NOVA SCOTIA COURT OF APPEAL
Citation: J.G. v. T.D., 2002 NSCA 162

Date: 20021210
Docket: CA 185950
Registry: Halifax

Between:

J. G.

Appellant

v.

T. D.

Respondent

Judges:	Glube, C.J.N.S.; Saunders and Oland, JJ.A.
Appeal Heard:	December 10, 2002, in Halifax, Nova Scotia
Written Judgment:	December 11, 2002
Held:	Leave to appeal is granted and the matter is remitted to the Supreme Court (Family Division) for hearing on the issue of transportation. No costs are awarded, per oral reasons for judgment of Glube, C.J.N.S.; Saunders and Oland, JJ.A. concurring.
Counsel:	Colin M. Campbell, for the appellant Susan J. Young, for the respondent

Reasons for judgment: (Glube, C.J.N.S.)

[1] This appeal concerns an order dealing with access which included placing the responsibility for transportation on the appellant, Ms. G., who is the custodial parent.

[2] The parties are the parents of A., born September *, 1996. (*editorial note-date removed to protect identity*) By a consent order issued on May 15, 2000, the respondent, Mr. D., was to have access every second weekend as well as other reasonable access at reasonable times with twenty-four hours notice, and certain holiday access at Christmas.

[3] In January, 2002, the respondent was denied access without initially being told why. Apparently, the child made allegations to another person of sexual activities during access. She at first confirmed this to Social Services, but on a second interview did not confirm the allegations and said that they were untrue. Due to a lack of evidence, Social Services took no further action against the respondent, but the appellant continued to deny access.

[4] Mr. D. filed an application on May 3, 2002, under the **Maintenance and Custody Act**, R.S.N.S. 1989, c. 160, as amended, for enforcement of the May 2000 order. In the Parenting Statement filed with the application, the respondent stated the following:

> I would like to see my daughter; I would like an Order enforcing the access terms of the existing court Order. I am also seeking a Variation in this Order on the issues of custody and mobility.
>
> [Emphasis added.]

[5] Affidavits were filed by both parties in advance of the hearing on July 25, 2002. No reference was made by the applicant, Mr. D., to any change of custody or to mobility. Ms. G., in her affidavit dated July 15, 2002, referred to her move from Halifax County to N., Nova Scotia, stating she was facing an increase in rent in Halifax, that rents were cheaper in N. and that there she had family support.

[6] At the hearing, which the court and the parties referred to as an interim hearing, only Mr. D. was cross-examined on his affidavit. He made a brief

reference to a period of time in 2000-01 when Mr. D.'s parents picked up and returned the child during access visits.

[7] At the conclusion of the hearing, Justice Leslie J. Dellapinna, in confirming the access as provided in the earlier consent order, stated in part in his oral decision (a slightly different written version was issued the same day):

> ... The Maintenance and Custody Act includes a provision that in any proceeding under the Act concerning care and custody or access and visiting privileges in relation to a child, the Court shall apply the principle that the welfare of the child is the paramount consideration. [Written version change is that ss.18(5) is actually quoted.] It is generally believed that a child is entitled to a good relationship with both her parents, and generally speaking, such a relationship has a better chance of surviving if the child has actual contact with a parent. The order that is presently in the file dated May 15, 2000, is deemed to have been an appropriate order at that time, and I have not been presented with any evidence to lead me to believe that any variation of that order should take place. I am not satisfied that Mr. D. should have ever been denied access to his daughter, ... [Almost identical wording in the written version.]
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> ...
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> ... It was completely inappropriate for Ms. G. to take it in her own hands to deny Mr. D. access in the face of a court order that required access and entitled him to access. [Written version says, "It was completely inappropriate for Ms. G. to take it in her own hands to deny Mr. D. access in the face of a court order that entitled him to have access and in the absence of evidence of impropriety."] I see no reason based on the evidence to order supervision of his access...
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> ...
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> ... Ms. G. will make the necessary transportation arrangements. [Written version says, "Unless Mr. D. agrees otherwise, Ms. G. will make the necessary transportation arrangements."]

[8] At this point, in the oral hearing, both Ms. G. and her counsel expressed their concern. Ms. G. reiterated what she had stated in her affidavit and advised the court that she did not have a car and had no financial ability to provide transportation to Halifax. She had to pay someone $50.00 to be driven to Halifax for the court hearing.

[9] On at least three occasions in response, Justice Dellapinna stated that "she should have thought of that before she moved." He made no reference to this exchange in his written decision but put the obligation for the transportation arrangements into the order, which reads:

> 2. The Respondent, J. G., shall provide and be responsible for all transportation of the child A. D.-G. to and from all access visits unless otherwise agreed upon by the parties.

[10] The issue on appeal is whether the learned judge erred in law in imposing responsibility for access transportation on the appellant.

[11] It is acknowledged that the recent case law of the Supreme Court of Canada requires the court of appeal to show considerable deference to the trial judge. See: **Van de Perre v. Edwards**, (2001) 204 D.L.R. (4th) 257.

[12] However, what is apparent in the present case is that the learned judge simply had no evidence before him on which to base his conclusion that the cost of transportation should be the responsibility of Ms. G.. It seems that sometimes in the past, Mr. D. had been the person responsible for transportation, but he did not refer to this issue in his affidavits nor during his cross-examination or redirect, nor did his counsel make any submission on this point at the hearing. He did not claim that the move to N.would in any way affect the issue of access. The only reference to transportation for access visits was about the period from June 2000 to September 2001, which was handled by his parents.

[13] The trial judge did not give any indication that he had considered the practice to date or the ability of either of the parties to effect access except when it was raised by the appellant after he had delivered his decision. Ms. G. indicated she could not comply with that provision, at which time the judge said "she should have thought of that before she moved." She then asked what would happen if she did not comply. He responded that she would be in contempt and that one thing the court could do would be to change custody. He then indicated that would be for another day. He also pointed out to Mr. D. that there was a court order for support which he was not paying regularly, and that he should be paying that even though access was being denied.

[14] The judge gave no reasons for this change, nor, as I have said, was there any evidence lead on this issue or on the ability of either party to pay for the transportation, or the impact such a direction might have on either parent's capacity to meet their child's needs.

[15] In his written decision, Justice Dellapinna stated:

> The order that is presently in the file dated May 15, 2000 is deemed to have been an appropriate order at that time it was made and I have not been presented with any evidence to lead me to believe that any variation of that order should take place.

However, he did vary that order in two respects by fixing access periods and directing that the cost of transportation would be borne by Ms. G..

[16] In our opinion, where the issue of transportation was not raised before the trial judge, where there was no evidence as to its cost or as to the financial situation of the parties, and where the trial judge did not consider any of the factors that would be necessary to address in ordering Ms. G. to take on the responsibility of the transportation costs, we would find there was an error in principle which allows this court to intervene.

[17] As this was said to be an interim hearing, we would grant leave to appeal and order that whether the cost of transportation should be borne by either or both parties should be decided following the hearing of evidence. We would therefore return this matter to the Supreme Court (Family Division) for a hearing on this issue.

[18] There will be no costs awarded on this appeal.

Glube, C.J.N.S.

Concurred in:

Saunders, J.A.

Oland, J.A.