Docket: CA 151724
Date:20001011

NOVA SCOTIA COURT OF APPEAL
[Cite as: Peck v. Peck, 2000 NSCA 114]

Roscoe, Bateman and Flinn, JJ.A.

BETWEEN:

DEBORAH PECK

Appellant

- and -

TRACY PECK

Respondent

REASONS FOR JUDGMENT

Counsel:	Shawna Y. Hoyte for the appellant Oliver Janson and Michael Lowe for the respondent
Appeal Heard:	October 2nd, 2000
Judgment Delivered:	October 11, 2000
THE COURT:	Appeal dismissed per reasons for judgment of Bateman, J.A.; Roscoe and Flinn, JJ.A. concurring.

BATEMAN, J.A.:

[1] This is an appeal by Deborah Peck from an Order of the Supreme Court granting day to day care and control of the parties' three children to the respondent, Tracy Peck.

[2] By decision dated June 30, 1998, Justice Alan Boudreau, having presided over a three day custody trial ancillary to divorce, followed by written submissions on behalf of the parties, determined that day to day care and control of Stephanie Peck born December 23, 1987; Aaron Peck born October 4, 1992 and Kimberly Peck born February 24, 1995 would be with Tracy Peck. The parties had agreed that custody would be joint. Each party was represented by counsel at trial.

BACKGROUND:

[3] The parties were married in 1988 and separated in 1996, living in the Digby area throughout the marriage. Mr. Peck has worked with his father in the family business since he was about fifteen years old.

[4] When the parties first separated, the children remained with Ms.

Peck in the matrimonial home with Mr. Peck having daily access to the children. He initially spent two to three hours with the children each evening and had weekend access, however, the situation deteriorated after a few weeks. There followed frequent confrontations, sometimes requiring the intervention of the police.

[5] Ms. Peck moved out of the matrimonial home in June of 1996 and lived in Clementsport for several weeks. She then moved back to the matrimonial home in August. The children continued to live with Ms. Peck during this period, but the situation had deteriorated and the tension between the parties was acute. Mr. Peck testified that he was concerned about Ms. Peck's emotional state and for the safety of his children. After consulting with counsel Mr. Peck removed the children and immediately made an application for custody to the Family Court.

[6] On August 27, 1996, after a hearing, the Family Court granted Mr. Peck custody of the children with limited access to Ms. Peck. Ms. Peck was also ordered to immediately seek and obtain psychological counseling.

[7] In September of 1996, there was a fire in an outbuilding next to the matrimonial home in which Ms. Peck was residing. The cause of the fire was never determined. Ms. Peck moved to Dartmouth, Nova Scotia, the next day, living initially with her mother. She now maintains her own apartment and is in receipt of social assistance.

[8] Ms. Peck's plan for the children, as stated at trial, is to remain at home until they are all in school, at which point she would seek employment.

[9] Up to the time of trial, by agreement of the parties, Ms. Peck has had access to the children every second weekend and during holidays and summer vacations. Mr. Peck transports the children to Dartmouth to facilitate access. It was agreed that the access arrangements continue, irrespective of which party was granted day to day care and control.

[10] The background to this matter is more fully canvassed in the decision of Justice Boudreau reported at [1998] N.S.J. 286 (Q.L.).

GROUNDS OF APPEAL:

1. That the Learned Trial Judge erred in law by failing to consider all the relevant evidence and thereby not according the proper weight to Ms. Peck's ability to have day-to-day care and control of her three children. The evidence which the Learned Trial Judge failed to consider was the Roth Report and the reference to paternity contained within the Nau report.

2. That the Learned Trial Judge by not considering all the relevant evidence before him, erred in jurisdiction by granting day-to-day care and control of Kimberly Peck to Mr. Peck, despite Mr. Peck's lack of standing with respect to the application of custody and access of the child Kimberly Peck born February 24, 1995, pursuant to s. 18(2) of the Nova Scotia *Family Maintenance Act*, and the absence of notice to the biological father of the custody proceedings.

3. That the Learned Trial Judge erred in law by raising a reasonable apprehension of bias in his written reasons of the June 30, 1998

decision.

ANALYSIS:

(i) Fresh Evidence

[11] The appellant has asked that this Court receive fresh evidence. In **Thies v. Thies** (1992), 110 N.S.R. (2d) 177, Freeman, J.A. said:

> [12] The tests for admission of fresh evidence on appeals was set out by McIntyre, J. writing for the Supreme Court of Canada in **R. v. Palmer** (1979), 30 N.R. 181; 50 C.C.C. (2d) 193 (S.C.C.):
>
> > "(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."
>
> . . .

[12] As set out in **R. v. Stolar** (1988), 40 C.C.C. (3d) 1 (S.C.C.), the procedure which should be followed when an application is made to a court of appeal for the admission of fresh evidence is that (per McIntyre J. at p.10):

> . . . the motion should be heard and, if not dismissed, judgment should be reserved and the appeal heard. In this way, the Court of Appeal has the opportunity to consider the question of fresh evidence against the whole background of the case and all the other evidence in the case. It is then in a position where it can decide realistically whether the proffered evidence could reasonably have been expected to affect the result of the case. If, then, having heard the appeal, the court should be of the opinion that the evidence could not reasonably have affected the result, it would dismiss the application for the introduction of fresh evidence and proceed to the disposition of the appeal. On the other hand, if it should be of the view that the fresh evidence is of such nature and effect that, taken with the other evidence, it would be conclusive of the issues in the case, the Court of Appeal could dispose of the matter then and there. Where, however, the fresh evidence does not possess that decisive character which would allow an immediate disposition of the appeal but, nevertheless, has sufficient weight or probative force that if accepted by the trier of fact, when considered with the other evidence in the case, it might have altered the result at trial, the Court of Appeal should admit the proffered evidence and direct a new trial where the evidence could be heard and the issues determined by the trier of fact. .....

