In the Court of Appeal of Alberta

Citation: McAlpine v Leason, 2016 ABCA 153

Date: 20160511
Docket: 1501-0249-AC
Registry: Calgary

Between:

Alyssa-Rae Doranne McAlpine

Appellant/Cross-Respondent
(Applicant)

- and -

Steven Ward Leason

Respondent/Cross-Appellant
(Respondent)

The Court:

The Honourable Mr. Justice Peter Costigan
The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Thomas Wakeling

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice C.M. Jones
Dated the 8th day of October, 2015
(Docket: FL01-16461)

Memorandum of Judgment

The Court:

Introduction

[1] This is a mobility case. The issue is whether it is in the best interests of an (almost) seven-year-old girl to have her primary care transferred from her mother to her father in Calgary rather than moving with her mother to Winnipeg, given her mother's decision to relocate from Calgary to Winnipeg. The trial judge ordered this change and denied the mother's application to take the child with her. The appeal also demonstrates how the effluxion of time can have serious consequences, leading to a change in circumstances that makes the decision under appeal less sustainable, and requires us to consider what a court of appeal can or ought to do in those circumstances.

The Decision under Appeal

[2] The mother brought an application to relocate with the child to Winnipeg. The mother proposed the move because she could no longer work the required hours at her employment because of childcare issues. As such, she was no longer able to meet her financial obligations. She sought her family support in Winnipeg to help her with childcare. In addition, the mother has a new partner who lives in Winnipeg. The father wished the child to stay in Calgary and have her primary care transferred to him immediately.

[3] The trial commenced in September 2014, ran for five days into October and recommenced for several days in early January 2015. A decision was rendered in October 2015. The trial judge held that it was in the best interests of the child not to move. The mother appealed that decision. The trial judge directed that primary care would remain with the mother until the move occurred, and that when, or if, the mother moved to Winnipeg, primary care of the child would be changed to the father at that time. The father cross-appealed on this point.

[4] The trial judge found both parents had a good relationship with the child. The trial judge was favourably impressed with the father's parenting plan in contrast to that of the mother. The father's plan involved the mother flying several times a month as a WestJet employee to Calgary to parent the daughter and to live, free of charge, in accommodation provided by the father, in a basement suite in a rental property he owns next door to his own home.

[5] The mother's appeal was originally predicated on judicial errors in overemphasizing some factors, underemphasizing others and errors in principle in failing to consider the relevant factors in a mobility case. In our view, the decision below reflects several errors warranting our intervention.

[6] The main error here is a variant of the analytical problem identified by this Court in *Christmas v Christmas*, 2005 ABCA 213, 367 AR 172, *Spencer v Spencer*, 2005 ABCA 262, 257 DLR (4th) 115 and *RJF v CMF*, 2014 ABCA 165, 575 AR 125. This Court has repeatedly cautioned against approaching the best interest test by comparing the effect on children if they are permitted to relocate with the custodial parent versus maintaining the status quo (i.e. the children remaining with the custodial parent in their current location). Approaching the issue in that manner ignores a key component of the *Gordon v Goertz*, [1996] 2 SCR 27, 134 DLR (4th) 321, test – the effect of removing the child from the care of his or her primary caregiver after that parent moves.

[7] The trial judge concluded that the child would be harmed by the proposed move, since it would result in reduced contact with one parent or the other: para 89. He also commented that the existing arrangement was working well and that disrupting it might harm the child: para 131. Rather than wrestling fully with the impact on the child of being separated from her mother, the trial judge focused on what he saw as the inevitability of the child suffering harm as a result of the impending move and sought to minimize the number of things that would change for her.

[8] The parenting assessment prepared prior to trial recommended two alternative parenting plans, both of which assumed that the child would remain with the mother at least 50% of the time. The parenting assessment did not envision the child being removed from the primary care of her mother and placed with her father, yet that is what was ordered by the trial judge. The trial judge made that order without full consideration of the effect on the child of being removed from her mother's care and notwithstanding clear evidence from the assessor that being removed from her mother's care would be detrimental to the child's well-being. The trial judge acknowledged that evidence in his reasons, but did not give due consideration to, or offer any analysis, on that important factor.

[9] The trial judge seemed to place more emphasis on the potential harm caused by requiring the child to move away from her current school and extracurricular activities. In a child of six (five at the time of trial), this would not be the primary concern. Moreover, the child currently resides and attends school in Strathmore. The respondent stated that, if primary custody were transferred to him, he would eventually enroll her in school in Calgary, where he lives. Those changes would occur regardless of the outcome of the application.

