COURT OF APPEAL FOR ONTARIO

CITATION: M. v. F., 2015 ONCA 277
DATE: 20150422
DOCKET: C57855

MacFarland, Tulloch and Benotto JJ.A.

BETWEEN

M.

Applicant (Appellant)

and

F.

Respondent (Respondent in Appeal)

Edwin A. Flak and Amit S. Dror, for the appellant

Thomas G. Bastedo Q.C. and Samantha Chousky, for the respondent

Heard: March 31, 2015

On appeal from the order of Justice Kevin Whitaker of the Superior Court of Justice, dated October 22, 2013.

Benotto J.A.:

[1] The parties to this appeal are the parents of a little boy now age six. They have been arguing with each other about parenting arrangements for his entire life. The child's primary residence is with his mother, the appellant. He has extensive time – but no overnights – with his father, the respondent. The overnight time was the main issue at a trial that lasted 34 days. The trial judge

concluded that the child's best interest would be served by allowing overnights. The mother appeals this finding.

Background

[2] The parties began dating in 2006 and were involved in an on-again/off-again relationship until June 2009. They lived together from mid-March 2008 until late April 2008. It was during this brief cohabitation that the appellant became pregnant with their child who was born in January 2009.

[3] Both parties have children from previous relationships. At the time of trial the appellant's two children were 8 and 11, and the respondent's were 13 and 18. He also has a new baby (then 5 months old) from his current relationship. The two older children reside with the respondent part of the time and the baby lives with him full time.

[4] The appellant owns a successful insurance brokerage. The respondent is a litigation lawyer.

[5] The parties' relationship has been aptly described as toxic. They have treated each other with cruelty and disrespect. The respondent was previously diagnosed with narcissistic personality disorder and struggled with alcohol issues. The appellant used marijuana. The appellant alleged that the respondent abused her physically. On one occasion, the police were called. The allegations

against the respondent included: strangulation during intercourse; ripping out of her earrings; dragging her down stairs; and hitting her in the face.

[6] Both parties admitted that they lied at various points in the litigation. Both engaged in inappropriate conduct during the litigation. The respondent sent the appellant a video of a husband giving a wife keys to a car, which blew up when the wife tried to turn it on. The appellant "passed on and promoted" false information about the respondent's personal life, sexual practices and drug habits; installed video cameras to watch drop-offs and pick-ups of the child, and tried to hack into his daughter's computer to find images that would undermine his credibility.

Involvement of Dr. Butkowsky

[7] Dr. Irwin Butkowsky is a highly experienced child psychologist who specializes in family breakdown. He first saw the parties in October 2009 when the child was nine months old. They consulted him for mediation with respect to their parenting arrangements. The mediation continued until February 2010 when it was terminated because the parties were not able to reach an agreement. By June 2010, when the child was 17 months old, the parties were involved in litigation. They wished to have an assessment pursuant to section 30 of the *Children's Law Reform Act* R.S.O. Chapter C.12 (CLRA). Their counsel contacted Dr. Butkowsky. He was concerned about conducting the assessment

after having been involved in mediation. The parties signed the appropriate waivers and consents for him to proceed.

[8] Dr. Butkowsky completed the assessment report on August 10, 2011. The parties still did not resolve the parenting issues and proceeded to trial. A second updated report was requested and prepared in anticipation of trial. The report was completed in September 2012 just before trial.

[9] The trial began in September 2012 and continued until May 2013. Dr. Butkowsky's two reports and oral testimony were in evidence. He proposed a comprehensive parenting plan which included overnights with the respondent.

[10] Dr. Butkowsky noted a difference in the child between the first and the second report. The child's original precocious and sociable nature had changed. In marked contrast, at the second assessment, he was apprehensive, shy and somewhat fearful. Dr. Butkowsky attributed this change to the child's continued exposure to instability, parental tension and conflict. Dr. Butkowsky opined that:

> [The child] is in need of increased opportunity to further develop his psychological/emotional attachment to his father…

[11] Dr. Butkowsky felt that overnight access would assist in developing the relationship between the father and the child, and would be safe. In light of what Dr. Butkowsky referred to as the "highly toxic and dysfunctional nature" of the

relationship between the parties, he recommended ongoing counselling/mediation.

