NOVA SCOTIA COURT OF APPEAL
Citation: Slade-McLellan v. Brophy, 2012 NSCA 80

Date: 20120731
Docket: CA 355883
Registry: Halifax

Between:

Emilie Slade-McLellan

Appellant

v.

Justin Brian Brophy

Respondent

Judges:	Fichaud, Beveridge and Farrar, JJ.A.
Appeal Heard:	March 21, 2012, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Farrar, J.A.; Fichaud and Beveridge, JJ.A. concurring.
Counsel:	Lloyd I. Berliner and Cassandra Armsworthy (law student), for the appellant Roseanne M. Skoke, for the respondent

Reasons for Judgment:

Introduction

[1] This is an appeal by Emilie Slade-McLellan from a Variation Order of Associate Chief Judge James C. Wilson dated December 31, 2011. The reasons for judgment are dated August 26, 2011 (**E.S.M. v. J.B.B.**, 2011 NSFC 21). The appellant alleges that the judge erred by ordering a change in the primary care of the child from her to the father. She asks that the primary care of the child be returned to her forthwith with specific access to the respondent. She also asks that the provisions in the Order restricting the care and contact of her partner, Travis Dean, with the child be removed.

[2] For the reasons that follow, I would dismiss the appeal. As neither party has requested costs, I would not award costs.

Overview of Facts and Proceedings

[3] Ms. Slade-McLellan and Mr. Brophy are the parents of Lily Eva Slade. They began dating in 2006 and maintained "an off-and-on" relationship until December, 2007.

[4] The parties reconciled briefly in 2008. The relationship ended permanently in November, 2008, prior to Ms. Slade-McLellan learning she was pregnant with Lily.

[5] At the time of Lily's birth on July 21, 2009, Mr. Brophy was living and working in Alberta. He returned to Nova Scotia the day of her birth, remained here for a week and then returned to Alberta. He permanently returned to Nova Scotia in September, 2009 and began exercising access for short periods of time.

[6] The first proceeding under the **Maintenance and Custody Act**, R.S.N.S. 1989, c. 160, following the birth of Lily, was heard on December 8, 2009 resulting in an Interim Order dated January 18, 2010 which granted sole custody of Lily to Ms. Slade-McLellan with reasonable access to Mr. Brophy. The Interim Order also provided for DNA paternity testing to be completed. The paternity test confirmed Mr. Brophy was the father of Lily.

[7] The parties entered into a consent order on June 25, 2010 which changed the custodial arrangement. It provided that the parties were to have joint custody of Lily with Ms. Slade-McLellan having primary day-to-day care and Mr. Brophy having specified access. In November, 2010, Mr. Brophy applied to vary the order to accommodate changes in his work and school schedule. The application was heard on January 5, 2011 and a further consent order was issued on March 4, 2011 which provided Mr. Brophy with access on alternate weekends and one overnight each week. The parties also consented to a provision requiring that Lily would not be left unsupervised in the care of Travis Dean.

[8] On May 25, 2011, Ms. Slade-McLellan made an application to vary requesting that she be permitted to relocate to Alberta with Lily to join Mr. Dean. At that time, she was pregnant with a child from her relationship with Mr. Dean. The child was born in November, 2011. On June 6, 2011, Mr. Brophy filed an Intake Form opposing the relocation application and making a counter application for sole custody of Lily with Ms. Slade-McLellan to have supervised access. The applications were scheduled for August 3, 4, 5, 2011.

[9] On that same day, June 6, 2011, the Family Court issued an Interim Order directing that Lily was not to be removed from Nova Scotia and further directing that she was to have no contact with Mr. Dean.

[10] At the time of the hearing in August, Ms. Slade-McLellan was employed at Tim Horton's. She and Mr. Dean had been living together in an apartment from October, 2010 until May, 2011. In May, 2011, Mr. Dean moved to Alberta and Ms. Slade-McLellan and Lily went to live with Ms. Slade-McLellan's mother in New Glasgow. Mr. Brophy was entering his second year of studies in the Business Administration Program at the Nova Scotia Community College and was a casual employee at the Nova Scotia Liquor Commission.

