

NOVA SCOTIA COURT OF APPEAL

Citation: Gill v. Hurst, 2010 NSCA 98

Date: 20101209

Docket: CA 318440

Registry: Halifax

Between:

Christopher Valentino Gill

Appellant

v.

Christine Mary Hurst

Respondent

Judges: Hamilton, Farrar and Bryson, JJ.A.

Appeal Heard: November 24, 2010, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Hamilton, J.A.; Farrar and Bryson, JJ.A. concurring. Appeal costs payable by the appellant to the respondent in the amount of \$1,500, including disbursements

Counsel: Christopher Valentino Gill, self-represented, together with Raye Leier
Bradford G. Yuill, for the respondent

Reasons for judgment:

[1] Christopher Gill appeals Justice Cindy A. Bourgeois' decision awarding sole custody of his fourteen year old daughter, Kaitlyn, to her mother, Christine Hurst. While Mr. Gill argued in his factum that the trial judge also erred in ordering some counselling, not ordering other counselling and in allowing contact between his daughter from a former marriage and Kaitlyn, his oral argument focussed only on whether the judge erred in granting sole custody of Kaitlyn to Ms. Hurst, with liberal access to him, albeit supervised access until such time as his daughter waives this requirement. The father represented himself on appeal. Both parties were represented by counsel at trial.

[2] Mr. Gill also argued at the hearing that Ms. Hurst is not living up to the spirit of the Corollary Relief Judgment issued on January 6, 2010, because she is alienating their daughter from him, as he alleges she has done since separation, so that his daughter doesn't want to have as much access with him as he would like to have. He recognized, when pointed out to him, that this argument relates to the enforcement of the Corollary Relief Judgment rather than to any alleged error of the judge in making the order, so that it is not a matter this Court can deal with on this appeal. He intends to pursue this argument at the upcoming hearing to deal with his enforcement application in the Nova Scotia Supreme Court.

[3] Mr. Gill argues that the trial judge erred in awarding sole custody to Ms. Hurst with liberal access to him; by failing to recognize the significance and relevance of his evidence and that of his witnesses; and that she failed to give this evidence proper weight. He argues further that the trial judge erred by accepting the evidence of psychologist Dr. Carolyn A. Humphreys who had been appointed by the court to conduct a "parent-child assessment" and to make recommendations regarding custody and access. Nor should the trial judge have accepted the evidence of Kaitlyn's counsellor, Lorraine Logan-Smith. Mr. Gill also says that the judge did not take into account Ms. Hurst's reluctance to co-parent or communicate with him as well as her alleged breaches of some provisions of the interim orders.

[4] I am satisfied there is no merit to the father's appeal. This Court's function is to review the decision of the judge in light of the record to determine if she erred. We are not to retry the case, which is what Mr. Gill is asking us to do.

[5] Having reviewed the judge's decision in light of the record, I am satisfied she made no reversible error. She recognized that the starting point for determining custody and access was to consider whether joint custody was appropriate, with both parents having unfettered and liberal access to their child. She found joint custody would not be in Kaitlyn's best interests at that time (1) given the parents' inability to communicate, which problem she laid at the feet of Mr. Gill, and (2) Kaitlyn's expressed wish to live with her mother and have only supervised access with her father on a schedule determined by her, to protect herself from being pressured by her father to help him reunite with Ms. Hurst and to discuss other marital issues.

[6] The judge's unreported oral decision indicates that, in coming to this conclusion, she considered the evidence presented by both parties and gave it the weight she determined was appropriate. Attributing the weight to be given to the evidence is squarely within the judge's jurisdiction because of the advantage she has of seeing the trial unfold before her.

[7] The judge found that while both parents had made mistakes, Ms. Hurst had the insight to recognize the impact these mistakes had on Kaitlyn, whereas Mr. Gill did not. She found the parties were unable to constructively talk with each other about making decisions regarding Kaitlyn because of Mr. Gill's inability to listen to a view opposite to his own and recognize that it may have some merit. She found the reports and testimony of Dr. Humphreys credible (to the effect that Kaitlyn did not wish to live with or have unsupervised access with her father because of his repeated insistence on talking about the marriage breakup and his desire to reunite with Ms. Hurst). She accepted that Kaitlyn had expressed legitimate concerns about having unsupervised access with her father because her father may continue to try to involve her in discussions relating to her parents' marriage.

[8] The record is replete with evidence from which the judge could draw these conclusions.

[9] I would dismiss the appeal and order Mr. Gill to pay costs to Ms. Hurst in the amount of \$1,500, including disbursements.

Hamilton, J.A.

Concurred in:

Farrar, J.A.

Bryson, J.A.