NOVA SCOTIA COURT OF APPEAL

Citation: ***MacLearn v. Thomson***, 2004 NSCA 34

Date: 20040220
Docket: CA 205971
Registry: Halifax

Between:

Carol J. MacLearn

Appellant

v.

Angela Thomson and Howard Albert O'Brien

Respondents

Judges: Roscoe, Bateman & Hamilton, JJ.A.

Appeal Heard: February 4, 2004, in Halifax, Nova Scotia

Held: Appeal dismissed, with costs of $1,500 including disbursements payable by the appellant to the respondent, Howard Albert O'Brien, as per reasons for judgment of Hamilton, J.A., Roscoe & Bateman, JJ.A. concurring

Counsel: B. Lynn Reierson, for the appellant
Tim Peacock, for the respondent O'Brien
Angela Thomson, unrepresented respondent, not participating

Reasons for judgment:

[1] This is an appeal from the July 21, 2003 judgment of Judge Robert C. Levy of the Family Court in which he ordered, further to an application for variation of custody pursuant to s. 37(1) of the **Maintenance and Custody Act**, R.S.N.S. 1989, c. 160 that Howard Albert O'Brien have sole custody of his son, four year old Kristopher James Thomson, rather than Kristopher's maternal grandmother, Carol J. MacLearn.

[2] At the time Kristopher's father applied to vary custody, his application was countered by a similar application by Ms. MacLearn with Kristopher's mother, Angela Thomson, consenting. Previously Kristopher's custody was governed by a consent order granted when he was about nine months old. It gave sole custody of Kristopher to his mother and, after providing for a few introductory visits by his father with Kristopher at his mother's home, gave his father access with Kristopher every Sunday.

[3] The arrangements with respect to Kristopher changed over time. I will not detail the various access arrangements agreed to for Kristopher's father over the years since the consent order was granted. Suffice it to say that the record indicates he was diligent in ensuring he obtained and exercised as much access with Kristopher as he could on a regular basis. In pursuing access he was also considerate of the wishes of Kristopher's mother and Ms. MacLearn, going so far as to agree for a period of time to reduce his access from every weekend to every second weekend when Ms. MacLearn requested this to enable her to take Kristopher to Sunday School.

[4] Kristopher has also had significantly more contact with Ms. MacLearn than was anticipated at the time of the consent order. Kristopher, his mother and half-sister moved in with Ms. MacLearn when he was about three months old. They moved into their own accommodation when he was about five months old and Ms. MacLearn continued to provide day-care for him. Eventually in March, 2002, because of an oil spill at the residence where his mother, half-sister and he lived, Kristopher began living with Ms. MacLearn full time, with his mother and half-sister living elsewhere.

[5] The record indicates Kristopher's father offered to take Kristopher and his half-sister to live with him temporarily when he learned of the oil spill at the mother's residence, but Kristopher's mother refused saying the children were going to live with Ms. MacLearn temporarily.

[6] Kristopher's father's evidence, accepted by the trial judge, was that he was not told by either Kristopher's mother or Ms. MacLearn that Kristopher was living full time with Ms. MacLearn and that as soon as he became aware of this he applied to vary custody of Kristopher to himself.

[7] The narrow scope of appellate review in an appeal such as this is as set out in ¶ 17 of Ms. MacLearn's factum:

> 17. The limited role of an appellate court in family law cases involving custody was reviewed by Bastarache, J. in **Van de Perre v. Edwards** [2001] S.C.J. No. 60 at page 6, paragraphs 11 and 12:
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> > 11 **In reviewing the decisions of trial judges in all cases, including family law cases involving custody, it is important that the appellate court remind itself of the narrow scope of appellate review.** L'Heureux-Dubé J. stated in Hickey v. Hickey, [1999] 2 S.C.R. 518, at paras. 10 and 12:
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> > > [Trial judges] must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. **Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.**
> > >
> > > ...
> > >
> > > **There are strong reasons for the significant deference that must be given to trial judges in relation to support orders**. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised

> by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. **Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently**. [Emphasis added]

> 12 **Hickey involved the appellate review of support orders, but the principles related to appellate review discussed therein are equally applicable to orders concerning child custody.**
>
> (Bold/underlining mine)

[8] Thus the trial judge's decision is owed considerable deference and we must only intervene if there is material error, a serious misapprehension of the evidence or an error of law.

[9] Ms. MacLearn argued the trial judge erred by not considering in his decision whether there had been a material change in circumstances to warrant a variation of custody. Section 37(1) of the **Act** provides that a custody order may only be varied if there has been a change in circumstances since the making of the last order:

> The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.

