NOVA SCOTIA COURT OF APPEAL
Citation: ***Parent v. MacDougall***, 2014 NSCA 3

Date: 20140107
Docket: CA 411186
Registry: Halifax

Between:

Briand Guy Parent

Appellant

v.

Amanda Dawn MacDougall

Respondent

Judges:	Oland, Beveridge and Scanlan, JJ.A.
Appeal Heard:	November 29, 2013, in Halifax, Nova Scotia
Held:	Appeal is dismissed with costs of $1,000.00 inclusive of disbursements, per reasons for judgment of Oland, J.A.; Beveridge and Scanlan, JJ.A. concurring
Counsel:	Colin J. M. Fraser, for the appellant Judith Schoen, for the respondent

Reasons for judgment:

[1] The parties to this appeal are the parents of two young children. For most of the time following their separation in 2009, Mr. Briand Parent and Ms. Amanda MacDougall co-parented their children; that is, the children lived with one parent one week, and with the other the following week.

[2] In November 2012, Ms. MacDougall applied pursuant to ss. 11 and 37 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, as amended (the "Act") for primary care of both children and permission to relocate them from Yarmouth to Halifax Regional Municipality. Judge Robert White of the Family Court heard the matter and granted her application. Mr. Parent appeals the judge's Order dated March 8, 2013.

[3] For the reasons which follow, I would dismiss the appeal.

Background

[4] The parties resided in a common-law relationship for approximately 14 years, from 1995 until 2009. Their two children were born in 2003 and 2006.

[5] For the first year following their parents' separation, the children lived primarily with their mother. The parties consented to an Order which was issued on January 18, 2010 and reissued on March 31, 2010 which implemented a shared parenting arrangement whereby the children spent alternating weeks with each parent. No child support was ordered.

[6] In January, 2012 Mr. Parent brought an *ex parte* application after discovering that Ms. MacDougall had accepted a temporary position in Halifax and had relocated there, leaving the children with her boyfriend. On January 11, 2012, the court granted him primary custody of his children for the six weeks while their mother was employed outside Yarmouth County. Except for that interval, the shared parenting arrangement proceeded smoothly.

[7] After ten years with her employer, Ms. MacDougall lost her job. Over an 18 month period, she applied for "well over 300" positions all over the Province, including Yarmouth where she, Mr. Parent and their children resided. There were no job offers in the Yarmouth area. It was during this period that she took the

temporary position in Halifax which resulted in Mr. Parent's successful *ex parte* application.

[8] Mr. Parent is a seasonal rockweed harvester and part-time carpenter. He has married, and his wife's two children reside with them full-time. The family recently moved into a new home.

[9] Ms. MacDougall was faced with having to apply for social assistance to support herself and her children. In early November 2012, she received a job offer in her field from a company in Halifax. This was the impetus for her application to court.

[10] At Mr. Parent's request, a home study was completed by Ilonka Alexander, a clinical social worker. She met with the children on three occasions, once at their mother's home and twice at their father's home. According to the home study, both children told Ms. Alexander that they wanted to live with their mother and to visit their father, and that if they lived in Halifax they would miss their father but preferred to live with their mother. They said that "We do not want to hurt anyone."

[11] Among other things, the home study recommended that the children be allowed to move to Halifax with their mother and her home be their primary residence, and that their father be given generous access monthly, during summer vacation and by telephone.

[12] Counsel for each of the parties filed pre-hearing briefs with the judge. The hearing began with examination and cross-examination of Ms. MacDougall. The home study was filed and Ms. Alexander questioned. Then followed the examination and cross-examination of Mr. Parent, his wife, and a person who assisted with housekeeping and childcare in their household. After the witnesses completed their testimony, both counsel chose to rely on their written briefs and did not make any oral submissions.

[13] Judge White gave an oral decision which is unreported. He understood that he had to determine the best interests of the children, and concluded that this was an appropriate case for the children to move to Halifax with their mother. Later, I will set out portions of his reasons.

