NOVA SCOTIA COURT OF APPEAL
Citation: McAleer v. Farnell, 2009 NSCA 14

Date: 20090206
Docket: CA 298737
Registry: Halifax

Between:

Helen M. McAleer

Appellant

v.

Jason David Edward Farnell

Respondent

Judges:	MacDonald, C.J.N.S.; Fichaud, J.A. and Murphy, J. *(Ex Officio)*
Appeal Heard:	December 11, 2008, in Halifax, Nova Scotia
Held:	Appeal allowed and a new hearing ordered, per reasons for judgment of MacDonald, C.J.N.S.; Fichaud, J.A. and Murphy, J. concurring.
Counsel:	Terry E. Farrell and Lisa Bevin, for the appellant Douglas B. Shatford, Q.C., for the respondent

Reasons for judgment:

OVERVIEW

[1] When the parties' common law relationship ended, they agreed to share parenting of their son, Cole. He is now five years old. When Ms. McAleer decided to relocate from the Springhill area to Truro with her new husband, Mr. William Booth, she wanted to take Cole with them. So she asked the Nova Scotia Family Court to award her primary care. Mr. Farnell, intent on having Cole remain in the Springhill area, countered with his own application for primary care. Following a day and a half hearing, Judge Robert J. White ruled in Mr. Farnell's favour. Ms. McAleer asserts that the judge erred and she now asks this court to reverse that ruling. Specifically, she seeks an order for primary care or, alternatively, a new hearing.

[2] For the reasons that follow, I conclude, respectfully, that the judge in making his decision committed an error in principle significant enough to warrant a new hearing.

BACKGROUND

[3] The parties started living together in the Spring of 2004, when Cole was only seven months old. Up until then, he was primarily in his mother's care. The common law relationship lasted approximately 18 months, with the parties separating in the Fall of 2005.

[4] At that time, both parties had full time jobs and their parenting agreement reflected this. Specifically, by their January 2006 consent order, the parties enjoyed shared custody with equal parenting time. Weekly, Ms. McAleer had Cole from Sunday at noon until Thursday. Then Mr. Farnell had Cole in his home from Thursday until Sunday at noon.

[5] In February of 2006, however, Ms. McAleer left her job and was then able to stay at home. As a result, the arrangement was altered so that Ms. McAleer would care for Cole most Fridays while Mr. Farnell was at work.

[6] Also relevant to this appeal is the fact that both parties have children from other relationships. Mr. Farnell has two children from a previous relationship; his son, Wyatt, nine, and his daughter, Priscilla, seven. They live with their mother in New Brunswick but spend every other weekend with their father in Nova Scotia. To achieve this, Mr. Farnell makes a significant sacrifice. He drives to and from New Brunswick twice on each access weekend; first to pick the children up and second to return them. This involves approximately 10 hours of driving every access weekend or, on average, over 20 hours a month.

[7] Ms. McAleer has a son, Dawson, from a previous relationship. He is now ten. With Mr. Booth she also has a twenty-month old son, Christian.

[8] So when Mr. Booth secured a new job in Truro, the decision was made to relocate; thus the respective applications to vary.

ISSUES

[9] In her notice filed with this court, Ms. McAleer listed ten grounds of appeal which, in her factum, she synthesized to the following five issues:

1. What is the appropriate standard of review?

2. Did the Learned Trial Judge err by failing to render reasons for his conclusions that are sufficient to permit meaningful review on appeal?

3. Did the Learned Trial Judge err by failing to give proper weight to the factors outlined in the cases of *Gordon v. Goertz* (1996), 2 S.C.R. 27 (S.C.C.) and *Foley v. Foley* (1993), 124 N.S.R. (2d) 198 (N.S.C.A.)?

4. Did the Learned Trial Judge misapprehend the evidence regarding the distance of the proposed move and the evidence regarding the loss of contact with the Respondent and his other children?

