Docket: CA156704
Date: 19991124

NOVA SCOTIA COURT OF APPEAL

[Cite as: Cleveland v. Cleveland, 1999 NSCA 142]

Pugsley, Hart and Hallett, JJ.A.

BETWEEN:

DANIEL EVANS CLEVELAND	)	
	)	Hector J. MacIsaac
Appellant	)	for the appellant
	)	
	)	
- and -	)	Ms. Roseanne Skoke
	)	for the respondent
	)	
CHRISTINE MARIE CLEVELAND	)	
	)	
	)	
Respondent	)	
	)	Appeal Heard:
	)	November 18, 1999
	)	
	)	Judgment Delivered:
	)	November 24,1999
	)	
	)	

THE COURT: The appeal is allowed, per reasons for judgment of Pugsley, J.A.; Hart and Hallett, JJ.A., concurring.

Pugsley, J.A.:

[1] This appeal was scheduled to be heard on November 18, 1999. After receiving submissions by both counsel respecting preliminary issues raised by the Court, the Court recessed, and subsequently adjudged that the appeal should be allowed without costs, with reasons to follow.

[2] These are the reasons.

[3] Mr. Cleveland appeals from the decision of Justice MacLellan of the Supreme Court delivered orally on May 6, 1999. That decision granted a motion by the respondent (Mr. Cleveland's former wife) to strike Mr. Cleveland's application to vary Justice MacLellan's judgment of January 5, 1999, to substitute Mr. Cleveland in place of the respondent, as the primary care giver for their two daughters, then eleven and fourteen years of age.

[4] The grounds of appeal include a submission that Justice MacLellan erred in failing to recuse himself from considering the respondent's motion to strike.

Background

[5] After a five-day divorce hearing, involving issues of division of property, and custody and access to the two children of the marriage, Justice MacLellan determined

on January 5, 1999, that the respondent should be the primary care giver for the children.

[6] After a number of unsuccessful attempts to convince Justice MacLellan to reconsider his decision, the appellant applied to the Supreme Court, by notice of application filed on April 3, 1999, for an order to return the children to his primary care because of a change in circumstances. The application came on for hearing before Justice MacLellan on April 29th.

[7] At the commencement of the hearing, counsel for the respondent advised that she would be opposing the application to vary and further requested that the application be struck as it was vexatious, frivolous, and constituted an abuse of process.

[8] Counsel for the appellant then stated:

> My client does believe that, given the history of it, and you having sat on the trial, he's certainly objecting to you continuing with any question as to whether or not this thing should even be set as well as hearing it.

[9] Justice MacLellan determined:

> ...if there is a full hearing on this matter, it will be before another Judge, but that I'm going to hear, in effect, the application by Ms. Skoke, on behalf of Mrs. Cleveland, as to whether there should be a hearing or not. I think I'm the best person to determine that and I am going to determine that, ... (emphasis added)

[10] The following exchange then occurred:

> Counsel for the appellant:
> I don't know, my Lord, I got a real problem with this one. I mean things have gone on in this pre -- these post-trial conferences. I don't know how you can hear this, quite frankly.
>
> The Court:
> Well. . . I've heard your position, Mr. MacIsaac, and I made -- I made a decision. I'm going to hear the -- the opposition to having it -- the matter heard.

[11] The application on behalf of counsel for the respondent to strike the appellant's application to vary was then adjourned to May 6, 1999.

[12] After cross-examination of the respondent had been conducted, and after receiving all submissions by both counsel, Justice MacLellan gave an oral judgment in which he allowed the appellant's application to strike with costs.

Analysis

[13] A former spouse has a statutory right to apply to the Court to vary, rescind, or suspend a custody order or any provision thereof, based on a change in the condition, means, needs or other circumstances of a child of the marriage occurring since the making of the custody order, or the last variation order made in respect of that order (**Divorce Act**, R.S.C. 1985 (2nd Supp.) C.3, s. 17).

[14] Counsel did not raise the issue of whether an application brought pursuant to the provisions of s. 17 of the **Divorce Act** by one spouse, is capable of being struck on an application by the other spouse, on grounds that the s.17 application is vexatious,

frivolous, and an abuse of the process of the Court. In view of my proposed resolution of the appeal, it is not an issue that needs to be resolved.

[15] In the course of allowing the respondent's application to strike, Justice MacLellan stated:

> ... I believe this application [i.e., the application to vary filed on behalf of Mr. Cleveland] is frivolous and is not based on any real change in circumstances.

[16] I am respectfully of the view that Justice MacLellan erred when he considered, and in effect determined, not only the application to strike, but also the application on behalf of the appellant to vary. The intermingling of the two applications could have been anticipated as the issues on each application were tied closely together. In fact, during the course of the hearing on May 6, Justice MacLellan remarked that the issues in the application to strike and the application to vary were "tied together so closely that it is difficult to separate them."

[17] Justice MacLellan, in effect, decided the very issue that he concluded on April 29, 1999, should be determined by another judge.

[18] Counsel for the respondent, during the course of oral submissions, inferred that if the appeal were to be allowed, the consequences would be "far reaching". I respond that this opinion is derived from the particular circumstances of this case.

[19] I would allow the appeal, set aside the decision of Justice MacLellan of May 6, 1999, and any order based thereon.

[20] In the circumstances, there will be no costs.

Pugsley, J.A.

Concurred in:

Hart, J.A.

Hallett, J.A.