[12] The appellant retained Dr. Peter Jaffe to conduct a critique of Dr. Butkowky's report. Dr. Jaffe did not see the child or the parties in a clinical setting. He defined his "limited role" as an expert to be "to raise concerns about Dr. Butkowsky's assessment for the court's consideration."

[13] Dr. Jaffe opined that there should be no overnights until the respondent father "takes responsibility, expresses genuine remorse and completes treatment" in connection with the domestic violence. He testified that the mediation-arbitration of parenting disputes in this case was inappropriate because it provides the perpetrator with a new arena for abuse.

The Trial Judgment

[14] The trial judge concluded that, notwithstanding the allegations of abuse, alcoholism and narcissistic personality disorder, the respondent should have overnights with the child. He considered that these allegations had no bearing on the respondent's ability to parent the child during the night and that the child's best interests would be served by adopting Dr. Butkowsky's parenting plan. He accepted the recommendations of Dr. Butkowsky. His reasons for doing so included the following:

- Dr. Butkowsky determined that overnights would be safe, and were essential to the well-being of the child. Dr. Butkowsky was very familiar with the family and is highly regarded in his field.
- The respondent has parented three children without incident and without any restrictions.
- The respondent has spent many hours alone with the child without incident, and without his alleged alcoholism manifesting itself while parenting.
- The respondent has had lengthy and unsupervised time with the child and there is no basis to consider that the child will be at risk of violence.
- Dr. Jaffe lacked information and admitted he might have changed his mind if he knew more about the facts.
- The allegations of domestic violence were over four years old and there were no suggested or reported incidents in the intervening period.

[15] The trial judge ordered that the parenting recommendations of Dr. Butkowsky be implemented. He also ordered the child's name changed to include the respondent's surname.

Basis of the Appeal

[16] The appellant's challenge to the overnight time in connection with the parenting plan rests on three broad grounds:

1. The trial judge gave insufficient reasons.

2. The trial judge's decision is not supported by the evidence.

3. The trial judge erred by not making an order for custody in her favour and by "delegating" his authority to the assessor.

Analysis

Sufficiency of Reasons

[17] The appellant submits that the trial judge's reasons were insufficient. The remedy sought is to reverse the trial judge's ruling, eliminate the overnights and grant her sole custody.

[18] The appellant's submission with respect to the trial judge's reasons is threefold: (i) the trial judge failed to consider the mandatory criteria of section 24(2) of the CLRA; (ii) he failed to give proper weight to the allegations of domestic violence in accordance with the report of Dr. Jaffe; and (iii) he did not articulate the basis for the credibility findings he made.

[19] Section 24(2) of the CLRA sets out the criteria that court must consider with respect to the merits of an application for custody and access:

> Best interests of child
>
> (2) The court shall consider all the child's needs and circumstances, including,
>
> (a) the love, affection and emotional ties between the child and,

> (i) each person entitled to or claiming custody of or access to the child,
>
> (ii) other members of the child's family who reside with the child, and
>
> (iii) persons involved in the child's care and upbringing;
>
> (b) the child's views and preferences, if they can reasonably be ascertained;
>
> (c) the length of time the child has lived in a stable home environment;
>
> (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;
>
> (e) the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;
>
> (f) the permanence and stability of the family unit with which it is proposed that the child will live;
>
> (g) the ability of each person applying for custody of or access to the child to act as a parent; and
>
> (h) the relationship by blood or through an adoption order between the child and each person who is a party to the application. 2006, c. 1, s. 3 (1); 2009, c. 11, s. 10.

[20] The trial judge specifically referred to section 24(2) of the CLRA early in his judgment. When his reasons are reviewed in their entirety, it is clear that the criteria in the sub-section guided his analysis.

[21] The trial judge did consider the allegations of domestic violence. He concluded that it was likely that the respondent had been violent towards the appellant in the past, but this had not been the case for the three years before the trial. Most importantly, he found that the allegations did not and would not

impair the respondent's parenting of the child. I will refer to Dr. Jaffe's evidence later in connection with the evidence upon which the trial judge based his findings.

