Docket No.: CA 165298
Date: 20010103

NOVA SCOTIA COURT OF APPEAL

[Cite as: Handspiker v. Rafuse, 2001 NSCA 1]

Bateman, Flinn and Oland, JJ.A.

BETWEEN:

DOROTHY ELLEN RAFUSE

Appellant

- and -

ANTHONY HARTFORD HANDSPIKER

Respondent

REASONS FOR JUDGMENT

Counsel:	Ian Robert Morrison, for the appellant Ian A. MacKay, Q.C., for the respondent
Appeal Heard:	December 8, 2000
Judgment Delivered:	January 3, 2001
THE COURT:	Appeal allowed per reasons for judgment of Oland, J.A.; Bateman and Flinn, JJ.A. concurring.

OLAND, J.A.:

[20] This is an appeal from a decision of Judge Robert J. White of the Family Court in which he awarded custody of a child jointly to her parents, with the respondent father to have primary care and the appellant mother liberal and generous access. Custody proceedings commenced following the appellant's decision to move from Pictou to Bridgewater.

[20] The appellant and the respondent lived together for several years before the birth of their daughter in early 1992. According to an agreement between them dated April 30, 1993 they separated in December 1992. That agreement provided that the appellant would have custody of their child and the respondent would have reasonable access and would pay $138 every two weeks for her maintenance. The parties complied with their agreement until the initiation of custody proceedings in early 2000.

[20] Following their separation, both the appellant and the respondent remained in Pictou. Their child lived with the appellant and her two daughters from previous relationships. The appellant did not work outside

the home and provided full time care to her children. The respondent, who works full time shift work, consistently exercised access every second weekend, two weeks in the summer, and additional access as agreed with the appellant. Until the appellant told the respondent of her intention to move, they communicated well and often about their daughter.

[20] In 1993 the appellant married Richard Rafuse. They separated in 1996 and she and her three daughters moved to Ontario for four or five months. They returned to Pictou after she and her husband reconciled. In October 1999 they separated again for a few months because of his drinking and reconciled after he completed a treatment program.

[20] In early January 2000, Mr. Rafuse became aware of a job opportunity in Lunenburg County with prospects of better pay. The appellant spoke to the respondent about moving and he was opposed to their daughter leaving Pictou. In February 2000, the appellant filed an application in Family Court seeking custody and maintenance and the matter was set down for March 20th. The respondent also filed for custody in February. On March 14th, he brought an *ex parte* interlocutory

application for interim custody supported by his affidavit of that date. Judge White granted an interim order that day providing that the respondent was to have "principal care" of the child until March 20th, she was not to be removed from Pictou County until custody was resolved, and the appellant was to have reasonable access. After reading the parties' applications and hearing their counsel on March 20th, the judge granted a further interim order whereby the respondent's "principal care" and the appellant's access were extended until a certain date. The parties essentially consented to this order dated March 21st and that arrangement continued until the custody hearing.

[20] That hearing was held May 16, 2000 and the judge rendered his decision on May 30, 2000. He had interviewed the child and in his decision the judge stated that she had made "no specific elections herself and it appeared that she could be comfortable with either parent". He referred to the welfare of the child being the paramount consideration under s. 18(5) of the **Family Maintenance Act**, R.S.N.S. 160 as amended, and quoted the factors to be considered in determining custody in **Foley v. Foley**, [1994] 124 N.S.R. (2d) 198 (N.S.S.C.) and in **King v. Low** (1985), 44

R.F.L. (2d) 113 (S.C.C.).

[20] After expressly finding that both parents were able to provide for the physical and emotional needs of the child, the judge stated that the respondent father was better able to provide the stable environment which this child needs. His reasons at p. 5 of his decision read:

> Clearly, the evidence indicates a propensity on the part of the mother to act in haste and (sic) has in recent years uprooted herself and the children, in one case, and herself and two of the children, in the other case, without a lot of forethought and planning.
>
> Clearly, the move to the South Shore was precipitous inasmuch as it resulted in a diminution of family income. Surely, the wisest approach would have been to maintain residence in Pictou at least until the finish of the school year, with the stepfather going to the Lunenburg area to test the employment waters to be satisfied that the future was as rosy as it had been purported to be. Thus far, it has proven to be less rosy than their previous circumstances.
>
> While the court is left to delve into the realm of speculation, it would not seem to be a far stretch to see another move in the future when it becomes apparent that circumstances in Lunenburg County do not get better than they have proven to be.
>
> All children in general, and this child in particular, require that there be a high degree of certainty and stability in their lives.

The judge granted the parents joint custody of their child, with the respondent to have primary care and the appellant liberal and generous access. He found the appellant had no ability then to contribute to child

support.

STANDARD OF REVIEW

[20] A decision by a trial judge on a question of the custody of a child is not to be disturbed on appellate review unless he or she has clearly acted on some wrong principle or disregarded the evidence: see for example **Routledge v. Routledge** (1986), 75 N.S.R. (2d) 103 (N.S.C.A.) and **Gorham v. Gorham** (1994), 131 N.S.R. (2d) 7 (N.S.C.A.).

ISSUES

[20] The grounds of appeal read as follows:

1. Did the Honourable Judge err in not placing sufficient weight to the views of the appellant as the custodial parent?

2. Did the Honourable Judge err in placing undue emphasis on the appellant's reason for moving?

3. Did the Honourable Judge engage in speculation and make findings of fact in the absence of evidence in giving the reasons for his decision?

ANALYSIS

[20] The first two grounds of appeal have their basis in **Gordon v. Goertz**, [1996] 2 S.C.R. 27, 19 R.F.L. (4^{th}) 177. The Supreme Court of

Canada set out the principles and enumerated several factors to be considered in a case in which the custodial parent proposes to move with the child resulting in a material change in circumstances. In that case, a court order pursuant to a divorce proceeding had determined custody.