[10] Ms. MacLearn has not satisfied me that the trial judge erred by not dealing with this issue in his decision. This issue was not raised with him, nor could it realistically have been raised. Such an argument by Ms. MacLearn would have

been hollow given the application to vary custody she made to counter the application by Kristopher's father. There was clearly a change in circumstances since the consent order, for Kristopher was living full time with Ms. MacLearn instead of with his mother.

[11] Ms. MacLearn also argued that the trial judge erred by not applying the right test in reaching his decision on custody, namely: what is in the best interests of Kristopher, and instead put the interests of Kristopher's father ahead of Kristopher's best interests.

[12] Section 18(5) of the **Act** provides that the welfare of the child is the paramount consideration in deciding custody matters:

> In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration.

[13] Ms. MacLearn has not satisfied me that the trial judge applied the wrong test. He did recognize that the contest for custody before him involved the father and the maternal grandmother with whom Kristopher had been living for some time:

> The argument, of course, is a deep and profound one, the issue, rather than the argument and that is essentially the status quo versus the role and rights of a natural parent in the raising of this child.

[14] However his later comments make it clear the test he applied in reaching his decision was the correct test, the welfare of Kristopher:

> It's not a question of his rights, really, it's a question of the best interests of the child and when you look at it through that lens, it takes on a more complex nature.
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> . . .
>
> I don't think there's any question, let me re-phrase it...<u>there is no question that the paramount consideration for this court is to consider...is the best interests of the</u>

> child. Period, full stop. That's the easy part to articulate that. How in this situation is that best interests most likely to manifest itself? And that's the tough part.
>
> (Underling mine)

[15] Ms. MacLearn also argued that the trial judge erred by not applying the best interests of the child test properly in light of the evidence. She argued that he failed to consider and comparatively analyse the types of factors outlined in **Foley v. Foley** (1993), 124 N.S.R. (2d) 198. She argued that had he analysed the plans of care offered by Kristopher's father and herself in light of these factors, he would have had to conclude that custody should go to her based on the status quo.

[16] While it may be useful when deciding custody disputes to refer to lists of considerations such as the list in **Foley**, there is no error in not referring to such a list or in not referring in one's decision to all possible factors that can affect a custody dispute.

[17] While some criticism of the judge's decision may be warranted because of its lack of organization and clear statements of the basis on which he decided Kristopher's father should have custody, making it hard perhaps for Ms. MacLearn to accept why custody was not awarded to her in light of the positive comments made by the trial judge about her and about Kristopher's development under her care, I am satisfied it is clear from reading the whole of the decision that the trial judge did not err in his application of the best interests test to the evidence before him. Findings of credibility and fact were clearly within his purview as long as there was evidence to support them.

[18] The decision of the trial judge indicates he balanced what custody by each of Kristopher's father and Ms. MacLearn offered Kristopher and found Kristopher would be well taken care of by whoever was granted custody:

> The fact of the matter is that probably the psychological parent of Christopher(sic), more than anyone, is Ms. McClaren(sic). I also would observe that the child seems to be a fine young man and everybody's idea of what a four year old boy should be and that should not be regarded as an accident. It has to be seen as a tribute to the care that he has received at the home of his grandmother and, to an extent, his mother's and also to his father but in terms of degree of contact, it would be the grandmother, most of all and it seems to me that Ms.

> McClaren(sic) has been a dutiful parent in every sense of the word to the child, every sense of the word except the biological parent. And yet, the evidence is also very clear and I so find that the father has a great deal to offer. I find that he is a loving and caring, very conscientious and consistent in his determination to, for want of a better word, to step up to the plate and to be a parent on a more full-time basis to the child. There are no concerns whatsoever with respect to the care that he would receive in the home of the father and Ms. Millett.
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> . . .
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> I view it as a matter of, as I said, of a very satisfactory status quo with respect to the care being given to the child by Ms. McClaren(sic) versus the very satisfactory parenting that could be done by his natural father, were he given a choice, were he given the chance.
>
> (Emphasis mine)

[19] The trial judge had the advantage of hearing the parties give their evidence and his conclusion is supported by the record.

[20] The trial judge also considered how to maximize contact between Kristopher and his half-sister and recognized that the status quo already provided little contact between Kristopher and his half-sister:

> . . . I'm not unaware of the fact of and the relationship with, between Christopher (sic) and his sister, Jenna, although there has not been as much contact lately as there might have been but obviously they are siblings and one would be loath to interrupt that unduly or to be unmindful of the importance of the sibling.

[21] The trial judge also considered the importance of Kristopher having the maximum contact with and recognizing the equal value of both parents and their extended families and decided that this contact and recognition would be fostered more by Kristopher's father than Ms. MacLearn, stating:

> But it seems to me that, as I look back at the evidence without as I say, being critical, rather, being uneasy rather than critical but it seems to me that it was a given between Christopher's (sic) mother and Christopher's (sic) grandmother that this was a situation for them to address, for them to solve and for the role of Mr. O'Brien was incidental to theirs and that his input was of less import than

<u>theirs and that his role in the child's life and his family's role in the child's life was considerably secondary to that of the maternal side</u>.

