryan’s primary concerns are whether Justice Goodfellow had jurisdiction to vary the custody agreement and ancillary orders and, if he did, whether it was procedurally fair to do so when neither party had asked for a review of custody in the applications before him. This requires consideration of the actual effect of the order, for in my view custody was not varied.

[8] The Separation Agreement states in Clause 6, “Custody and Access”:

> The parties agree on an interim basis and without prejudice to any final disposition that the Wife shall have primary care of the child and the Husband shall enjoy liberal contact.
>
> (a) Residential Care
>
> The residence of the child shall be with the Wife and she shall have the primary day to day care of the child for guidance and upbringing;
>
> (b) Access
>
> The Husband shall have liberal access upon reasonable notice.

[9] The Agreement then goes on to spell out access that reflects the husband's flexible hours as a self-employed person and the wife's more regular working schedule. The Husband was to have the child four days a week between Monday and Friday during the wife's working hours for approximately eight hours a day, during which he was to maintain a regular schedule for her, including play group. It provides further that

> The Husband shall have such other access as agreed between the parties. If the Husband or wife requires a babysitter they shall, whenever possible, advise the other and allow the Husband or Wife as the case may be, the first opportunity to provide such babysitting services.

[10] When the Agreement was signed March 24, 1997, the child was about seven months old.

[11] An order by Associate Chief Justice Joseph P. Kennedy, as he then was, dated January 13, 1998, confirmed the agreement in full force and effect. It states: "The access of the Applicant, Ted Ryan, shall be subject to his direct custodial involvement, which phrase shall be interpreted reasonably." Whatever that sentence is intended to convey, it appears to have no bearing on the present appeal. The order then sets out an

access schedule taking into account that Mrs. Ryan's work schedule provided for her to have every second Friday off.

[12] Mr. Ryan again applied to the court, complaining that the existing schedule did not provide for him to have overnight access, and an order by Justice John M. Davison dated July 29, 1998, provided for three regular days of access during the week plus Mondays and Fridays when the wife was not available, overnight access every second weekend subject to review when the child became two, and two weeks of block access in the summer. Justice Davison's order provided for the appointment of a third party access facilitator. It stated it was agreed between the parties that access arrangements may be varied upon agreement or further application to the court "without substantiation of a material change in circumstances."

[13] It was presumably with respect to that last provision that both parties brought the applications which Justice Goodfellow heard in March of 1999 resulting in his order of June 24, 1999. His order begins as follows:

> **Whereas** the Orders of Justice Joseph P. Kennedy, dated January 13, 1998, the Order of Justice John M. Davison, dated July 29, 1998, as well as all Custody and Access provisions of the Separation Agreement dated March 24, 1997, have been rescinded and replaced by this Order;
>
> **And Whereas** it is not in the child's best interests to have peace officers or police involved in the determination of access;
>
> **And Whereas** it is necessary to <u>confirm interim custody</u> and set a specified access schedule for the benefit of the child Alexsandria Patrice Ryan, born on September 10, 1996. (Emphasis added.)

[14] Under the heading "Interim Custody" the order provides:

> The mother, Joanne Helen Ryan, shall have interim sole care, custody and control of the child, Alexsandria Patrice Ryan, born on September 10, 1996.

[15] Under “Access” the father is granted “liberal access”, including overnight access between 10 a.m. Tuesday and 6:30 p.m. Wednesday, and every second weekend including a schedule of extended weekends, plus additional weekday access granted by the mother at her discretion, alternating holiday access and block summer access for both parents.

[16] The mother’s right to change residence outside the province is restricted by requiring the father’s consent or 30 days written notice to him. While this in a strict sense is a variation of a key incident of custody, it is also confirmatory of the wife’s custody. It is not onerous and it is in keeping with the initial spirit of the agreement. I do not consider it to be the variation from which the appellant has appealed.

