NOVA SCOTIA COURT OF APPEAL
Citation: *Haines v. Haines,* 2013 NSCA 63

Date: 20130516
Docket: CA 393502
Registry: Halifax

Between:

David Francis Haines

Appellant

v.

Lisa Lynn Haines

Respondent

Judges:	Oland, Farrar and Bryson, JJ.A.
Appeal Heard:	April 11, 2013, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Farrar, J.A.; Oland and Bryson, JJ.A. concurring.
Counsel:	M. Louise Campbell, Q.C., for the appellant Bernard Thibault and D. Thomas Dulong, Articled Clerk, for the respondent

Reasons for judgment:

Overview

[1] The appellant Daniel Francis Haines and the respondent Lisa Lynn Haines were married on May 22nd, 1999, in Canso, Nova Scotia where they resided until their separation on February 25, 2010. They have one child, Memory, born in 2003.

[2] The proceedings relating to the custody of Memory started in the Family Court in Antigonish on March 12th, 2010, and culminated with a mobility application by Ms. Haines on September 13 and 27, 2011. Associate Chief Judge James Wilson rendered an oral decision on September 27th, 2011 and issued the Final Order on May 1st, 2012.

[3] Mr. Haines' only issue is with the provision in the Final Order which grants Ms. Haines the right to move and relocate with Memory from Nova Scotia to Ontario. He raises three grounds of appeal:

1. Did the the judge err in finding there had been a material change in the circumstances affecting the child;
2. Did the judge err in not giving sufficient weight to the existing access arrangment between the child and Mr. Haines;
3. Did the judge err in not giving sufficient weight to the desired ability of maximizing the contact between the child and both parents?

[4] For the reasons that follow, I would dismiss the appeal, however, in these circumstances, without costs.

Standard of Review

[5] This Court has consistently stressed the need to show deference to trial judges in family law matters. In the absence of some error of law, misapprehension of the evidence, or on the award that is clearly wrong on the facts we will not intervene. We are not entitled to overturn an order simply because we may have balanced the relevant factors differently. (**Hickey v. Hickey**, [1999] 2 S.C.R. 518, ¶10-12.)

[6] Findings of fact, or inferences drawn from the facts are reviewed on a standard of palpable and overriding error. Matters involving questions of law are subject to a correctness standard. When the matter is one of mixed fact and law and there is an extricable question of law, the question of law will be reviewed on a correctness standard. Otherwise, it is reviewed on a palpable and overriding standard. (**Housen v. Nikolaisen**, 2002 SCC 33.

[7] The first ground of appeal, whether there was a material change in circumstances, is a question of mixed fact and law, without an extricable legal issue, it will be reviewed on the palpable and overriding error standard.

[8] The second and third grounds of appeal are questions of fact relating to the judge's weighing of the evidence and will, also, be reviewed on a standard of palpable and overriding error.

Analysis

#1 Did the judge err in finding there had been a material change in the circumstances affecting the child?

[9] The judge, in his oral decision at p. 6, found that the lack of the possibility of reconciliation was a material change in circumstances. He said:

> [12] On the evidence, I find there has been a change. Mr. Haines is in a new relationship and there is not the possibility of reconciliation that there might have existed a year ago when the first order was made.

[10] Ms. Haines, in her factum, concedes that the judge erred in his consideration of the evidence surrounding reconciliation and that the possibility of the couple's reconciliation was not a material change in the circumstances. However, she says the error is of no consequence because the planned move was clearly a material change in circumstances which allowed the judge to review the custody arrangement between the parties. Ultimately, she says the trial judge reached the proper conclusion, but cited the wrong material change in circumstances as the springboard for his analysis.

[11] Mr. Haines' counsel acknowledged that a planned move, such as in this case, would normally be a material change in circumstances. However, she argued that the proposed move had been contemplated in a previous court order and, therefore, was not a material change in circumstances. In particular, reference was made to the Order of Judge Wilson dated May 11th, 2010. Paragraph 3 of that Order provides:

> 3. This Order is subject to the condition that the primary residence of Memory Rainn Haines is Guysborough County and there shall be no removal of Memory Rainn Haines from Guysborough County;

[12] Counsel for Mr. Haines properly acknowledged that if the proposed move was not contemplated in the previous order it would constitute a material change in circumstances.