[11] At the conclusion of the hearing the judge dismissed the application to relocate citing concerns about the loss of support from extended family for both Ms. Slade-McLellan and Lily. The judge found that it was in Lily's best interests to remain where she had access to both parents and the support of extended family (¶16). The decision on custody and access was reserved and, in a written decision dated August 26, 2011, Mr. Brophy's application was allowed to change Lily's primary care from Ms. Slade-McLellan to him and restricted Lily from being in the sole care of Mr. Dean.

[12] It is from this decision that Ms. Slade-McLellan appeals. The dismissal of the application to relocate is not under appeal.

Issues

[13] In the Notice of Appeal and her factum, Ms. Slade-McLellan raises the following grounds of appeal:

1. The Learned Trial Judge erred in law and in fact by failing to establish a material change in circumstances since the previous Order sufficient to warrant a change in primary care.

2. The Learned Trial Judge erred in law and in fact by considering circumstances which had existed prior to the previous Order to find a change in circumstances.

3. The Learned Judge erred in law and in fact by failing to show the appropriate deference to the status quo in light of the finding that the child, Lily Slade, was thriving in the current custodial arrangement.

4. The Learned Judge erred in law and in fact by failing to account for the evidence with respect to each parent's willingness to facilitate contact with the other.

5. The Learned Judge erred in law and in fact by failing to account for the amount of time the child, Lily Slade, would spend with third party caregivers.

6. The Learned Judge erred in law and in fact in concluding that certain decisions made by the Appellant were indicative of an exercise of judgment not consistent with the child's best interests.

7. The Learned Judge erred in law and in fact in failing to consider the credibility of certain evidence provided by the Respondent.

8. The Learned Judge erred in law and in principle in concluding that the appellant's relationship was not stable, viable, or long-term.

9. The Learned Judge erred in law and in principle in finding that Lily Slade should not be permitted to be left in the sole care of Travis Dean.

> 10. And such other grounds for appeal as may be relevant from a review of the Court transcript**.**

[14] For the purposes of her written argument, Ms. Slade-McLellan summarized the grounds of appeal and addressed them collectively under the following headings as follows:

> a. Grounds (1) and (2) — "**Material Change in Circumstances**".
>
> b. Grounds (3), (4), (5), and (6) —"**Best Interests of the Child**".
>
> c. Ground (7) — "**Findings of Credibility**".
>
> d. Grounds (8) and (9) — "**Travis Dean**"

[15] I will address the grounds of appeals under these headings.

Standard of Review

[16] This Court has consistently stressed the need to show deference to trial judges. In the absence of some error of law, misapprehension of the evidence or an indication that an order is clearly wrong on the facts we will not intervene. See, for example, **Lamrock v. Goreham**, 2006 NSCA 46 at &2. Therefore, in reviewing the judge's decision on custody and access we must give it considerable deference. (**Hickey v. Hickey**, [1999] 2 S.C.R. 518, &10-12)

Material Change in Circumstances

[17] The appellant argues once the trial judge rejected her application to relocate with the child, he could not go on to change custody without another material change in circumstances being shown. She argues:

> 23. …..that the learned Trial Judge failed to establish a material change in circumstances before considering whether a change in custody was in the child's best interests. It is further submitted that, absent the move, there was no material change in circumstances that would allow the learned Trial Judge to embark on a fresh inquiry with respect to the existing custodial arrangement.

> 24. At the time the learned trial Judge was considering the Respondent's application for sole custody of Lily, the relocation application had been dismissed and the move was no longer a live issue. The evidence had clearly established that, were she not permitted to move, the Appellant would remain in Nova Scotia, and that her partner, Travis Dean, intended to return to live with her. It is submitted that at the time the Respondent's application for primary care was being considered, the move was no longer appropriate grounds on which to find a material change.

[18] The judge in his decision at para. 4 held:

> [4] ... Since the last order the applicant has become pregnant and wishes to relocate with her boyfriend to Alberta where he has found employment. This change, together with other circumstances of the parties that will be more fully described in this decision, is sufficient for the court to "embark on a fresh inquiry into what is in the best interest of the child having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to meet them".