[14] His Order provided that effective January 1, 2013, the children shall reside in the primary and day-to-day care of Ms. MacDougall, their mother could relocate

the children's primary residence to Halifax Regional Municipality, and Mr. Parent shall be entitled to access one weekend per month and otherwise as the parties in good faith shall agree. It also ordered parental contact by Skype, block access during the summers, and holiday access. Mr. Parent appeals the judge's Order.

The Issues

[15] In his factum, Mr. Parent set out the issues on appeal as follows:

> (i) Did the Learned Trial Judge err in law and/or mixed fact and law by relying on case law that should have been distinguished from the case at bar, more particularly, by relying on cases dealing with a primary caregiver seeking mobility rather than a shared parenting arrangement, and whether the shared parenting arrangement entered into the final analysis?
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> (ii) Did the Learned Trial Judge err in law and/or in mixed fact and law by considering the evidence before the court of the children's wishes, despite the children's young ages?

Standard of Review

[16] The decision of a trial judge in custody cases such as this is entitled to considerable deference. In *A.M. v. The Children's Aid Society of Cape Breton-Victoria*, Cromwell, J.A. (as he then was) writing for the court, stated:

> **26** This is an appeal. It is not a retrial on the written record or a chance to second guess the judge's exercise of discretion. The appellate court is not, therefore, to act on the basis of its own fresh assessment of the evidence or to substitute its own exercise of discretion for that of the judge at first instance. This Court is to intervene only if the trial judge erred in legal principle or made a palpable and overriding error in finding the facts. The advantages of the trial judge in appreciating the nuances of the evidence and in weighing the many dimensions of the relevant statutory considerations mean that his decision deserves considerable appellate deference except in the presence of clear and material error: **Family and Children's Services of Lunenburg County v. G.D.**, [2003] NSJ No 416 (Q.L.) (C.A.) at para. 18; **Family and Children's Services of Kings County v. B.D.** (1999), 177 N.S.R. (2d) 169 (C.A.); **Nova Scotia (Minister of Community Services) v. C.B.T.** (2002), 207 N.S.R. (2d) 109; **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014 at paras. 10 - 16.

See also *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at ¶ 12 and *MacKay v. Murray*, 2006 NSCA 84 at ¶ 22 and 23.

Analysis

Reliance on Inappropriate Cases

[17] In his reasons, the judge referred to *Gordon v. Goertz*, [1996] 2 S.C.R. 27, which remains the leading case on the issue of parental mobility. He quoted from *MacPhail v. Karasek*, 2006 ABCA 238 and from a case which he did not name, but which is clearly *Burns v. Burns*, 2000 NSCA 1.

[18] Mr. Parent argues that both *Karasek* and *Burns* were distinguishable from the case the judge had before him. In those decisions, the parent seeking mobility was the primary caregiver, whereas here the parties were in a shared parenting arrangement. According to the appellant, the judge's references to and quotations from these cases demonstrate that, although the judge did refer to the co-parenting arrangement, that critical fact was lost as the judge weighed the evidence and decided in favour of allowing the children to move.

[19] With respect, I cannot accept this argument. This is not a case where the judge only mentioned the parenting arrangement once at the outset, or merely in passing. A reading of his reasons shows repeated references to co-parenting throughout. For example, the judge pointed out the potential weight to be given to the views of the custodial parent (discussed in *Goertz*) did not come into play because "both parents were operating under a co-parenting arrangement." Later he observed that both parties were "shouldering responsibilities as parents". He commented on the home study which, of course, included material regarding the two households and the shared parenting of the children. Further in his reasons, the judge spoke of "the idea or the principle is that the move is less likely to be approved where caregiving and physical custody have been equally shared between the parents and that's the situation that obtains in this instance."

[20] While most references were before he referred to *Karasek* and *Burns*, these frequent reminders that this was a case of shared parenting persuade me that the judge kept sight of this arrangement throughout his analysis.