[13] The May 11, 2010 Order resulted from an application made by Mr. Haines seeking interim custody for Memory. In his affidavit sworn in support of the application he says:

> 12. On or about March 9th while I was in Halifax I was told in a telephone conversation with my sister-in-law, Melanie Haines, and I do verify believe, that the Respondent's mother was coming to Canso this week to take the Respondent and Memory back to Ontario, where the Respondent's parents reside.
>
> 13. I am very concerned that the Respondent would even consider taking such a step without first consulting me, and I also have a potential concern as to her state of mind that she would even discuss making such plans.

[14] Ms. Haines, in response to the application, swore an affidavit saying that she did not have any intention of moving out of the Canso area:

> 22. THAT Mr. Haines has also expressed concern that I am going to move out of Guysborough County with Memory. I have no intention of moving out of the Canso area. I was born in Canso and want Memory to be brought up in Canso close to her family on both my side and her father's side. I would never raise Memory in a city. ...

[15] The parties ultimately consented to the May 11th, 2010 Order.

[16] The appellant says the proposed move was clearly contemplated at that time and, therefore, it could not be a material change in circumstances at the time of the mobility application in September, 2011.

[17] With respect, I cannot agree with the appellant's position for the following reasons:

1. It is Ms. Haines' sworn testimony that she did not contemplate moving out of the Canso area at that time. Other than Mr. Haines' suspicions, there was no evidence that she intended to move;
2. The May 11, 2010 Order was superceded by another order dated June 29th, 2010, which provided:

> 3(c) Neither party shall permanently remove Memory from Guysborough County without application to the Court upon notice to the other party .....

> This Order contemplates either party making a mobility application on notice to the other. If the May 11, 2010 Order precluded such an application the June 29, 2010 Order could have simply said so.
>
> 3. To give effect to the argument would be to preclude Ms. Haines, regardless of her circumstances, from seeking court approval to move. The May 11, 2010 Order would, effectively, give custody of Memory to Mr. Haines, by default, if Ms. Haines moved. This was not intended nor contemplated by that Order.

[18] While it is acknowledged that the judge misapprehended the evidence in determining that the reconciliation of the parties was a material change in circumstances, not every error will result in the appeal being allowed or a new trial ordered. In **Fralick v. Dauphinee**, 2003 NSCA 128, Oland, J.A. explained the remedies available when errors are found on the part of the trial judge:

> 22 If the court of appeal, applying the correct standard of review, finds reviewable error on the part of the trial judge, it must then address the question of what relief to grant to the appellant. The court may allow the appeal and direct a new trial, allow the appeal and give the judgment which might have been made by the trial court or, in exceptional cases, dismiss the appeal if it is clear that the appellant would inevitably fail even if the error or errors had not been made. See Civil Procedure Rule 62.23 and **Moore v. Economical Mutual Insurance Co.** (1999), 177 N.S.R. (2d) 269 at para 41 to 43. (Emphasis added)

[19] The judge's error was inconsequential in these circumstances. Ms. Haines' move was a material change in circumstances. Had he concluded so he would have undertaken the same analysis and reached the same conclusion. Once this threshold was crossed, the judge was then free to review the existing custodial arrangement. (**Gordon v. Goertz**, [1996] 2 S.C.R. 27).

[20] I would dismiss this ground of appeal.

#2 Did the judge err in not giving sufficient weight to the existing access arrangement between the child and Mr. Haines;

#3 Did the judge err in not giving sufficient weight to the desired ability of maximizing the contact between the child and both parents?

[21] These issues will be considered together as there is substantial overlap in the argument. With respect, these grounds of appeal are nothing more than an invitation for us to reweigh the evidence and come to a different conclusion.