[13] At the conclusion of the Family Court proceeding, by Order dated September 3, 1996, Judge Comeau directed that Ms. Peck seek psychological counseling. Ms. Peck says that this counseling culminated in an October 28, 1996 report titled “Preliminary Assessment” prepared by Jacqueline Milner-Clerk of Jason Roth and Associates. This report was not tendered by either party at trial, nor was its author presented to testify.

[14] I would find that this report does not satisfy the due diligence criteria for the admission of fresh evidence. The report was available to the appellant at trial. Counsel did not seek its admission.

[15] The application does not fail, however, on due diligence alone. Having reviewed the report, I am satisfied that, when taken with the other evidence at trial, the report could not reasonably be expected to have affected the result. The stated purpose of the report was "to determine the nature and severity of Deborah's current distress". Ms. Milner-Clerk considered it a limitation that the information in the report was provided solely by Ms. Peck. In addition she wrote:

> It is acknowledged that a more extensive assessment is required to offer more conclusive and valid conclusions and recommendations regarding the questions of the scope and ability of Deborah to parent.
> .....
>
> At present, it cannot be conclusively determined whether Deborah's current distress interferes with her ability to parent her three children due to the limited contact to date and lack of needed information. . .

[16] Ms. Milner-Clerk recommended that Ms. Peck continue with counseling and that a more extensive assessment be conducted, which would include meetings with Mr. Peck and the children. A further court directed assessment was completed by Danny Nau. That report, dated January 3, 1997, was tendered at trial on the agreement of both parties. In these circumstances, I would not grant the request of the appellant to receive the "Preliminary Assessment" as fresh evidence.

[17] The appellant says, as well, that Justice Boudreau, as a result of a statement contained in the Nau report, should have questioned the paternity of one of the children. She asks this Court to receive fresh evidence about the paternity. Danny Nau interviewed Mr. Peck's parents in preparing his report. He states at p.12 of that report: "The Pecks also stated that Debbie [Peck] has been telling Tracy that he is not the father of [one of the children]". That is the only suggestion that paternity is in question. Ms. Peck did not assert in her evidence at trial, in the documentation filed with the Court, nor in her interviews with Mr. Nau that one of the children was not the biological child of Mr. Peck. This was not an issue before the trial judge. Ms. Peck relies solely upon the hearsay statement of Mr. Peck's parents, as repeated in the Nau report. There is no other information before this Court that would put paternity into question. I would find that there is no fresh evidence for consideration on this issue.

(ii) Bias:

[18] Ms. Peck further alleged that "the Learned Trial Judge erred in law by raising a reasonable apprehension of bias in his written reasons dated

June 30, 1998." The alleged bias arises from the fact that Justice Boudreau referred to the financial situation of each party and awarded day to day care and control to the more affluent parent. The reference to the parties' respective financial situations came during the judge's review of the circumstances of the parties leading up to the hearing. In this regard he wrote:

> Around mid to late September of 1996, there was a fire in an outbuilding next to the matrimonial home in which Ms. McDow was residing. The origin or cause of the fire was never determined. Ms. McDow moved to Dartmouth, Nova Scotia, the next day. She first went to live with her mother and she has lived in the Dartmouth area ever since. She has had to move three or four times since going to Dartmouth. She has lived and continues to live on social assistance. Ms. McDow has testified that if she is granted day to day care and control of the children, she plans to stay at home in her apartment to look after the children. She stated she would look for work when all the children were older and in school. Even with child support from Mr. Peck, she would still have to rely, in part at least, on social assistance. Mr. Peck does not earn enough income to provide her with the financial ability to maintain herself and the children without social assistance.

[19] In weighing the respective positions of the parties he wrote:

> 14 The case law has been accurately summarized in Mr. Peck's post-trial brief. When one looks at the many factors to be considered, as outlined in the case of *Foley v. Foley* (1993) 124 N.S.R.(2d) 198, it is readily apparent that, on the majority of the sixteen or so factors mentioned, most favour that the day to day care and control of these children be awarded to Mr. Peck. (E.g., the physical environment, role model, wishes of the children (and here I refer to Stephanie), assistance of experts, cultural development, emotional support to assist in child development, financial welfare, support of extended family (Mr. Peck's family and Rachael Peck help to babysit the children), willingness of custodial parent to facilitate access, interim and long range plans, the financial consequences of custody and

> finally the status quo.)
>
> 15 Mr. Peck has arranged his work schedule to provide him with maximum time to be with the children. He cooks breakfast and suppers, attends extracurricular activities, has an aunt as an in-home babysitter when he is at work and he is very actively and emotionally involved in the children's daily lives. Mr. Peck has a secure home for the children and he has secure employment for himself.
>
> 16 There is no question Ms. McDow is a loving mother and that she may honestly believe that the children would be better off in the long run if they were to move to Dartmouth with her. However, the evidence leads me to the opposite conclusion.
> (emphasis added)

[20] There is no suggestion in his decision, nor in the judge's comments during the trial, that he placed an inappropriate emphasis on the relative financial abilities of each parent. The evidence supports the judge's conclusion that the circumstances favoured the preservation of the status quo. His inquiry was a broad one, extending well beyond the financial abilities of the parties. This allegation is without merit.

(iii) Other grounds of appeal:

[21] The other grounds of appeal are premised upon the assumption that Mr. Peck is not the biological father of one of the children. As stated above, there was no such evidence at trial, nor is the proposed fresh evidence sufficient to call paternity into question.

DISPOSITION:

[22] I would dismiss the appeal but in the circumstances, without costs.

Bateman, J.A.

Concurred in:

Roscoe, J.A.

Flinn, J.A.