[21] I turn then to Mr. Parent's submissions regarding those decisions. In *Karasek*, the mother had been the primary care-giver of the child from birth to slightly over two years when the parents began sharing parenting. She applied to

move with the child to a location some 300 kilometers away from the father. In deciding that the trial judge had erred in ordering that the child's primary residence be with the father, the Alberta Court of Appeal found that the judge had erred by failing to evaluate the impact this would have on the young child's strong bond with the mother. It stated:

> **44** According to this logic, parents cannot move unless the move is calculated to further the best interests of their children. Custodial parents cannot be limited in this way. Canadians are mobile and the courts are not the arbiters of the reasonableness of every decision a custodial parent makes. Custodial parents cannot be held hostage to the place the access parent lives. Certainly access parents are not. Moreover, it is not an option to conclude that a child's best interests are best served by both parties living in the same place any more than it is an option to consider that it is in a child's best interest that their parents remain together.
>
> **45** Canadians have the right to choose to separate and divorce, and they have the right to relocate, and it is not for the courts to determine whether they like or agree with the reason for separating or moving. Custodial parents should not be faced with a potential loss of custody simply because they choose to move. Nor should a decision to move be seen automatically as a negative factor in the ability to parent.

[22] The judge quoted these passages from *Karasek*. While the appellant is correct that they refer to the custodial parent, that does not mean that they cannot be considered in a case of shared parenting. The judge's reference to these general statements does not amount to an error which calls for appellate intervention.

[23] Mr. Parent also complains that, in referring to *Burns* the judge stated that here "a similar situation arose". However, there a mother who was the primary care-giver applied for sole custody and permission to move with the children. Again, it was not a co-parenting arrangement.

[24] The appellant submits that there is a distinction between a mobility application brought by a primary caregiver seeking to relocate with the child or children, and one by a parent which would disrupt a shared parenting arrangement. He points to *Wood v. McGrath*, 2009 NSSC 384 at ¶ 41where Lynch J. cited with approval *P.R.H. v. M.E.L.*, 2009 NBCA 18 that:

> The general trend of the jurisprudence since *Gordon v. Goertz* has been to grant approval for a proposed move, so long as it is proposed in good faith and is not intended to frustrate the access parent's relationship with the

> child. … However, this general trend is most evident in cases where there is a clear primary caregiver for the child or children. A proposed move is less likely to be approved where caregiving and physical custody has been equally shared between parents. [Emphasis added]

[25] Mr. Parent also argues that, while the judge found that the respondent's proposed move would result in an economic benefit for the children, that was not balanced with the benefits of continuing the shared parenting arrangement. He refers to *Webb v. Webb*, 2008 NSSC 415 at ¶ 39.

[26] I first observe that, while the judge did not refer to it by name, he specifically took into account the emphasized portion of *Wood* upon which the appellant relies: see the last quotation from his reasons in my ¶ 19 above.

[27] I then look to his decision to see what factors the judge considered to determine the best interests of these children. After again stating that both parents here were operating under a co-parenting arrangement, the judge continued:

> There is a ... getting into the current access situation, if the children are moved to the Metropolitan area, that's going to impair the existing access arrangement. There's also the issue with respect to maximizing the contact between the children and the parents.
>
> It's interesting to note that one of the precepts is the views of the children and, I guess, in some measure the children have given or expressed their wishes. The other issue is the reason for moving and only in the exceptional case where it's relevant to the parent's ability to meet the needs of the children, well, I think we've already touched upon that now. The type of employment that she was seeking and wanted for the benefit of the children wasn't in Yarmouth, and that's unfortunate because everybody ... nobody probably would be here if such employment was available. And speaking for myself I can't find any fault with her for trying to improve, not only her lot in life for herself, but here (*sic*) lot in life for her children. That's an important thing.
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> Courts have to also reflect upon what disruption is or may occur and any changes of the old home area and yet, again, on the home study the children have indicated that they would like to live full-time with mom and see their father on a regular basis.
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> Also you have to take into consideration the disruption that comes from leaving extended family, schools, the community that they've come to know. And, again, there certainly will be some loss to them, although the flip side of that is is (*sic*) that they can maintain contact, not only electronically, but while if they were to live in Halifax they're not that far down the road and, of course, the other

> suggestions that were made in the home study report are weekends and extended periods in the summertime.
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> And finally, the decision alludes to the importance of the child remaining with the parent to whose custody it has been accustomed and, again, the comment was that on the home study report that the gender aspect comes into play and that has some bearing ... that was on, "It is reported in the literature that the single most important role model for a child's development is the same sex parent." Well, in this case I suppose there was access to another same sex parent, but not the birth mom, but anyway I take that into consideration as well.