[17] The child’s attending physician was specified; “only in emergencies shall the father take the child to any other physician.” This tended to further confirm rather than to modify custody and was directed toward an incident that arose during the father’s access.

[18] The child support provision in the agreement was continued until varied, with provision for the father to apply to Justice Goodfellow to vary the amount of support and retroactive support by telephone conference.

[19] The appellant's first ground of appeal, and in my view the only one of substance, is:

> That the learned trial judge erred in proposing that the nature of the hearing will determine the custody and that the application before the court was in regard to vary an interim consent order and verification of the orders that existed.

[20] Under s. 18(4) of the **Family Maintenance Act**, R.S.N.S. 1989 c. 160 parents are equally entitled to the care and custody of a child unless otherwise ordered by a court of competent jurisdiction. Here the agreement providing for other than equal entitlement to custody was an implied or specific term of three court orders. Mr. Ryan obviously attached importance to having insisted that the agreement not state that the wife was to have sole custody. The effect of the agreement which otherwise seems clear and unambiguous must therefore be considered objectively.

[21] Justice Goodfellow states in the preamble to his order that "it is necessary to confirm interim custody," not to vary it. If it had been his intention to vary it, no doubt he would have required more evidence of a material change in circumstances, and the appellant's grounds relating to insufficient evidence might have had more weight. If he did nothing more than confirm what was already in the agreement, the appeal cannot succeed.

[22] In **V.W. v. D.S.** ,[1996] 2 S.C.R. 108 the Supreme Court of Canada examined the concept of custody in depth in the context of the **Hague Convention on Child Abduction** (Convention on the Civil Aspects of Child Abduction, Can. T.S. 1983 No. 35)

in the case of a child brought from Maryland to Quebec against the mother's wishes. The defining characteristics of custody in the Convention are found in the following passage at paragraph 22 of the court's judgment:

> Thus, the Convention makes a clear distinction between rights of access, which "include the right to take a child for a limited period of time to a place other than the child's habitual residence," and custody rights, which are defined as "includ[ing] rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."

[23] The Court further stated in paragraph 73:

> Thus, the concept of custody under the *Civil Code of Québec*, as at common law and under the *Divorce Act*, cannot be distinguished from the concept of custody under the Convention and the Act. Since these different systems all give this concept a broad meaning that is distinct from access rights and that includes, *inter alia*, the right to choose the child's place of residence, it is of little consequence that the trial judge ruled on the appellant's motion for custody of the child under the Act rather than the *Civil Code of Québec*.

The Court also remarked in paragraph 71:

> From a comparative perspective, it is interesting to note that the liberal concept of custody is also well established at the present time in divorce matters, as noted by J. D. Payne, Payne on Divorce (3rd ed. 1993), at p. 240:
>
> > In Canadian divorce proceedings, case law tends to support the conclusion that, in the absence of directions to the contrary, an order granting "sole custody" to one parent signifies that the custodial parent shall exercise all the powers of the legal guardian of the child. The non-custodial parent with access privileges is thus deprived of the rights and responsibilities that previously vested in that parent as a joint custodian of the child. [Emphasis added.]
>
> According to the same author at pp. 242-43, this interpretation of custody rights remains the same under the *Divorce Act*, 1985, S.C. 1986, c. 4 (now the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.)):
>
> > The provisions of the Divorce Act, 1985, and particularly the definitions of "custody" and "accès" in section 2(1), may preclude Canadian courts from reverting to a narrow definition of custody. Pursuant to section 2(1), "'custody' includes care, upbringing and any other incident of custody" and "'accès' comporte le droit de visite." The use of the word "includes" in the definition of "custody" implies that the term embraces a wider range of powers than those specifically designated in section 2(1).... Consequently, in the absence of an order for shared

> parenting or a court-ordered division of the incidents of custody, a non-custodial spouse with access privileges would remain a passive bystander who is excluded from the decision-making process in matters relating to the child's welfare, growth and development. [Emphasis Added]

The provision in the Ryan's Separation Agreement that "the residence of the child shall be with the Wife and she shall have the primary day to day care of the child for guidance and upbringing" in my view conclusively vests her with custody. Residence and care are the two main incidents of custody. Regardless of what significance Mr. Ryan may have attached to the absence of the word "custody" or the words "sole custody" in the text (as opposed to the headings) of the agreement, the agreement confers custody of the child upon the wife pending the hearing of the divorce, and provides Mr. Ryan with liberal rights of access.