[19] The judge, in this passage, is quoting from **Gordon v. Goertz**, [1996] 2 S.C.R. 27 which remains the leading case on mobility. The specific material change identified by the trial judge was the proposed move to Alberta. According to **Gordon,** relocation itself, if any distance is involved, will almost always be a material change, because of its intimate connection with the child's needs and circumstances:

> … Relocation will always be a "change". Often, but not always, it will amount to a change which materially affects the circumstances of the child and the ability of the parent to meet them. A move to a neighbouring town might not affect the child or the parents' ability to meet its needs in any significant way. Similarly, if the child lacks a positive relationship with the access parent or extended family in the area, a move might not affect the child sufficiently to constitute a material change in its situation. Where, as here, the child enjoyed frequent and meaningful contact with the access parent, a move that would seriously curtail that contact suffices to establish the necessary connection between the change and the needs and circumstances of the child.(&14)

[20] The appellant does not dispute that the proposed relocation was a material change but rather, once the application to relocate was dismissed there was no longer a material change which would allow the court to reconsider custody. The question then becomes — was it open for the judge to consider the existing

custodial arrangements afresh after he had refused the proposed move to Alberta? The appellant says no. I disagree. I will explain why.

[21] In this case, the judge had potentially three custodial options on the table, the first two from the mother's perspective and the last one from the father's perspective:

- Plan A – Ms. Slade-McLellan relocates to Alberta with Lily; father's access by default, has to change;
- Plan B – Ms. Slade-McLellan stays in Pictou County and remains the primary care parent;
- Plan C – Ms. Slade-McLellan stays in Pictou County but Mr. Brophy becomes the primary care parent.

[22] If the parent wants to relocate and presents Plan A (moving) and also presents Plan B (staying), then does the Court still go on to consider the father's Plan C if it rejects the move or does the analysis stop at the mother's Plan B?

[23] The judge acknowledged that there was a Plan B here:

> Where E.S.M. brought this application to gain authorization to move to Alberta where T.D. had employment, the evidence is clear that E.S.M. would not leave Pictou County without her daughter. T.D. states he will return to Pictou County if E.S.M. cannot relocate. ... (¶ 34).

[24] In my view, the analysis does not stop at Plan B. The material change threshold has been crossed and the judge was free to review the existing custodial arrangement.

[25] **Gordon, supra** tells us that not only can it be done, the custodial arrangement should be reviewed. McLachlin, J. (as she then was) stated:

> The threshold condition of a material change in circumstance satisfied, the court should consider the matter afresh without defaulting to the existing arrangement: *Francis v. Francis* (1972), 8 R.F.L. 209 (Sask. C.A.), at p. 217. <u>The earlier conclusion that the custodial parent was the best person to have custody is no longer determinative, since the existence of material change presupposes that the terms of the earlier order might have been different had the change been known at the time</u>. (*Willick v. Willick, supra,* at p. 688, per Sopinka J.) … The judge on the

> variation application must consider the matter anew, in the circumstances that presently exist. …
>
> … 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. (¶ 17, 18)
> (Emphasis Added)

[26] This freedom implicitly includes the ability to alter custody arrangements even when the applicant parent does not end up relocating. For example, McLachlin, J. specified that "the earlier conclusion that the custodial parent was the best person to have custody is no longer determinative" and that the material change "places the original order in question". The **Gordon v. Goertz** analysis is intended to be broad and open-ended because of the fact-driven nature of applying the best interest test.

[27] The Supreme Court's principled directive is for judges to focus exclusively on the child's best interests and not the "rights" of the parents to custody and access. As long as the material change threshold is crossed, the trial judge is obliged to make whatever order would be in the best interests of the *child* – not the parent, no matter how badly he or she may want to relocate:

> . . . underlying much of the argument for the presumption is the suggestion that the custodial parent has the "right" to move where he or she pleases and should not be restricted in doing so by the desire of the access parent to maintain contact with the child. However, the *Divorce Act* does not speak of parental "rights". . . (¶ 46)
>
> . . . The focus is on the best interests of the child, not the interests and rights of the parents. (¶ 49)

[28] The *status quo*, Ms. Slade-McLellan staying if the move is rejected, is but one factor to be taken into account in reviewing the custodial arrangement anew.