[10] Moreover, having regard to the difficulty of the relationship between the parents, we note that the father's parenting plan, one that involves the mother being very proximate and beholden to the father for parenting time in Calgary, is less desirable than it might appear superficially.

[11] It is an error to presume, as the trial judge seems to have done here, that it is never in the best interests of a child to move with his or her primary caregiver. As this Court recognized at para 55 of *MacPhail v Karasek*, 2006 ABCA 238, 273 DLR (4th) 151, a move will always result in decreased contact with one parent. The trial judge's approach is really another way of saying that it would be best for the child to maintain the status quo, without considering the effect on the child of staying in her current location without the primary caregiver. Although the trial judge commented

that the status quo was off the table, his approach to the relevant factors suggests otherwise. This is the kind of error discussed in *MacPhail* and the other cases cited above, and it is an error in principle.

Effect of New Evidence

[12] The mother brought a fresh evidence application that outlines significant changes in her circumstances since the trial concluded in January 2015 and the decision issued in October 2015. The fresh evidence states that the mother was due to have another child with her fiancée in January 2016. The infant is now approximately four months old. The mother's fiancée was laid off from work in northern Alberta. He sought work in Alberta, unsuccessfully, and has been working in Northern Manitoba since January 2016. He resides in Winnipeg. The child has been living primarily in the day-to-day care of her mother together with her new sibling in Calgary. The mother and fiancée intend to wed this summer. The fiancée works a 21 day on - 7 day off schedule that makes commuting to Calgary unsustainable in the long term. It is the effect of these circumstances on the child's best interest that she submits must now be the focus of the inquiry.

[13] Several issues arise. First, the respondent submits that the fresh evidence should not be admitted because it is tangential, at best, to the issues before the Court and if adduced would or could result in perennial litigation. We are satisfied that, in these circumstances and having regard to the overriding concern about the best interests of the child, it would be inappropriate to turn a blind eye to the fresh evidence. That evidence is properly admissible under the *Palmer*[1] test.

[14] As noted earlier, the trial judge failed to properly consider what the impact on the child would be if she were removed from the care of her mother for more than 50% of the time. The evidence makes clear it would be significant. The impact on the child were she to be removed from the care of her mother and be without her new sibling makes this a more pressing concern. This Court has noted the importance of the sibling relationship and the need to consider it in assessing the best interests of the child on a mobility application: *MacPhail* at para 33.

[15] A further concern is the effect on both proposed parenting plans given the birth of the new child. The parenting plan presented by the father at trial is clearly unworkable now. On the other hand, while we understand the mother is prepared to make considerable accommodation on parenting to enable the father to travel to Winnipeg virtually free of charge and to fly the child back to Calgary for consistent parenting time each month, the details of this proposal have not been fleshed out. The evidence does not permit us to make any direction regarding a proper parenting plan.

[16] In the circumstances, we are satisfied the decision below reveals serious errors in principle. Having regard to the record before us and the fresh evidence, we conclude that the child's best

[1] Palmer v The Queen [1980] 1 SCR 759.

interests are best served in maintaining a close tie with her parents and her new sibling. The best way of promoting that is by allowing her to move to Winnipeg with her mother. We allow the appeal on the issue of mobility, allowing the mother to move to Winnipeg with the child on the following conditions: Within 15 days of the date hereof the parties agree on a comprehensive parenting plan that includes regular and consistent visitation with the father. In the absence of agreement, the parties are directed to attend before the Alberta Court of Queen's Bench before June 30, 2016 for directions on a comprehensive parenting plan one that involves regular consistent parenting time with the father. Until such time as a comprehensive plan is agreed to or directed by the Alberta Court of Queen's Bench, which direction shall take place on or before June 30, 2016, the mother is to refrain from moving the child with her to Winnipeg.

[17] The parties appealed the cost order in the Court below. Having regard to our decision on appeal, we direct the parties bear their own costs both at the Alberta Court of Queen's Bench and before us.

[18] The appeal is allowed and the matter is remitted back to the Alberta Court of Queen's Bench for the determination of a proper parenting plan on the terms provided for above.

Appeal heard on May 9, 2016

Memorandum filed at Calgary, Alberta
this 11th day of May, 2016

Costigan J.A.

Paperny J.A.

Wakeling J.A.

Appearances:

A.A. Fares
for the Appellant/Cross-Respondent

R.N. Joshi
for the Respondent/Cross-Appellant