5. Did the Learned Trial Judge err by failing to consider whether alternative arrangements were in the best interests of the child?

[10] For my purposes, these issues can be further distilled to three:

1. The adequacy of the judge’s written reasons.

2. The judge’s handling of the relevant legal principles.

3. The appropriate relief, should our intervention be required?

ANALYSIS

The Adequacy of the Judge’s Reasons

[11] Ms. McAleer challenges the judge's reasons, asserting that they are deficient to the point of denying her an effective appeal. For the following reasons, I disagree.

[12] I begin with the recent decision of the Supreme Court of Canada in **R.E.M**., 2008 SCC 51. Although decided in a criminal law context, I nonetheless find that it offers good guidance in this appeal. There, the Chief Justice explained how a trial judge's reasons fulfill five basic purposes: 1) to inform the parties why the decision was made; 2) to provide public accountability for the judicial decision; 3) to permit effective appellate review; 4) to help ensure fair and accurate decision making, and 5) to provide guidance to future courts in accordance with the principle of *stare decisis.*

[13] These basic goals, the Chief Justice explains, are effectively fulfilled if the decision informs the reader as to what was decided and why:

> ¶ 17 These purposes are fulfilled if the reasons, read in context, show why the judge decided as he or she did. The object is not to show *how* the judge arrived at his or her conclusion, in a "watch me think" fashion. It is rather to show *why* the judge made that decision. The decision of the Ontario Court of Appeal in *Morrissey* predates the decision of this Court establishing a duty to give reasons in *Sheppard*. But the description in M*orrissey* of the object of a trial judge's reasons is apt. Doherty J.A. in *Morrissey*, at p. 525, puts it this way: "In giving reasons for judgment, the trial judge is attempting to tell the parties what he or she has decided and why he or she made that decision" (emphasis added). What is required is a logical connection between the "what" - the verdict - and the "why" - the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

. . .

> ¶ 25 The functional approach advocated in *Sheppard* suggests that what is required are reasons sufficient to perform the functions reasons serve - **to inform the parties** of the basis of the verdict, to provide public accountability and to permit meaningful appeal. The functional approach does not require more than will accomplish these objectives. Rather, reasons will be inadequate only where their objectives are not attained; otherwise, an appeal does not lie on the ground of insufficiency of reasons. This principle from *Sheppard* was reiterated thus in *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27, at para. 31: ... [Emphasis in original.]

[14] Furthermore, the amount of detail required to meet these basic functions very much depends on the context of each case:

> ¶ 44 The degree of detail required may vary with the circumstances. Less detailed reasons may be required in cases where the basis of the trial judge's decision is apparent from the record, even without being articulated. More detail may be required where the trial judge is called upon "to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue ...": *Sheppard*, at para. 55.

[15] For this reason, our role on appeal is not to criticize the level of detail or expression. Instead it is to determine if the functions noted above have been fulfilled to the point where a meaningful appeal is available:

> ¶ 53 However, the Court in *Sheppard* also stated: "The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). To justify appellate intervention, the Court makes clear, there must be a functional failing in the reasons. More precisely, the reasons, read in the context of the evidentiary record and the live issues on which the trial focussed, must fail to disclose an intelligible basis for the verdict, capable of permitting meaningful appellate review.

[16] I will now apply this guidance to the present case, dealing first with the context of the decision under appeal.

[17] Here, an experienced family law judge faced this one basic question. Considering Cole's best interests, which parent should be awarded primary care? Indeed the issue was especially focussed because legal custody *per se* was not in dispute. Joint custody was agreed upon. Furthermore, it was understood that the

parent who did not receive primary care would nonetheless enjoy generous access. In fact, the judge had the benefit of choosing between two fully capable parents with positive plans. He observed:

> From the evidence, it is clear that both parents are equally capable of providing all of the necessary care for their child and to be able with some assistance from extended family on both sides to attend to his every need. The Applicant seeks to maintain primary care with her and move the child to Truro and the Respondent resists the application and seeks Law.