[20] The respondent pointed out that in this case, no court had granted an earlier custody order and that the application for custody was the original proceeding and not an application to vary. He submitted that accordingly, **Gordon v. Goertz** does not apply. With respect, I am unable to agree.

[20] The parties had voluntarily entered into an agreement in 1993 which reflected their decision as parents on the matters of custody, access and maintenance. Each of them honoured its terms. Neither the appellant's day-to-day care nor the respondent's enjoyment of access was challenged or disturbed for some six years following their agreement. While there was no indication that it had ever been made a court order, the agreement was long-standing and respected. In these circumstances, the absence of a formal court order does not have the effect of excluding the application of

the principles in **Gordon v. Goertz**.

[20] The trial judge did not mention that case or any other mobility case in his decision. In **Gordon v. Goertz**, the Supreme Court of Canada rejected any legal presumption in favour of the custodial parent but indicated at § 48 that:

> . . . the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration.

While the trial judge cited **Foley, supra,** that decision did not include this principle among the factors enumerated for determining the best interests of a child.

[20] The failure by a trial judge to afford proper respect to the views of a custodial parent can constitute an error in principle: **Burns v. Burns**, [2000] 3 R.F.L. (4th) 189 (N.S.C.A.) at p. 205. Here the child of the appellant and the respondent was eight years old when custody proceedings commenced in February 2000. She had lived with the

appellant, her mother, and with the appellant's two other daughters since her birth. There is no indication in the decision that the judge gave the views of the appellant as the custodial parent the degree of respect and consideration required by **Gordon v. Goertz**. Rather, as his reasons show, the judge disagreed with the move itself.

[20] The appellant's second ground of appeal concerns the factors which a judge should consider in a mobility case as enumerated in § 49 of **Gordon v. Goertz**:

> 7. More particularly the judge should consider, *inter alia*:
>
> (a) the existing custody arrangement and relationship between the child and the custodial parent;
> (b) the existing access arrangement and the relationship between the child and the access parent;
> (c) the desirability of maximizing contact between the child and both parents;
> (d) the views of the child;
> (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
> (f) disruption to the child of a change in custody;
> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.
> (Emphasis added)

[16] In his reasons here, the trial judge focused on the move to the

South Shore and the reasons for that move. However, once he had found that both parents could provide for the physical and emotional needs of the child, the judge erred by placing undue emphasis on the reasons for the move.

[17] In considering the first two issues raised on appeal, I have referred to a principle and several factors to be considered in deciding custody according to **Gordon v. Goertz**. The respondent argued that the elements listed in **Foley, supra,** and cited by the trial judge in determining the best interests and the welfare of a child were extensive, that that listing was longer than the one in **Gordon v. Goertz**, and that, as indicated in **Foley,** it was impossible to compile an exhaustive listing. He submitted that the failure to consider any single factor is not enough to set aside a decision if the trial judge had considered most of the relevant factors. He also asserted that because the judge did not mention certain things does not mean that he did not take them into account.

[18] The trial judge indicated in the opening line of his decision that this contest for custody was precipitated by a physical move contemplated by

the appellant and the evidence established that by agreement, the appellant had had custody from the time the child was less than a year old until she was eight. It is common ground that the proposed move would constitute a material change. This requires a judge to embark on a fresh inquiry into the best interests of the child having regard to all of the relevant circumstances of the case. Such determination is not made based on the length or the extent of the detail in any listing of the factors to be considered nor generally on the inclusion or omission of any single criteria.

[19] A judge must apply the most appropriate criteria to the case before him. Yet there is no recognition in the reasons of the trial judge that **Gordon v. Goertz**, the leading authority on mobility cases, had any application to the case before him. It does not appear that the judge gave the views of the custodial parent the extent of the consideration required. Moreover, his decision does not review some other factors set out in **Gordon v. Goertz** (and also in **Foley**) such as the desirability of maximizing the contact between the child and both parents. Nor does he deal with other factors in the Supreme Court of Canada decision, such as the disruption to the child following a change in custody which here would

include the separation from her siblings. It is not clear from the decision just what factors the trial judge did consider, he having underlined certain of the **Foley** criteria for emphasis but not having made additional comment as to their relevance or weight in this particular case. It is clear that his decision improperly emphasized the reasons for the move. In these circumstances I cannot agree with the respondent that the judge simply failed to consider one relevant factor but considered most others.

[20] As to the third ground of appeal, a review of the transcript did not reveal evidence to support the judge's conclusion that the appellant has a propensity to act in haste and to uproot her children. While she and her children had moved to Ontario for several months, there was nothing on the record that the appellant had done this with alacrity and without planning. Similarly, there was no evidence that she had rushed to move to Bridgewater. She did not leave before filing formally for custody in February 2000 and she and her two other daughters stayed in Pictou until April. There is no evidentiary basis for the conclusions that the appellant has a propensity to act in haste and without forethought and planning, which conclusions also led to speculation that there may be another move

in the future. Consequently I would find that the trial judge erred in principle.

DISPOSITION

[21] I would allow the appeal. The appellant asked this court to reverse the decision of the trial judge, to grant custody of the child to her and generous and liberal access to the respondent, and to order the respondent to pay child support. I am of the view that such a disposition of the appeal would not be appropriate here.

[22] The child has been living with the respondent for some nine months following the interim order for custody. The circumstances of the appellant and of the respondent may have changed during that period. Custody should be determined after consideration of all the relevant circumstances of the particular case. This court does not have sufficient or current information before it.

[23] I would remit this matter to the Family Court for a rehearing before a different judge. There will be no award of costs.

Oland, J.A.

Concurred in:

Bateman, J.A.

Flinn, J.A.