[22] Although the appellant submits that the credibility analysis was inadequate, the trial judge did explain his findings. He reviewed the conflicting evidence including the inappropriate conduct on both sides and indicated that it was difficult to make reliable credibility findings. He said:

> It is fair to say that neither party inspires trust as to their truthfulness. Neither are reliable historians and both have been caught misleading the court.

[23] Still, he concluded "not without some difficulty" that where the evidence conflicts, the appellant is to be preferred.

[24] Therefore, contrary to the appellant's submissions, the trial judge accepted that the violence she alleged probably took place and he preferred her evidence over that of the respondent. However, even in light of these findings, he found that the child should spend overnights with the father and there would be no risk to the child if he did so.

[25] The appellant's submission with respect to the sufficiency of reasons is actually a complaint that the trial judge made the findings that he did. The reasons are sufficient; she does not like the result. I share the views of Doherty J.A. when he commented:

> I am dubious about the merits or arguments claiming that the reasons for judgment are inadequate. Experience teaches that many of those arguments are, in reality, arguments about the merits of the fact finding made in those reasons. By framing the argument in terms of the adequacy of the reasons, rather than the correctness of the fact finding, an appellant presumably hopes to avoid the stringent standard of review applicable to findings of fact. (*Law Society of Upper Canada v. Neinstein* 2010 ONCA 193 at para 4).

Decision not Supported by the evidence

[26] The overall submission by the appellant is that the trial judge came to the wrong conclusion and should not have granted overnights.

[27] The trial judge accepted the evidence of Dr. Butkowsky. I have reviewed this evidence. His two reports are thoughtful and comprehensive. He has been involved with the parties and the child for nearly all of the child's life. His opinion was that the respondent should have overnights. He was of the view that the appellant was engaged in ongoing and extraordinary efforts to discredit the respondent, in order to prove the validity about her concerns that overnights would put the child at risk. Dr. Butkowsky commented – with good reason - that this was difficult to reconcile with the extensive amount of time the child spent with the respondent in daytime hours.

[28] Dr. Butkowsky proposed a comprehensive parenting plan involving increased involvement of the respondent on a phased in basis. He recognized

the dysfunctional relationship of the parties and proposed ongoing mediation or counselling.

[29] The appellant submits that the trial judge placed insufficient weight on the evidence of Dr. Jaffe. The trial judge preferred Dr. Butkowsky who had known the child and the family for nearly all of the child's life. That he placed little weight on the evidence of Dr. Jaffe who never met the child, is not surprising. Indeed, it is not clear that Dr. Jaffe's evidence was admissible in the first place.

[30] Several trial judges have admitted critique evidence and then discounted its weight. However, other courts have determined that it is not admissible because it does not meet the criteria set out in *R. v. Mohan* [1994] 2 SCR 9. In *Mayfield v. Mayfield* (2001) 18 R.F.L. (5th) 328, Justice Wein ruled that evidence critiquing an assessment report was not admissible. After considering the threshold of "helpfulness" often applied in family law cases, she said:

> Prior to the decision in *Mohan*, the general standard for admissibility of expert evidence was the relatively low threshold of "helpfulness."….[S]ubsequent to *Mohan*, the Court in effect had been asked to function as a "gatekeeper,"….[T]he standard of helpfulness was explicitly rejected as being too low.…(para. 34)

[31] She went on to find that critique evidence will "rarely" be admissible. She said that:

> [I]n most cases, it is simply not necessary or appropriate to have the parties bring forward the evidence of a collateral critique…it will rarely, if ever, be "necessary"

> to introduce the critique as original evidence or to call the critique as a witness. (para. 44)

[32] Her words were cited with approval by this court in *Sordi v. Sordi* 2011 ONCA 665. This was an appeal from a custody order. The trial judge had refused to admit critique evidence. Epstein J.A. "strongly supported" the view set out in *Mayfield* and said:

> I find no fault with the trial judge's refusal to admit the [critique] on the basis of (1) its frailties, and (2) the fact that its value – to impeach the report of the court-appointed expert – remained available to the appellant through cross-examination and, ultimately, argument. (para.14)

[33] When these considerations are applied to Dr. Jaffe's report, it is evident why the trial judge gave it little weight. Dr. Jaffe's self-described task was to "raise concerns" about the court-appointed assessment. It would be difficult to find that such evidence meets the criteria of *Mohan*.

