NOVA SCOTIA COURT OF APPEAL
Citation: H.B. v. R.B., 2003 NSCA 24

Date: 20030211
Docket: CA 185067
Registry: Halifax

Between:

H.B.

Appellant

v.

R.B., Sr.

Respondent

Judges:	Glube, C.J.N.S.; Chipman and Hamilton, JJ.A.
Appeal Heard:	February 11, 2003, in Halifax, Nova Scotia
Written Judgment:	February 13, 2003
Held:	Appeal dismissed per oral reasons for judgment of Glube, C.J.N.S.; Chipman and Hamilton, JJ.A. concurring.
Counsel:	Wayne S. Rideout, for the appellant The respondent not appearing

Reasons for judgment:

[1] This is an appeal from an order by Chief Judge Comeau of the Provincial Family Court dated August 1, 2002, under the provisions of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, which varied a previous order for joint custody and awarded sole custody of the parties' son, R.B., Jr., born September ..., 1995, (*editorial note- date removed to protect identity*) to the respondent father, R.B., Sr., with provision for access to the appellant mother.

[2] On February 4, 2002, the Children's Aid Society of Shelburne County, Nova Scotia, commenced a protection application with respect to the child. On March 27, 2002, the father applied to vary to sole custody an order dated June 7, 1999 which granted joint custody to the parties with primary care to the mother and access to the father every second weekend. The two matters were heard one after the other by Chief Judge Comeau.

[3] The Children's Aid Society became involved when a complaint was made concerning the risk to the child of sexual abuse by a boyfriend of the mother who had been convicted of gross indecency against his two siblings. After the mother proved she had permanently ended the relationship, the Children's Aid Society terminated its involvement and the court dismissed the Children's Aid Society application on May 27, 2002.

[4] The main issues raised in the evidence are the mother's ongoing and historic drinking problem, her relationship with a man previously convicted of gross indecency relating to children, and once she ended that relationship, her new and ongoing relationship with a man on house arrest after a drug trafficking conviction. She and her son moved into an apartment below his. There was considerable evidence from professionals including a community mental health nurse, a clinical therapist, an outreach worker for a women's shelter, and a social worker, that the mother was using their services appropriately and improving. There was also evidence from the parties, friends and family of the mother, as well as the Children's Aid Society worker. The mother's stepbrother gave evidence of the mother's unavailability due to drinking requiring him to pick up the child and take him to his grandmother's home where he was looked after on a number of occasions. When she drank, the mother would call someone to take the child as she usually drank at home. She continued to drink and drank up to 6 or 7 beers the night before one of the hearings, testifying that it took a case of beer for her to become intoxicated.

[5] The mother raises the following grounds of appeal: (1) that the trial judge erred in misinterpreting and/or disregarding a substantial portion of the evidence presented on behalf of the appellant; and (2) that the trial judge erred in ordering a change in custody when there was no change of circumstances from the date of the earlier order that would authorize a variation.

[6] In his decision, Chief Judge Comeau reviewed the relevant evidence relating to both parties. He made findings based on that evidence.

[7] The court of appeal has a limited role when reviewing family matters where custody and the best interests of the child are in issue. (*Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014 ¶ 9, 12 and 13; *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at ¶ 10 and 12). When dealing with custody and access, the welfare of the child is paramount (s. 18(5) *Maintenance and Custody Act*, supra.) We are unable to find any palpable or overriding error by the learned trial judge which affected his assessment of the facts. (*Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802 at 808.) In our opinion, he did not act on any wrong principle nor did he disregard any material evidence or fail to give any weight or any sufficient weight to any relevant evidence.

[8] On the second ground, the trial judge did not specifically refer to s. 37(1) of the *Act* which provides that there must be a change in circumstances before varying custody. The trial judge identified and reviewed the law on the principle that the welfare of the child is the prime consideration. He also referred to the concern about removing a child from his present environment. He then reviewed where the child would have more stability and refers to the evidence of the use of alcohol as a coping mechanism by the mother and also to her personal relationships. He found that in spite of receiving professional help, she still has the same problems. He stated:

> [45] . . . In the end, the Court has to look at both parents' plan of care of the child and determine whether there is a compelling reason to change the status quo.
>
> [46] The Courts are very reluctant to change the status quo, however, where it is determined the long term interests of the child are better served by establishing another status quo, this must be done. . . .

[9] Although the trial judge did not express the test in the clearest of terms, it is clear that he understood the concept of change of circumstances.

[10] We have reviewed the record and we are satisfied that the mother has been unable to bring her drinking problem under proper control despite

professional help over several years and she continues to exercise poor judgment in her choice of boyfriends as previously outlined. Although the mother submits that if the trial judge had not misinterpreted and/or disregarded a substantial portion of the evidence there would be no demonstrated change of circumstances, we find that the record gave the trial judge the necessary basis to order a change of custody. He concluded that this was a case "where the child's best interest requires one parent to supervise the day to day stability of the child." He altered the joint custody order and gave custody to the father.

[11] This was an experienced Family Court judge and the "deference to be paid to the findings of a trial judge in a case dealing with the best interests of a young child is arguably greater than that to be paid to the findings of a trial judge in any other type of case." (*Mahoney v. Doiron*, [2000] N.S.J. No. 12 at ¶ 94.)

[12] We find no error in his decision to vary the custody.

[13] Accordingly, the appeal is dismissed.

Glube, C.J.N.S.

Concurred in:

Chipman, J.A.

Hamilton, J.A.