NOVA SCOTIA COURT OF APPEAL
Citation: *Laframboise v. Millington*, 2019 NSCA 43

Date: 20190524
Docket: CA 476546
Registry: Halifax

Between:

Joseph Claude Francis Laframboise

Appellant

v.

Susan Irene Millington

Respondent

Judge:	The Honourable Justice Jamie W.S. Saunders
Appeal Heard:	May 14, 2019, in Halifax, Nova Scotia
Subject:	**Custody. Parental Decision-Making. Expert Opinion Evidence. Admissibility. Standard of Review.**
Summary:	A trial judge rejected the appellant's attempt to proffer expert opinion evidence by simply attaching it to his affidavit. The judge found that the appellant's attitude in refusing to go along with any professional advice that was not in accord with his own views was having an adverse impact on their daughter's well-being. His interventions had become obstructionist. It was not in the child's best interests for her parents to continue a shared parenting arrangement. The judge ordered that the child be placed in her mother's primary care with sole authority to make decisions regarding their daughter's physical and mental health, development, counselling and education. The father appealed.
Held:	Appeal dismissed. The Court explained the various standards of appellate review that ought to be applied to the issues in dispute. The judge's refusal to admit the so-called "expert opinion evidence" was absolutely correct. In fact, the judge

would have erred had she admitted the "evidence" under those circumstances. The appellant was given every opportunity to present his case. There was nothing unfair about the way in which the trial was conducted. The judge's strong findings that the appellant's attitude had created a toxic environment in the home which required a termination of their joint parenting arrangement, found ample support in the record. So too her determination that the child's best interests required that she be placed in her mother's primary care, who would then have sole authority to make decisions regarding the child's health, treatment, development and education.

The appellant failed to demonstrate any error in law, or in fact, or in the judge's exercise of discretion.

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Joseph Claude Francis Laframboise

Appellant

v.

Susan Irene Millington

Respondent

Judges:	Bourgeois, Saunders and Scanlan, JJ.A.
Appeal Heard:	May 14, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Bourgeois and Scanlan, JJ.A. concurring.
Counsel:	Terrance G. Sheppard, for the appellant Julia E. Cornish, Q.C. and Gillian R. Lush, for the respondent

Reasons for Judgment:

[1] After carefully considering the appellant's submissions we recessed and then returned to court to announce our unanimous decision that the appeal was dismissed with reasons to follow. These are our reasons.

[2] Mr. Laframboise appealed the decision of Nova Scotia Supreme Court Justice Beryl A. MacDonald delivered orally on December 13, 2017 and her confirmatory order issued April 13, 2018. Before addressing the appellant's grounds of appeal, I will give a brief summary of the facts to provide context.

Background

[3] The parties began living together in a common law relationship in May, 2002. They separated in October, 2007.

[4] They have one child, a daughter, [*] born December 24, 2006.

[5] Sadly there has been extensive litigation between the parties since they separated. Much of that has centered around an ongoing dispute concerning the cause(s) of their daughter's many behavioral challenges, as well as what should constitute appropriate treatment.

[6] In May, 2016 Ms. Millington filed a Notice of Variation Application seeking custody (medical decision-making), the table amount of child support (prospective and retroactive) and costs.

[7] For his part, Mr. Laframboise filed a Response to the Variation Application in September, 2016, in which he sought custody, access, the table amount of child support and costs.

[8] At the trial, both parties presented substantial affidavit evidence. Each testified and called witnesses to support their respective positions. They included: a child psychologist, a social worker, a school principal, various teachers, a behavioral specialist, counsellors and an occupational therapist.

[9] At the conclusion of the trial, Justice MacDonald delivered a comprehensive oral decision. She found that it was not in [*]'s best interests for her parents to continue a shared parenting arrangement. The judge ordered that [*] be placed in Ms. Millington's primary care, and she would have sole authority to make

decisions regarding her daughter's physical and mental health, development, counselling and education. In doing so the trial judge made strong factual findings critical of Mr. Laframboise's role in this longstanding dispute.