[18] Given this context, the judge's basic function was to select the preferred plan for Cole by applying certain well-defined principles set out by the Supreme Court of Canada in **Gordon v Goertz**, (1996), 2 S.C.R. 27 (S.C.C.).

[19] To this end, the judge correctly identified his task and properly recognized the **Gordon v. Goertz** principles. In the process he underlined those most apt to this case:

> It is trite to say that the overpowering consideration in cases of this nature is to determine what is in the best interests of the child. This mantra is spelled out in virtually all statutory law and, where not, in the volumes of case law.
>
> The hallmark case on this very point is *Gordon v. Goertz* (1996), 19 R.F.L. (4^{TH}) 177, S.C.C. wherein McLachlin J. at p. 201-202 commented as follows as she summarized the law:
>
> > 1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
> >
> > 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
> >
> > 3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
> >
> > 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

> 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
>
> 6. The focus is on the best interests of the child, not the interests and rights of the parents.
>
> 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.
>
> In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new? [Emphasis by trial judge.]

[20] Then, as required, the judge set out to apply these principles to the facts as he so determined:

> Taking into consideration all of the evidence presented at the hearing; the contents of the affidavits filed by the parties respectively; the cross examination of the affiants; the relative circumstances of the respective parties; the submissions of counsel; the authorities and indeed related cases following the

> principles enumerated in these authorities and ultimately the most important issue, the best interests of the child. I have come to the conclusion that those interests would be better served if primary care was vested in the Respondent with generous access to the Applicant at all times when the child was not in school or otherwise on vacation. I am satisfied that the availability of the Respondent's extended family, who already have been actively involved with the child, is greater than the speculative assistance that may be provided by her extended family. Moreover, at his tender age he will continue to have contact with others, such as his small friends and those he may know when he starts school. Also, if the Respondent were to continue to be an access parent this child would suffer a loss of access as his father would, of necessity, be travelling in lengthy opposite directions in order that the child would have some contact with his paternal step-siblings.

[21] In light of the above, these reasons in my view reflect their intended purpose. Specifically, the result is obvious and whether or not one agrees with it, the judge's reasoning path is equally clear. In short these reasons do not reflect the type of "functional failing" that would deny Ms. McAleer an effective appeal. On this issue, I see no reason for us to interfere.

The Applicable Legal Principles

[22] As an alternative submission, Ms. McAleer asserts that the judge erred in his application of the **Gordon v. Goertz** principles. Before considering the merits of this submission, I will first address the standard upon which we should review this aspect of the judge's decision. It commands significant deference. Let me elaborate.

[23] Family law judges have a challenging task, particularly when it comes to resolving parenting issues. In each specific case, they must delicately balance a number of competing factors. Because they have viewed the evidence first hand, their difficult choices are entitled to significant respect. As Bateman, J.A. recently confirmed in **MacLeod v. Theriault**, 2008 NSCA 16, short of a material error of principle or a palpable and overriding error of fact, the ultimate balancing function should be left to the trial judge:

> ¶ 12 A decision on a custody matter may be set aside on appeal only if the trial judge erred in legal principle or has made a palpable and overriding error in his/her appreciation of the evidence (*Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014). *The appellate court is not entitled to reverse an order simply because it*

> *would have balanced the relevant factors differently* (*Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 12; *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at para. 15).
>
> [Emphasis added.]

[24] Turning to the issue on its merits, did the judge err in principle to the extent that our intervention is necessary? For the reasons that follow, I respectfully believe that he did.

[25] Let me begin with the **Gordon v. Goertz** principles where, as noted, the Supreme Court of Canada settled the law as it applies to applications to vary custody and access orders. In the process, the Supreme Court identified 7 factors that a trial judge should consider when determining a child's best interests. As noted, the trial judge recognized these factors which I repeat here for ease of reference:

> ¶ 49 The law can be summarized as follows: ...
>
> 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.]