. . .

<u>I'm concerned that . . . the one big concern that I have with respect to the way things have unfolded with respect top Christopher (sic) being more involved with the maternal side of his family is the sense that Christopher (sic) is getting, or may get, inadvertently perhaps, the message that his father and his side of the equation are of less importance....That is an assessment I make from having just observed everybody and read between the lines in the affidavit and just ultimately looked at where we are and how we got here. I question really how consistent with the child's best interests it is for that sentiment to prevail, for that attitude to prevail</u>.

. . .

<u>I acknowledge that Christopher (sic) is very close, not only to his grandmother but to his mother as well and to Jenna and I am confident, and this is a big part of my decision that Mr. O'Brien will respect that and will foster that</u>.

(Emphasis mine)

[22] As stated above, the trial judge found Kristopher would be well cared for regardless of who had custody. He considered the contact Kristopher had with his half-sister and the importance of his having the maximum contact and favourable contact with both parents and their families. Taking this into account, he concluded it was appropriate to vary the status quo because it was established without Kristopher's father's knowledge or input, because Kristopher's father had done nothing to disentitle himself from having custody, and because a parent's right to custody should not be lightly set aside.

[23] Ms. MacLearn argued that there was nothing wrong with the way that the status quo was established, relying on ¶ 35 of **Gordon v. Goertz**, [1996] 2 S.C.R. 27:

¶ 35 <u>The first proposition is that the custodial parent should be able to choose the child's residence because he or she has the legal responsibility of making all decisions concerning the child</u>. The general obligation and right of the custodial parent to decide where the child shall live is not in dispute. Barring a

> situation which amounts to a material change in circumstances, the custodial parent may take the child wherever he or she pleases. When, however, the proposed move amounts to a material change, Parliament has decreed that the access parent is entitled to ask a judge to review the matter. The custodial parent has the right to decide where the child shall live, but that right is subject to the right of the access parent to apply for a change in custody once a material change in circumstances is established.
>
> (Emphasis mine)

[24] With respect, the right of the custodial parent to decide where the child shall live referred to in that paragraph is not applicable to the facts of this appeal. **Gordon** dealt with mobility rights in a custody dispute between two parents under the **Divorce Act,** not a dispute between a parent and a grandparent, and the change in the child's residence referred to in para.35 involved a change where the child and the custodial parent would continue to live together in a new location, not a situation where the custodial parent gave up custody in favour of another. **Gordon** cannot be interpreted as supporting the right of Kristopher's mother in this case, with custody under the consent order, to decide that Kristopher will live with Ms. MacLearn rather than with his father.

[25] The trial judge was 'uneasy' with the way the status quo was established with Ms. MacLearn full time:

> I must say that I am uneasy with ... I say uneasy with rather than being overtly critical of the circumstances under which Christopher (sic) came to, and his care came to be yielded up to the grandmother.
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> . . .
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> For example, I don't know why people didn't just come out and tell Mr. O'Brien where the child was living. It may be that ... that was a conversation, in my view, that needed to be had. I think in fairness to ... and not least to his father, he had a right to be consulted. He had a right to be at the table. He had a right to be aware of what was going on.

[26] He did not err in considering the manner in which the status quo was established in reaching his decision, nor did he err in taking Kristopher's father's parental rights into account as he did.

[27] As was stated by the Supreme Court of Canada in **King v. Low**, [1985] 1 S.C.R. 87, at ¶ 27, parental claims to custody are entitled to serious consideration and must not be lightly set aside, unless it is clear the welfare of the child requires it:

> 27 This conclusion is consistent with modern authority in this Court and others: see Racine, Beson, and Re Moores and Feldstein. I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside.
>
> (Underlining mine)

[28] Once the trial judge was satisfied Kristopher would be as well off living with either his father or Ms. MacLearn, considered how contact with his half-sister would be affected by his decision, considered how to maximize contact and recognition of both parents and their families, he did not err in taking Kristopher's father's parental rights into account and concluding that the status quo of Kristopher living with Ms. MacLearn did not trump these parental rights, especially considering his findings as to how the status quo was established.

[29] The record confirms that there was evidence before him to support all of the trial judge's conclusions. Ms. MacLearn has not satisfied me that the trial judge made a material error, had a serious misapprehension of the evidence or made an error of law.

[30] Accordingly I would dismiss the appeal and order Ms. MacLearn to pay costs to Kristopher's father in the amount of $1,500 including disbursements with respect to the appeal.

Hamilton, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.