[10] This appeal is limited to Justice MacDonald's order that Ms. Millington will have "primary care of [*]" and:

> … sole responsibility and authority to make decisions that have significant or long lasting implications for [*]. This includes, but is not limited to, decisions about [*]'s physical or mental health, dental care, eye care, physical and social development, counseling, education, choice of child care provider, choice of school, and enrolment in recreational activities.

[11] In terms of relief the appellant asks that we overturn the trial judge's decision and either order a new trial before a different judge or "substitute our decision in favour of the Appellant".

Issues

[12] In many respects the appellant's arguments amount to dissatisfaction with the trial judge's findings, with an invitation that we retry the case. Respectfully, that is not our role.

[13] I will reduce the appellant's various submissions to two simple questions:

i. Did the trial judge err by refusing to admit into evidence on-line articles and other materials attached to the appellant's affidavit?

ii. Did the trial judge err by making a decision without there being "expert evidence" before the Court?

Standard of Review

[14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of correctness. When interpreting and applying the law the judge must be right. On questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge's exercise of discretion, deference is owed. We will only intervene if we are satisfied that in

the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just described, the appeal will fail. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8 *ff.*; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶31-34; *Laushway v. Messervey*, 2014 NSCA 7 at ¶27-29; *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 at ¶18-19; and *McPherson v. Campbell*, 2019 NSCA 23 at ¶17-20.

Analysis

Did the trial judge err by refusing to admit into evidence on-line articles and other materials attached to the appellant's affidavit?

[15] At the hearing before us Mr. Laframboise's counsel tried to suggest that the attachments to his affidavit were not objectionable and should have been admitted because they weren't being proffered as expert opinion evidence. I reject that submission.

[16] As I will now explain, there can be no doubt that the appellant's complaint relates to his failed attempt to introduce expert evidence by simply attaching it to his affidavit. This is obvious from how he framed his first ground of appeal in the Amended Notice of Appeal filed November 15, 2018 which states:

> **Grounds of Appeal**
>
> The grounds of appeal are
>
> (1) The trial judge erred by failing to consider professional evidence (such as articles by learned experts) included in the appellant's case.

[17] The inquiry into whether Justice MacDonald erred by refusing to admit the material attached to the appellant's affidavit is a question of law, to the extent that it deals with the admissibility of the material. Once admitted, the weight to be attached to evidence becomes a matter of discretion.

[18] The material Mr. Laframboise says should have been considered by Justice MacDonald consisted of excerpts from the "Parenting Information Program" (information made available to families by the Supreme Court (Family Division)), often shortened to the P.I.P., together with on-line articles the appellant appended to his affidavit as exhibits.

[19] Justice MacDonald firmly rejected these attempts by Mr. Laframboise to proffer evidence in this fashion. Of the Parenting Information Program she said:

> He refers to the Parenting Information Program provided by this Court as if it constitutes expert evidence in this hearing; it does not. It provides parents with potential explanations for a child's behavioural problems, but only a professional can provide the Court with the diagnosis upon which the Court can rely.

[20] Justice MacDonald explained why she refused to rely upon the articles submitted by Mr. Laframboise:

> For the same reason, the Court cannot rely on articles by learned experts who have not come before the Court to provide testimony – evidentiary [sic] that is not permitted, nor can I use such information.

[21] Justice MacDonald was absolutely correct in her ruling when she refused to admit into evidence these untested and arguably irrelevant materials. To illustrate the appellant's misunderstanding of the rules of evidence as well as his failure to satisfy the requirements of the Nova Scotia *Civil Procedure Rules*, I need only refer to one particular article he attached to his affidavit in support of his position. The article is entitled "Renowned Harvard Psychologist Says ADHD is Largely a Fraud". Mr. Laframboise attached it as Exhibit "32" to his affidavit. It appears to have been printed from the Internet without any indication of its source. There can be no doubt that the appellant's purpose in attaching the article to his affidavit was to present it as an expert opinion which he felt "verified" his own views. We see this in his affidavit, in a separate section headed **ADHD**:

> 143. I agree [*] displays symptoms … I also pointed out to (sic) the anxiety and the Parental conflict circumstances and her unstable schedule for not allowing her to develop properly. …
>
> 145. There is a very intimate relationship between Anxiety/ADHD and environmental stressors. … Dr. Joyce clarified that while [*] experiences anxiety, it is not a clinical anxiety disorder …
>
> 147. … It is my belief that we exacerbated the symptoms to a point of diagnosis because of the continued parental conflict. …
>
> 148. Attached hereto as Exhibit "32" is an article by Jerome Kagan, one of the most respected psychologist in Harvard and his opinion on ADHD and depression. What it says(sic) it is to look for environmental factors before starting with an intrusive medical investigation. He warns also of the loopholes of psychiatry. This is not some conspiracy theory pulled from the dark corners of the web. This is the Head psychologist at Harvard.

> The coincidental link between the raise (sic) in ADHD and depression in kids and the rise in "broken families" or "step-families".

[22] From this it is obvious Mr. Laframboise wished to present this untested "opinion" of a psychologist named "Jerome Kagan" to purportedly support his own position on what was causing or not causing his daughter's difficulties.

[23] The appellant did not call the Harvard psychologist referenced in the piece, nor produce the author of the article itself. He made no attempt to comply with the Rules when presenting expert opinion evidence. Ms. Millington's counsel was quite right in objecting to its admissibility.

[24] As Mr. Laframboise's counsel conceded in his oral submissions in this Court, nothing prevented the appellant from engaging an expert to prepare a report and testify with respect to it, if so advised. Mr. Laframboise had many months to consider that strategy with his lawyer, but chose not to pursue it. The material attached to his affidavit did not in any way constitute admissible opinion evidence and Justice MacDonald would have erred, had she admitted it under those circumstances. The appellant's first ground of appeal is entirely without merit.

Did the trial judge err by making a decision without there being "expert evidence" before the Court?

[25] In both the Amended Notice of Appeal and in his factum the appellant explains his second ground of appeal as:

> (2) […] the trial Judge erred by making a decision following the hearing without consideration of expert evidence, despite highlighting the need for an expert witness to attest to the parties' child's behavioral problems.

[26] To support his complaint the appellant excises three sentences from the judge's comprehensive decision where she said:

> No expert attended this Court to identify anxiety due to parental conflict as the cause of the child's impulsivity, her inattention, her aggression, her inability to regulate her emotional reactions, her difficulty with personal boundaries, and her poor social skills. Yet, this is the thread woven through Mr. Framboise's (sic) evidence. This is his explanation from (sic) the majority of problems experienced by his daughter including Ms. Millington's unwillingness to agree with him.

[27] Mr. Laframboise says this extract demonstrates both the judge's refusal to allow him to call an expert, as well as her chastising him, for failing to do so.

[28] Respectfully, that is a mischaracterization of Justice MacDonald's analysis and conclusions. It misconstrues the judge's remarks by ignoring the context and the sequence in which they were made, and then exaggerates their significance in the outcome.

[29] Let me begin with the appellant's assertion that the trial judge barred him from calling an expert. There is nothing in this record to support such a complaint. That much was conceded by Mr. Laframboise's counsel during oral argument in this Court. Rather, the allegation was watered down by counsel's suggestion that the judge had "discouraged" the appellant from engaging an expert. Respectfully, that assertion is equally flawed.