[26] While the trial judge acknowledged his obligation to consider these seven factors, I nonetheless have concerns with his failure to consider the impact on Cole's relationship with his mother. This involves primarily factor (c), but also (a) and (f) from **Gordon v. Goertz**.

[27] Specifically, while the judge fully addressed the need to maximize contact between Cole and his father, he appears to have ignored this goal when it came to Ms. McAleer. For example, regarding Mr. Farnell, the judge observed:

> Taking into consideration all of the evidence presented at the hearing; the contents of the affidavits filed by the parties respectively; the cross examination of the affiants; the relative circumstances of the respective parties; the submissions of counsel; the authorities and indeed related cases following the principles enumerated in these authorities and ultimately the most important issue, the best interests of the child. I have come to the conclusion that those interests would be better served if primary care was vested in the Respondent with generous access to the Applicant at all times when the child was not in school or otherwise on vacation. I am satisfied that the availability of the Respondent's extended family, who already have been actively involved with the child, is greater than the speculative assistance that may be provided by her extended family. Moreover, at his tender age he will continue to have contact with others, such as his small friends and those he may know when he starts school. Also, if the Respondent were to continue to be an access parent this child would suffer a loss of access as his father would, of necessity, be travelling in lengthy opposite directions in order that the child would have some contact with his paternal step-siblings.

[28] Yet, at the same time, the decision offers no such analysis *vis-a-vis* Ms. McAleer. Furthermore, this does not appear to be a situation where the judge may have conducted the proper analysis but simply failed to articulate it in his decision. I say this because the resultant order suggests otherwise. Let me elaborate.

[29] While the judge in his decision awarded Ms. McAleer "generous access", the final order significantly reduces Cole's contact with his mother. Aside from shared holiday access, the order provided:

> 1. The Applicant and Respondent shall have joint custody of the child, COLE DAVID FARNELL (herein called Cole), and the parties shall

share in the major decisions in regard to the child's upbringing. The primary residence shall be with the Respondent [Mr. Farnell].

2. Access between the Applicant [Ms. McAleer] and Cole shall be as follows:

   (a) The Applicant shall have Cole in her care every other weekend from 6:00 p.m. on Friday until 6:00 p.m. on Sunday. On the occasions when the Applicant's access weekend falls on a long weekend, access shall begin on the Thursday evening or conclude on the Monday evening depending on whether it is the Friday or Monday that is the holiday. The Applicant's weekends are not to fall on the alternate weekends when the Respondent's other two children are in the Respondent's care.

   (b) The Applicant shall have other reasonable access at all other reasonable times upon reasonable notice when the Applicant is visiting the Booth family in the Springhill area.

[30] This limitation on Ms. McAleer's access would be understandable if, in striking the appropriate balance, the inevitable result was a corresponding enhancement of contact with Mr. Farnell. However, that is not the result. Instead, it seems that Ms. McAleer's contact is diminished not to the primary benefit of Mr. Farnell, but to third party caregivers. In other words, the goal of maximizing contact with **both** parents appears to have been missed. My concern is best explained by a comparison of the parties' respective plans. In order to best appreciate the impact of the order, I will initially review the *status quo* at the time of the applications.

The Status Quo

[31] As noted, the parties' initial consent order saw a shared parenting arrangement where weekly Ms. McAleer had Cole from Sunday at noon until Thursday, and Mr. Farnell had him from Thursday until Sunday at noon. Then when Ms. McAleer stopped working full time, she began taking Cole most Fridays while Mr. Farnell worked. Thus, at the time of the hearing, despite the wording of the order, the *de facto* weekly cycle looked like this. Ms. McAleer would have Cole at her home in Mapleton with Mr. Booth and her two other sons (Cole's half-brothers) from Sunday at noon until Thursday evening when Mr. Farnell returned from work. Mr. Farnell would have Cole overnight Thursday,

and Ms. McAleer would care for Cole most Fridays during the day. When Ms. McAleer did not have Cole on Fridays, he would be in the care of an extended family member, usually Mr. Farnell's mother. Mr. Farnell would then have Cole Friday evening until Sunday at noon. Every other weekend Cole would have contact with Mr. Farnell's two other children (Cole's half-siblings) when they exercised access with Mr. Farnell.