[29] The British Columbia Court of Appeal in **Karpodinis v. Kantas**, 2006 BCCA 272, after citing the principles in **Gordon v. Goertz**, noted that the

principles are set out in a factual context where there were only two options: either vary the custody order allowing the mother to leave the jurisdiction; or alternatively, grant access to the father. However, where the mother says she will not relocate if the application is not granted that simply presents a third option in the **Gordon v. Goertz** analysis:

> 20 These principles were enunciated with a view to resolve conflicts between parents where there are only two options: vary the custody order to allow the mother to leave the jurisdiction with the child, or grant custody to the access parent. In other cases, such as the case at bar, the custodial parent states that he or she will not move if the child is not permitted to move to the proposed new location. This presents another option to a judge hearing such an application, namely maintaining the *status quo* extant before the application.
>
> 21 However, the maintenance of the *status quo* must not be overemphasized.
> …
>
> (Emphasis added)

[30] McLachlin, J. in **Gordon, supra**, emphasized that there is no presumption in favour of the custodial parent, and that conclusion is linked to the trial judge's ability to consider the matter afresh:

> Until a material change in the circumstances of the child is demonstrated, the best interests of the child are rightly presumed to lie with the custodial parent. The finding of a material change effectively erases that presumption. The judge is then charged with the fresh responsibility of determining the child's best interests "by reference to that change". To reinstate the presumption in favour of the custodial parent at this stage would derogate from the finding that the child's interests may, by reason of the change, no longer be best protected or advanced by the earlier order. It would be to reinforce the earlier order when its continuing propriety is the very issue placed before the court. This in turn would depreciate potential adverse effects of the established material change. In short, the two-stage procedure required by the *Divorce Act* supports the view of Morden A.C.J.O. in *Carter v. Brooks, supra*, that once the applicant has discharged the burden of showing a material change in circumstances, "[b]oth parents should bear an evidential burden" of demonstrating where the best interests of the child lie. (¶40)
> (Emphasis added)

[31] It should not be up to the relocating parent to drive the litigation and dictate what the court can or cannot consider when it is the best interests of the child that are paramount.

[32] Considering the matter afresh also permits the trial judge to examine the child's current needs and decide which parent is better positioned to meet those needs. The attraction of preserving the *status quo* custodial arrangement (if mobility is rejected) may be in tension with the need to ensure that custody reflects the evolving nature of children's best interests as they grow and change. Again, I refer to McLachlin J.'s reasons where she stressed the need to consider the child's needs and the parents' ability to meet them as time passes and circumstances change:

> A presumption in favour of the custodial parent may also impair the inquiry into the best interests of the child by undervaluing changes in the respective relationships between the child and its parents between the time of the custody order and the application for variation. The *Divorce Act*'s provision for variation of custody and access orders recognizes that the child's needs and the parents' ability to meet them may change with time and circumstance, and may require corresponding changes in custody and access arrangements. Children grow and mature, articulating new priorities and placing new demands on their parents. To the extent that the proposed presumption would give added weight to the arrangement imposed by the original custody order, it may diminish the weight accorded to the child's new needs and the ability of each parent to meet them. Consequently, its operation might be dangerous in a case, for example, where in the period following trial the access parent has demonstrated the desire, aptitude and temperament to assume a greater role in meeting the needs of the child, and the custodial parent has evinced a corresponding inability to do so. (**Gordon**, ¶ 45)

[33] The judge in this case did what McLachlin, J. said he must; consider the best interests of the child in changing circumstances. I will address what he considered when addressing the best interests test under the heading "Best Interests of the Child" later in these reasons.

[34] This Court has upheld trial judges who have refused mobility but varied custody even when the custodial parent says they will not move if mobility is refused.

[35] In **Mahoney v. Doiron**, 2000 NSCA 4, a variation in custody was ordered even though mobility was rejected. The material change in circumstances in that case was the mother's proposed move from Antigonish County to Halifax.