[30] The point Justice MacDonald was making was that the appellant had not produced an expert to support his "theory" which was that each and every one of his daughter's several and very different behavioral challenges stemmed primarily from the parental conflict over their parenting schedule and [*]'s treatment. That "theory" was the singular and repeated position taken by the appellant throughout these proceedings as reflected in his testimony and his affidavit. To illustrate, I refer to these portions of his affidavit where he criticizes Ms. Millington (as "The Applicant") and her approach to their daughter's treatment:

> 24. Unfortunately, the Applicant has been and is still pressing for further testing …
>
> 25. The Applicant is obsessed with obtaining different diagnosis … despite the PIP offering an all-encompassing description and explanation matching the reality observed in [*].
>
> 26. I am extremely concerned by the psychological damage caused to all involved, especially [*], by the approach imposed by the Applicant ultimately leading to these proceedings. Most importantly, how much this continued testing has contributed to the very symptoms observed in [*].
> …
>
> 30. It would be extremely detrimental to [*] to continue to pursue these medical assessments, which are arguably not addressing the primary source of the problem which is the environment created by the parenting schedule and the continued parental conduct between the Applicant and I. Dealing with the medical system has left me feeling powerless to protect my daughter from harm done in the name of good intentions to help her. With me being relegated by doctors and education professionals to have (sic) silenced, I have felt helpless to assist [*].

[31] When pressed by the Panel during the appeal hearing it was conceded that had Mr. Laframboise wished to locate and retain an expert to offer an opinion that practically all of [*]'s variety of challenges could be explained by her parents' discord over their parenting schedule he was free to do so, and yet with benefit of counsel, he had chosen not to pursue that course of action. The merits of adopting such a strategy is not for us to decide.

[32] Having explained the context, I return to the three sentences I quoted in paragraph 26 above, and as referenced by Mr. Laframboise. While they were important, they were hardly dispositive of her overall assessment of the evidence, her analysis, or her conclusions. Rather, many other findings led to the ultimate disposition. Simply to illustrate, I will consider a few.

[33] Reading Justice MacDonald's reasons as a whole, it is clear that she found the appellant's attitude in refusing to go along with any professional advice that was not in accord with his own views, was having an adverse impact on their daughter's well-being. His attitude and interventions had become obstructionist. While each parent may have genuinely felt that their approach was the best for [*], Justice MacDonald's finding that the appellant's actions were harmful to their daughter's development was strongly supported by the evidence.

[34] During preliminary discussions with the trial judge, appellant's counsel raised the prospect of their engaging an "expert" who might review earlier reports prepared by others and then perhaps have some contact with [*] in order to provide recommendations to assist the Court. Nothing was formalized. The specifics of such a potential engagement were left very vague and in my respectful view Justice MacDonald wisely exercised her discretion by declining the suggestion. First, she reminded counsel that she did not need an expert to report on something the judge had witnessed many times over the course of her long career on the Bench – that parental discord often leads to signs of stress, anxiety and behavioural difficulties in children. We see this in an exchange between the judge and the appellant's lawyer, Ms. Logan, during her cross-examination of Dr. Joyce, the Clinical Child Psychologist. After putting the question to Dr. Joyce, the judge interjected:

> **BY MS. LOGAN:** Q. Would you agree that the conflict between the parents has a significant piece to play in this?
>
> **THE COURT:** I'm going to maybe let that in as part of lay opinion. You already know that I am tainted by an understanding that parental conflict has a high correlation with behavioural and anxiety problems in children. We hear it so much in this Court that I feel I can say that without the necessity of expert

> opinion. I think it's getting to be one of those notorious facts frequently known to which any expert opinion may address themselves saying yes. So, I am going to leave it at that. I wrote a decision involving domestic violence around it. I don't want to get into that here, but I don't think this witness needs to comment any further. I've already indicated that that is the understanding of the Court in respect to parental conflict and its impact upon children.
>
> So, I'm not going to take the time forcing counsel and the expense of bringing someone in to say that, Ms. Logan. So, I hope that allows you to progress through your questions.
>
> **MS. LOGAN:** Yeah. Thank you, My Lady.

[35] Further, it is obvious from the record that MacDonald, J. went out of her way to caution the parties with respect to the time and cost of engaging an expert, wisely pointing out that no professional opinion was needed to establish the fact that parental conflict often caused distress and behavioural challenges in children. Nor did this dispute require hiring yet another expert to prepare a summary or draw conclusions from the professional opinions of others. That was hardly a task a trial judge could or would delegate to someone else. Justice MacDonald properly saw that as her responsibility.