[28] It is evident from his reasons that the judge took into account relevant circumstances in determining the best interests of the children, as set out in s. 18(6) of the *Act* and established by the jurisprudence. One cannot say that he was blinded by the economic benefit to the children and was not conscious of the effect that a change to co-parenting in the Yarmouth area would have on them. The judge was well aware that before him were two capable parents, each of whom gave their children deep love, encouragement and support, and two children who expressed much love for each of their parents. It was not a clear-cut or easy situation. At the end of his reasons, the judge stated that ". . . it's like playing Solomon when you get these cases, nobody or not everybody is happy at the result . . .".

[29] It was for the judge to hear, consider and weigh the evidence. I have not found any error in legal principle because of his references to cases which were not factually co-parenting cases that would permit us to intervene. I would dismiss this ground of appeal.

The Wishes of the Children

[30] When the home study was done, the children were nine and six years old. Mr. Parent says that, as a result, the judge should not have taken their wishes into account. The appellant acknowledges that this argument was not specifically made to the judge.

[31] In support of his position, the appellant relies on the following passage from: Professor Julien D. Payne, Q.C., *Payne on Divorce*, 4th ed (Scarborough: Carswell, 1996) at p. 397:

> "The best interests of the child are not to be confused with the wishes of the child. Children's perceptions of their needs and best interests, including their views as to the parent with whom they wish to live, are matters which should be logically considered as falling within the perimeters of the children's best interests. When children are under nine years of age, courts do not usually place much, if any, reliance on their expressed preference for either parent. The wishes of children aged ten to thirteen are commonly regarded as an important, though not a decisive, factor in parental custody disputes. The wishes of the children increase in significance as they grow older. A court may refuse to interfere with the wishes of a child who is intelligent and who has developed an expressed valid reasons for any preference. In matters of both custody and access, the preferences of older children carry significant weight, even though the parents may have influenced their choices. … [Emphasis added]

[32] As I stated earlier, s. 18(6) of the *Act* sets out various factors to be considered in determining the best interests of the child. It includes:

> **18 (6)** In determining the best interests of the child, the court shall consider all relevant circumstances, including
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> . . .
>
> (f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained; . . .

[33] Mr. Parent argues that, given their ages and development, the judge erred in considering the views of the children. He says that in *D.(C.) v. D.(K.)*, 2010 NBQB 22 where the child was eight years old, Tuck, J. referenced the above passage from *Payne on Divorce* in disregarding the child's preference. With respect, that is not an accurate recounting of that decision. After the quote, Tuck J. continued:

> 110 I reference this quote not because the Court gives any weight to the opinions expressed in scholarly journals or writings without the presence of an individual to testify. However the quote is useful to the extent that this quote references established case law; even that which the Court is not bound by; but takes note of particularly if it finds the logic compelling.
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> 111 I say that because the quote may in fact be what has often happened in courts in this country. However I don't believe that you can make such statements as broadly applying in every case. I think each case is unique and I think in some cases the "Voice of a Child" of a ten year old child, may be more influential on a Court than a "Voice of a Child" at 16.

> 112 I think it's imperative that the Court look at all the facts and all the indicia with respect to what weight would be placed on the views of a child. Just as Mr. K.D. has argued that's very often why professionals are elicited not to decide the factor but to provide assistance to the Court when the Court requires that assistance.

[34] Earlier at my ¶ 27, I set out a portion of the judge's reasons, which includes his references to the children's wishes as communicated to Ms. Alexander. I agree with Tuck J. that each case and child is unique, and that it is for the judge to decide the weight to be given to the wishes of the children. Nothing in the decision under appeal indicates that the determination of the best interests of the children was influenced unduly, or at all, by his references to their stated preference. In the result, I would dismiss this ground of appeal.

Disposition

[35] I would dismiss the appeal with costs of $1,000 inclusive of disbursements to be paid by the appellant to the respondent.

Oland, J.A.

Concurred in:

Beveridge, J.A.

Scanlan, J.A.