[36] The trial judge refused the mother's mobility application but allowed the father's variation application and granted him day-to-day care. One of the grounds of appeal was that the trial judge erred in refusing to reconsider the mother's post-decision application for reconsideration because she had abandoned her plan to move to Halifax permanently. Instead, she would commute from her parents' home where the child would reside and from where he could continue at school. As in the present case, the mother's move was "off the table". Pugsley, J.A., writing for this Court, dismissed the appeal emphasizing the deference owed to the trial judge who thought it in the best interests of the child to change the custody arrangement even though the mobility application was dismissed and the mother was not moving without the child.

[37] Similarly, in **Muir v. Sabean**, 2003 NSCA 99, the prevailing court order provided for joint custody with primary care to the mother. The mother then applied to vary that order taking full custody and the right to move with the children and her new partner, a member of the Canadian Forces, who was posted outside the province. The father cross-applied and requested sole custody. He was successful at trial and on appeal, even though "[t]here was evidence before the court to support the conclusion that the appellant's move would not take place in the immediate future. (¶ 3 and ¶ 11) Saunders, J.A. pointed out:

> Judge Black clearly preferred the parenting plan of the respondent to that of the appellant, whether she stayed in Greenwood in which case the children would most likely continue to remain separated, or whether she moved away, … (¶ 11)

[38] This Court upheld the trial judge who considered both parenting plans and the *status quo* (because the mother was not likely to move any time soon) and found that an alteration of the custody arrangement was in order.

[39] Saunders, J.A. continued:

> ... I am not persuaded that the trial judge erred in determining that the children's best interests would be achieved by reuniting them under their father's care and custody, with generous access to their mother. … (¶ 18)

[40] The ultimate result being a change in the custodial arrangement even though the mother was not moving at that time.

[41] The situation in this case is not unlike that which faced Dellapinna, J. in **LeBlanc v. LeBlanc**, 2009 NSSC 228, where he outlined four possible outcomes based on the evidence:

> [86] Realistically there are four possible outcomes resulting from the parties' applications. The Court could grant the Applicant's application and allow her to relocate with the children to Cape Breton and order a restructuring of the Respondent's access. The Court could reject the Applicant's application to relocate the children and grant primary care to the Respondent. This option is not seriously pursued by the Respondent and the Applicant has made it clear that if she is not allowed to move the children to Cape Breton then she has no intention of moving.
>
> [87] The third possible outcome would be to deny the Applicant's request to move the children but order a shared custody arrangement as sought by the Respondent.

[42] The mother's evidence that she would not move to Cape Breton if she were not allowed to move the children was just one factor in considering whether to change the custodial arrangement. However, this did not prevent the consideration of the third option. Dellapinna, J. ultimately found that it was in the children's best interests to keep the parenting arrangement that was already in place.

[43] In conclusion, I am satisfied that once Ms. Slade-McLellan showed that her proposed move to Alberta was a material change in circumstances, it was open for the court to review the custodial arrangement, even though the evidence was that she would not move without the child. The option of her staying was just one other option for the trial judge to consider when reviewing the custody arrangement. It was not necessary for him to find an additional material change in order to alter the custody arrangement.

[44] I would dismiss this ground of appeal.

Best Interests of the Child

[45] The appellant argues that even if there was a material change in the circumstances the judge erred in finding it was in the best interest of the child to be

removed from the primary care of the appellant. The appellant argued that the judge placed "undue weight on the parties' respective interim and long term plans to the exclusion of other relevant factors".

[46] With respect, this is nothing more than an invitation for us to re-weigh the evidence and come to a different conclusion.

[47] The judge outlined, in considerable detail, the evidence which he considered in determining what was in the best interests of the child. He cites a number of examples of what he considers to be lapses in judgment by Ms. Slade-McLellan: the vagueness of her parenting plan; the lack of clarity about how Ms. Slade-McLellan and Mr. Dean would live; and, how she would support Lily (¶ 49). In determining the best interests of Lily he concluded:

> Based on the evidence before me, J.B.B. has met the burden and persuaded me that a change in primary care is necessary in L.S.'s best interest. In my opinion E.S.M. has exercised judgment that is not consistent with L.S.'s best interest. While no single decision by itself was fatal, the overall exercise of judgment has been more about E.S.M.'s wishes than L.S.'s best interest. Furthermore, E.S.M. has only the vaguest of plans as to how she will provide a stable and nurturing environment for L.S. in the future. Left in the primary care of E.S.M., L.S. faces a lot of uncertainty, circumstances that are not conducive to optimal parenting. (¶52)

[48] The judge was in the most advantageous position to assess the evidence relating to the best interests of Lily and his reasons do not demonstrate a manifest error, a significant misapprehension of the evidence or that his conclusions are clearly wrong.