Gordon, supra outlines the factors which a judge must consider when considering mobility:

> 49 ... 7.
>
> (a) the existing custody arrangement and relationship between the child and the custodial parent;
>
> (b) the existing access arrangement and the relationship between the child and the access parent;
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> (c) the desirability of maximizing contact between the child and both parents;
>
> (d) the views of the child;
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> (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
>
> (f) disruption to the child of a change in custody;
>
> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.
>
> 50 In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[22] The trial judge recognized the need to appropriately balance the factors identified in **Gordon** and referred to them in his reasons:

> [13] ***Gordon v. Goertz*** goes on to set out a frame work in which to analyze the facts in any particular case, and I'm directed to consider the existing custody arrangement and the relationship between the child and the custodial parent. In this case Memory is in the primary care of her Mom. I've heard no negative comments on that relationship. There is no reason to believe she's not strongly attached to her Mom. Mom, I think, has always been the primary stay-at-home parent. I'm also directed to consider the existing access arrangement and the relationship between the child, and in this case, her Dad. Again, the evidence is that they have a very good relationship. As I understand the evidence before me, there is a schedule of access that's set out including the extended weekends alternating, and indeed I understand from the evidence there's virtually day-to-day contact. While we may criticize the judgment or circumstances of each other, nobody has seriously questioned the commitment of either parent to the child.
>
> [14] So, that simply sets up the dynamic that we're dealing with. I really don't have Memory's views. That's one of the things that ***Gordon v. Goertz*** ask me to consider if I know the child's view. Sometimes we know those through assessments, or whatever. In this case, I don't. Memory is probably old enough to have expressed herself on it,

> but in this case her views have not been asserted. No doubt she would like everything put back together with a picket-fence around the family. That would make her happy so that she didn't get caught in one of these situations.
>
> [15] I have to take into consideration the effect of a disruption to the child caused by a change in her custody. That does not appear to be an issue here. The primary care, I understand is not challenged because it's simply a question of whether she should be in the care of her mother here, or in Ontario.
>
> [16] Another consideration the Court has to consider is what it would mean to the child, Memory, to be removed from the extended family, schools and the community she's come to know, and in doing that I gather from the evidence that she is involved in activities in her community. She obviously goes to school, she attends skating, maybe dance, swimming, a number of activities she's been involved in. There is also evidence Memory has visited the home in Ontario where she would live, has made friends there and enjoyed activities that location has to offer.

[23] He was also alive to the necessity of maintaining maximum contact between Memory and her father, recognizing that Memory was old enough to use electronic means in order to maintain her relationship with her father:

> [17] I also think that it is important to bear in mind her age. There are ages when children's attachments are even more critical. Children too young to use the phone or computer depend on face to face contact to maintain important relationships. Children Memory's age are old enough to utilize some of these options to maintain relationships. Again, as children get older it becomes more difficult for them to adapt to moves.
>
> [18] What this one comes down to is that there are two other factors that are left for consideration to direct my attention too. One is the principles addressed certainly in the ***Divorce Act*** and is referred to in ***Gordon v. Goertz*** and that's the desirability of maximizing contact between the child and both parents, and this is certainly a case based on the existing custody access arrangements where all other things being considered equal, Memory would probably benefit most from being able to maximize contact with both parents.

[24] He went on to conclude that it was in the best interests of Memory to permit the relocation.

[25] The judge was in the most advantageous position to assess the evidence relating to the best interests of Memory. He balanced the relevant factors in reaching his conclusion. His reasons do not demonstrate manifest error, a significant misapprehension of the evidence or that his conclusions are clearly wrong.

[26] I would dismiss these grounds of appeal.

Costs

[27] The appellant did not seek costs, the respondent requested costs.

[28] Mr. Haines' counsel is from Antigonish. This appeal was originally scheduled on an earlier date. However, Mr. Haines' counsel arrived on the original hearing date only to find out that it was going to be necessary for the matter to be adjourned because of personal issues involving Ms. Haines' counsel. As a result it was necessary for her to return a second time to argue this appeal. In these circumstances where Mr. Haines' counsel was required to travel to attend this appeal on two occasions, I would decline to award costs to the successful party.

Farrar, J.A.

Concurred in:

Oland, J.A.

Bryson, J.A.