Ms. McAleer's Plan

[32] Under Ms. McAleer's plan, Cole would live in Truro with her, Mr. Booth, and his two half-brothers. He would attend school there, and would return home to Ms. McAleer after school. Mr. Farnell would have Cole in his care every second weekend, with four weeks of block access in the Summer. Ms. McAleer offered to provide transportation for Mr. Farnell's access one weekend a month. Further, she stated that she would be willing to coordinate Mr. Farnell's weekend access with Cole to allow Cole to be with his father the same two weekends when his two older children were present.

[33] To summarize Ms. McAleer's plan, over a two-week cycle, Cole would be with his mother, his step-father and half-brothers in Truro from Sunday late afternoon or evening until Friday of the next week; that is, for about 12 days. From Friday after school until Sunday late afternoon, Cole would be with his father and his two other half-siblings. Notably, under this plan, Cole would virtually always be staying with one or the other set of his siblings.

Mr. Farnell's Plan

[34] Mr. Farnell's plan is now embodied in the order under appeal. Cole would live with his father in Springhill. After school, Cole would be in the care of an extended family member, most likely his paternal grandmother, until Mr. Farnell returns from work around 5:30 pm. The weekends would unfold as follows: Two weekends per month, Cole would remain with his father and Mr. Farnell's two other children. For two weekends per month, Cole would be with Ms. McAleer in Truro with his step-father and two half-brothers.

[35] Thus, a normal two-week cycle would look like this. Cole would be with Mr. Farnell in Springhill from Sunday late afternoon or evening until Friday of the next week; again, for approximately 12 days. During the weekend spent with Mr.

Farnell, his two paternal half-siblings would visit. On the second weekend in the cycle, Cole would be with Ms. McAleer, his step-father and two half-brothers in Truro from Friday after school until Sunday late afternoon.

[36] It is noteworthy that by this plan, Cole would have contact with both sets of step-siblings only on the weekends. Furthermore, because of Mr. Farnell's job, Cole would spend many of his week days after school with third party caregivers. Yet, because Ms. McAleer expected to work only part time, under her plan, Cole would be with her weekdays after school. Thus, there would be no need to secure third party caregivers.

[37] It is therefore clear from the above analysis that the order significantly reduces Cole's contact with his mother while increasing Cole's contact with third party caregivers. Respectfully, therefore, this order does not appear to reflect an attempt to maximize Cole's contact with both parents.

[38] Furthermore, this error, I believe, is serious enough to warrant our intervention. In reaching this conclusion, I accept that our role is not to usurp the trial judge's role in balancing the relevant **Gordon v. Goertz** factors. However, my concern is not with how this balancing exercise may have been achieved. Instead, I fear that the appropriate balancing exercise may not have been have been attempted. This, therefore, in my opinion, constitutes an error in principle serious enough to call for our intervention.

[39] I would therefore allow this ground of appeal.

The Appropriate Remedy

[40] A final issue involves the relief that must flow from this omission. We could "take a fresh look" and decide the final outcome as this court did in **Burns v. Burns** (2000), 182 N.S.R. (2d), or remit the matter for a new hearing as this court did in **Rafuse v. Handspiker** (2001), 190 N.S.R (2d).

[41] In all the circumstances, I believe that the Family Court is better suited to complete the factual analysis that was omitted in the first instance.

DISPOSITION

[42] I would therefore set aside the order and direct a new hearing before a different judge. Finally, I would make no order for costs in the circumstances.

MacDonald, C.J.N.S.

Concurred in:

Fichaud, J.A.

Murphy, J.