[49] I would dismiss this ground of appeal.

Findings of Credibility

[50] The appellant argues that the judge erred in law and in fact in failing to consider the credibility of certain evidence provided by the respondent. The essence of this ground of appeal is that Mr. Brophy's evidence was not credible and should have been rejected by the judge. The appellant points to alleged discrepancies and inconsistencies in Mr. Brophy's *viva voce*, affidavit and other documentary evidence. She also says Mr. Brophy was evasive.

[51] This Court recently considered our role when addressing credibility issues. In **Hubley v. MacRae**, 2011 NSCA 25, Hamilton, J.A. held:

> [29] Determining credibility is a function squarely within the competence of trial judges. They are called to make such determinations on a daily basis. They have the advantage of seeing and hearing the parties testify. They are entitled to accept all, some or none of any witness's testimony.

[52] Although the judge does not address every piece of evidence upon which there may have been a conflict, he set out in considerable detail the evidence upon which he relied and which he considered relevant to the determinations which he had to make. The inconsistencies and disputes in the evidence referred to by the appellant are best characterized as inconsequential in the overall consideration of the best interests of Lily. I would neither characterize them as clear nor significant as suggested by the appellant.

[53] I would dismiss this ground of appeal.

Travis Dean

[54] The appellant says that the judge erred in concluding that the appellant's relationship with Mr. Dean was not stable, viable or long term and erred in finding that Lily should not be permitted to be left in the sole care of Mr. Dean.

[55] The judge's comments on the viability of the relationship is in the context of Lily being left in the sole care of Mr. Dean:

> I will not require that T.D.'s contact be supervised, but I will continue the provision that L.S. not be left in his sole care pending further review. At this point too little is known about the future plan of T.D. and E.S.M. If E.S.M. and T.D. establish a viable long term relationship and there is no further evidence of domestic abuse, this restriction should be revisited. While it is incumbent on the court to take measures to ensure children are not placed at risk of exposure to domestic violence, the court cannot regulate partner choice. (¶59)

[56] The trial judge had ample evidence before him to be concerned about Mr. Dean and his relationship with Ms. Slade-McLellan. The evidence established that Mr. Dean:

1. has an admitted history of domestic violence. A former partner and the mother of one of his children offered graphic evidence of the abuse she suffered during their relationship (¶ 19);

2. has suffered from chronic clinical depression although he was undergoing counselling and has some insight into his anger issues, his counsellor cautioned that he was not in a position to make predictions or assurances (¶ 19);

3. has a criminal record involving illegal entry into a dwelling house with a weapon (¶ 20);

4. Mr. Brophy had two confrontations in the fall of 2010 involving a pit bull that Mr. Dean and Ms. Slade-McLellan acquired soon after moving into their apartment and an incident involving comments with respect to family that resulted in more harsh words (¶ 21-22);

5. while only 21 years old at the time of trial, has at least two other children and was expecting another child with the appellant. He does not support his other two children financially nor does he maintain a consistent and regular access schedule (¶ 24).

[57] With respect, in light of this evidence, the judge made no error in questioning the viability of the relationship nor did he err in imposing the condition that Lily should not be left in the sole care of Mr. Dean. He left the door open for this restriction to be revisited if time shows that Mr. Dean has left his abusive behaviours behind and could become a supportive presence in the lives of his children and partner (¶ 44).

[58] I would dismiss this ground of appeal.

Costs

[59] There has been no request for costs by either party and as a result there will be no order of costs.

Farrar, J.A.

Concurred in:

Fichaud, J.A.

Beveridge, J.A.