[36] Finally, as noted earlier, Justice MacDonald was highly critical of the appellant's intransigence in accepting professional advice as to the proper treatment for their daughter's many behavioral problems. For example, in the paragraphs immediately preceding and succeeding the three sentences impugned by the appellant, MacDonald, J. said:

> Each of you has a very different opinion about what your daughter needs. Ms. Millington foments (sic) her opinion based upon the advice of professionals. Mr. Framboise (sic) does not respect the opinion of those professionals, unless they agree with him; few do.
>
> He complains his voice is not heard. On the contrary, the evidence of his being heard, and I certainly have heard him, in all of his Affidavit material of which there are many, many paragraphs, his testimony, and submissions, he has been heard and the evidence of that is overwhelming. …
>
> The essence of Mr. Framboise's (sic) complaint is that most of the professionals involved with his daughter do not agree with him. It is not they who failed to listen, it is Mr. Framboise (sic) who does not listen. He spends valuable time not asking questions and calmly listen (sic) to answers, he spends it arguing with the professionals. Perhaps in an expectation they will eventually agree with him. Perhaps because he has learned that doing so can prevent the implementation of their recommendations, for which there's also ample evidence; neither serves [*]'s best interest.

…

Ms. Millington is prepared to implement professional recommendations; Mr. Framboise (sic) generally is not. His reluctance to do so stems not from any professional advice he is receiving.

…

Mr. Framboise (sic) also cherry picks from the various reports provided by professionals in an attempt to either discredit their recommendations or to prove his own point of view. He does so by ignoring the totality of the information provided in the reports leading to the opinions and recommendations given.

Mr. Framboise (sic) considers Ms. Millington to be the primary driver of the conflict and has no insight into his role in creating a toxic family dynamic. And it is toxic; there's no question about that. [*]'s in the middle of this irreconcilable irresolvable conflict.

I cannot change the dynamic between you as parents, but I must do what I can to provide security and decision making in parenting for [*]. She likely will need psychological help to accept the change my order will create, but I consider this change to be in her best interest.

Although Mr. Framboise (sic) appears to acknowledge [*]'s impulsive, socially awkward, distractible, has anxiety and ADHD, he suggests he has strategies in his home and in parenting that result in a rare occurrence of the problems when she's in his care. I suggest the evidence indicates he is wilfully blind to the difficulties [*] experiences and his expectations of her can be harmful.

…

Mr. Framboise (sic) speaks about his rights as a father, that he believes are being ignored. He must understand that he has responsibilities, [*] has rights. She has the right to have parents who take professional advice seriously and who cooperate with and immediately implement recommendations made as a result of professional assessment or who quickly arrange for a second opinion from an agreed upon professional if there is concern about diagnosis or recommendations made.

The problems that [*] experiences are problems that must constantly be monitored, and professional advice may change based on assessments over time. It does not help this child to implement only the recommendations with which one agrees as Mr. Framboise (sic) has done.

…

[37] From this, MacDonald, J.'s reasons for rejecting the appellant's "strategies" are obvious.

[38] Accordingly, there is no merit to the appellant's second ground of appeal.

Conclusion

[39] The appellant was given every opportunity to present his case. There was nothing unfair about the manner in which the trial was conducted. Justice MacDonald was correct in her interpretation and application of the law to the issues before her. Her strong findings that the appellant's attitude had created a toxic environment in the home which necessitated a termination of their joint parenting arrangement find ample support in the record. So too her determination that [*]'s best interests required that she be placed in her mother's primary care, who would then have sole authority to make decisions regarding their daughter's health, treatment, social development, and education, as stipulated in her Order.

[40] The appellant has failed to demonstrate any error in law, or in fact, or in the judge's exercise of discretion.

[41] For all of these reasons the appeal is dismissed with costs payable to the respondent in the amount of $3,000 inclusive of disbursements.

Saunders, J.A.

Concurred in:

Bourgeois, J.A.

Scanlan, J.A.