

NOVA SCOTIA COURT OF APPEAL
Citation: *Brown v. Hughes*, 2002 NSCA 158

Date: 20021205
Docket: CA 181116
Registry: Halifax

Between:

Jacklyn Marie Brown

Appellant

v.

Tyler Fergus Hughes

Respondent

Judges: Glube, C.J.N.S.; Freeman and Saunders, J.J.A.

Appeal Heard: December 5, 2002, in Halifax, Nova Scotia

Written Judgment: December 10, 2002

Held: Appeal allowed in part as per reasons for judgment of Freeman, J.A.; Glube, C.J.N.S. and Saunders, J.A. concurring.

Counsel: Peter R. Lederman, for the appellant
Roseanne M. Skoke, for the respondent

Reasons for judgment:

[1] This is an appeal from the judgment of Judge James Wilson of the Provincial Family Court awarding custody of a child born July 31, 2000 to the child's father subject to reasonable access by the mother.

[2] The mother has appealed on grounds that the family court judge gave no reasons and unduly emphasized the inadequacy of evidence respecting child care, which was an important element in her plan for the child.

[3] The parents were before Judge Wilson because they considered their shared care of the child was not working in his best interests. They agreed that the court should determine the primary care and the access schedule for the alternate parent.

[4] Judge Wilson obviously was seeking to advance the best interests of the child, which he placed above those of either parent. He saw his task as "a difficult, close-call decision" which he intended not as a final disposition but as a work in progress requiring review to address the concerns standing in the way of a final order.

[5] One of these concerns was child care, and Judge Wilson gave adequate reasons for considering it important. In our view he did not overemphasize it, and this court would be in no better position to address it than he was before his concerns are met.

[6] Unfortunately there is a clear discrepancy between the two elements of the judgment. His decision repeatedly emphasized that it was subject to review; the order did not reflect that reservation. This obvious slip made the order appear final, and may have led the mother to embark on an appeal that, in all the circumstances, is premature.

[7] Judge Wilson raised concerns about a number of matters that were unfolding, including not only child care but the new baby expected in the father's household, transportation issues and the provision of playmates for the child. For purposes of giving judgment he resolved those concerns as follows:

I mention those things because I just take all of that into consideration in trying to devise a plan. All of which leads me to a position, contrary to what counsel

didn't want me to do, is, the issue of review. This case may well be back for review because I will do what you have asked and that is try to settle Michael in one spot, but I want to see how it works. You've got to approach this issue with that in mind. . . .

I am prepared, subject to review, to make an order that the primary care be with Mr. Hughes and there are two things I think that may trigger review. One is there may be detail that I can get with respect to child care, and I need that. . . . I also don't know what stresses having this youngster in the house on a full time basis may be for the other issues you have to deal with with an expectant child. . . . (Emphasis added.)

[8] In view of so clear an expression of intention that the order should be subject to review, it was obviously an "accidental mistake or omission" within the meaning of *Civil Procedure Rule* 15.07 not to include this provision in the order. The order could have been readily corrected by Judge Wilson, but his judgment is now within the jurisdiction of this court and we are in a position to make the correction pursuant to *Civil Procedure Rule* 62.23. We therefore will allow the appeal for the limited purpose of ordering that Judge Wilson's order of June 10, 2002, be subject to review, and we dismiss the appeal without costs on all other issues. If either party remains dissatisfied with Judge Wilson's order, the next step is to seek review in family court where the concerns he raised may be addressed.

Freeman, J.A.

Concurred in:

Glube, C.J.N.S.

Saunders, J.A.