[34] I too support the view that critique evidence is rarely appropriate. It generally – as here - has little probative value, adds expense and risks elevating the animosity between the parties.

[35] The trial judge admitted the evidence and this was in the appellant's favour. That he gave it little weight was understandable.

[36] There was ample evidence to support the trial judge's finding that the parenting plan proposed by Dr. Butkowsky be implemented.

No Order for "Custody"

[37] The appellant submits that the trial judge was required to make a finding of custody and that his failure to do so constitutes an error of law.

[38] The Ontario legislation does not require the trial judge to make an order for custody. Section 28(1) (a) of the CLRA is permissive, not mandatory: The court … by order *may* grant the custody of or access to the child to one or more persons (emphasis added).

[39] For over twenty years, multi-disciplinary professionals have been urging the courts to move away from the highly charged terminology of "custody" and "access." These words denote that there are winners and losers when it comes to children. They promote an adversarial approach to parenting and do little to benefit the child. The danger of this "winner/loser syndrome" in child custody battles has long been recognized.

[40] It was therefore open to the trial judge to adopt the "parenting plan" proposed by the assessor without awarding "custody." It was also in keeping with the well-recognized view that the word "custody" denotes "winner" so consequently the other parent is the "loser" and this syndrome is not in the best interests of the child.

Delegating Authority

[41] The appellant submits that the trial judge exceeded his jurisdiction by purporting to bind the parties to a private dispute resolution process without the parties' consent.

[42] The trial judge's Final Order included a provision that the assessor's recommendations be implemented. The recommendations were attached as schedules to the Final Order. In issue here is the recommendation that the parties appoint a senior member of the Family Law Bar to serve in the role of "Mediator/Arbitrator" whose responsibility would be to oversee the implementation and maintenance of the Parenting Plan.

[43] The Court cannot make an order requiring parties to attend mediation/arbitration in the absence of consent. However, there was evidence before the trial judge that the appellant did consent. This was canvassed with her at several points during cross-examination. She was asked how the future parenting would be managed and she said repeatedly that she would be willing for the Court to make an order requiring her to deal with a mediator, arbitrator or parenting coordinator.

[44] Given the hostilities between the parties, the impugned provision also made good sense. It provided the parties with the means by which the parenting plan could be implemented.

[45] Under these circumstances, the trial judge was not – as the appellant alleges – delegating his authority to a third person.

Change of Name

[46] I see no reason to interfere with the trial judge's determination that the child's last name should include the respondent's. It was relief the respondent requested in his answer and about which he gave evidence.

Costs

[47] The appellant seeks to overturn the trial judge's determination of costs against her. The appellant sought costs of just under $800,000. The respondent sought costs of over $900,000. The trial judge ordered that the appellant pay the respondent costs fixed at $500,000. He adjusted the amount sought due to the parties "joint responsibility" for the way the trial was managed. He stated that he had considered the principle of indemnification, the encouragement of settlement and sanctions for inappropriate behaviour. He noted that the respondent was completely successful on the issue at the heart of the dispute – overnights. The majority of the trial was spent dealing with this issue. The trial judge stated that he had considered the various offers made to settle.

[48] I would not interfere with the exercise of discretion of the trial judge in connection with costs.

Costs of the Appeal

[49] Both parties put forth submissions with respect to their partial indemnity cost of the appeal. The appellant requested $120,000, the respondent requested $160,000. These amounts are out of proportion to the issues on the appeal.

Disposition

[50] I would dismiss the appeal with costs payable to the respondent fixed at $40,000, inclusive of disbursements and HST.

Released: "JMacF" April 22, 2015

"M.L. Benotto J.A."
"I agree. J. MacFarland J.A."
"I agree. M. Tulloch J.A."