Justice Goodfellow did not vary the custody agreement in effect between the parties, but merely confirmed it in accordance with the intention stated in the recital to his judgment, and exercised his jurisdiction to vary access. The previous order of Justice Davison recorded the consent of the parties that access could be varied without proof of a material change in circumstances.

Justice Goodfellow took a pragmatic approach and exercised his discretion to reach a practical solution, one that was demanded by the history of the file. The temporary alterations in access cause no injustice; the rights of both parties have not been prejudiced. They are free to assert their cases on whatever evidence they choose at the final disposition of the matter if they are unable to reach agreement. The access

provisions remain unusually generous to Mr. Ryan, which suggest that at least at the time the agreement was signed he enjoyed the confidence and goodwill of Mrs. Ryan with respect to their daughter. He appears to have made good use of his access by dedicating himself with remarkable single-mindedness to the welfare of the child.

Gorham v. Gorham (1994),131 N.S.R. (2d) 7 reflects this court's consistent approach in custody matters:

> The question of custody is one which lies particularly within the discretion of the trial judge. That discretion should not be disturbed unless the trial judge clearly acted upon some wrong principle or disregarded material evidence. An appellate court does not have the advantage given a trial judge of seeing the parties, hearing them and evaluating the character of each. See **Routledge v. Routledge** (1987), 75 N.S.R. (2d) 103;186 A.P.R. 103 (C.A.).

In interlocutory matters of a discretionary nature generally, Chipman J.A. stated in **Global Petroleum Corp., et al., v. CBI Industries Inc., et al.** (N.S.C.A. December 14, 1998):

> This Court will not interfere unless wrong principles were applied or a manifest injustice has resulted. In so doing, we consider the consequences of the order under review, whether the Chambers judge gave insufficient weight to relevant matters, whether all relevant circumstances were brought to the attention of the Chambers judge, and whether the judge misapprehended the facts. See **Exco Corporation v. Nova Scotia Savings & Loan et al** (1983), 59 N.S.R. (2d) 331; **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143 at 145.
>
> This Court should narrowly confine the scope of appellate intervention on appeals respecting interlocutory decisions, particularly those involving procedural rulings. See **Campbell v. Lienaux** (1998), N.S.J. 142.

I have not been persuaded that Justice Goodfellow erred in law or principle or misapprehended the facts, nor that this court should interfere with this interim

discretionary order.

The appellant has undergone a bankruptcy and suggests a material change of circumstances has occurred that would justify variation of the support provision in the Separation Agreement and Justice Goodfellow's order. While the issue is included in the grounds of appeal, this court lacks a current factual basis for considering it, and it is more conveniently dealt with by the trial court. The appellant is free to bring such an application and indeed, the order anticipates it.

The appellant has applied to adduce fresh evidence, and we reserved decision on that application at the beginning of the hearing. While the rule against introducing evidence which might have been available at the original hearing should not be rigidly enforced in family matters, the evidence the appellant seeks to bring forward not only fails that test but also fails the other requirements of the test set out in **R. v. Palmer and Palmer** (1979), 30 N.R. 181; 50 C. C.C. (2d) 193 (S.C.C.) as well: These provide:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases . . .
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

I would therefore dismiss the application to adduce fresh evidence. I would dismiss the appeal with costs which I would fix at $800 plus disbursements.

Freeman, J.A.

Concurred in:

Glube, C.J.N.S.

Hallett, J.A.