NOVA SCOTIA COURT OF APPEAL
Citation: *Doncaster v. Field*, 2019 NSCA 61

Date: 20190716
Docket: CA 477902
Registry: Halifax

Between:

Ralph Ivan Doncaster

Appellant

v.

Jennifer Lynn Field

Respondent

Judge:	The Honourable Justice Hamilton
Appeal Heard:	May 29, 2019, in Halifax, Nova Scotia
Subject:	**Family Law; Access; Voice of the Child Report**
Summary:	In the Nova Scotia Supreme Court, Mr. Doncaster sought access with his four children. During the hearing the parties agreed that he would have access with his two oldest children, then 17 and 16. The access provisions permitted him to write to the two oldest children by mail no more than once a month, care of Ms. Field. The two oldest children could directly arrange access with him if they wished. No agreement was reached with respect to the two youngest children, then 14 and 13. Relying heavily on the Voice of the Children report relating to the two youngest children, the judge denied Mr. Doncaster access with his two youngest children. Mr. Doncaster appealed that decision.
Issues:	Did the judge err in law when considering whether access was in the best interests of the two youngest children, by treating their wishes as determinative of their best interests or by

failing to apply the maximum contact principle set out in s.16(10) of the *Divorce Act*?

Result: Appeal allowed. The maximum contact principle between each parent and the children, provided for in s.16(10), **must** be considered in deciding what is in the children's best interests. The judge erred by failing to consider this principle. The wishes of the children are only one factor to be considered in deciding whether access will be granted. The judge's references to the Voice of the Children report throughout the pre-trial, hearing and in his reasons indicate he erred by treating the wishes of the children as determinative.

Mr. Doncaster shall have access with his two youngest children on the same terms that he has access with his two oldest children.

NOVA SCOTIA COURT OF APPEAL
Citation: *Doncaster v. Field*, 2019 NSCA 61

Date: 20190716
Docket: CA 477902
Registry: Halifax

Between:

Ralph Ivan Doncaster

Appellant

v.

Jennifer Lynn Field

Respondent

Judges:	Wood, C.J.N.S.; Hamilton and Farrar, JJ.A.
Appeal Heard:	May 29, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Hamilton, J.A.; Wood, C.J.N.S. and Farrar, J.A. concurring.
Counsel:	Ralph Doncaster, appellant in person Jennifer Field, for the respondent

Reasons for judgment:

[1] Ralph Ivan Doncaster appeals the May 22, 2018 Order of Justice Jamie S. Campbell which dismissed his application for access with his two youngest daughters, Grace, then 14, and Kate, then 13.

[2] For the reasons that follow, I would allow his appeal and grant an order for limited access.

Facts

[3] Mr. Doncaster and Jennifer Lynn Field, the respondent, have been litigants in this Court and in the Nova Scotia Supreme Court multiple times since they separated on January 29, 2011. Several of their appearances in court have involved Mr. Doncaster's access with his four children. The resulting decisions provide significant detail about the difficulties that gave rise to the present situation where Mr. Doncaster has not had access with Grace or Kate since 2012. I will only repeat here the background necessary to put this appeal in context.

[4] Justice J. Edward Scanlan, then a judge of the Supreme Court, gave oral reasons and on March 5, 2012 granted an interim order (1) preventing Mr. Doncaster from having any access or contact, direct or indirect, with his children and (2) requiring that a parental capacity and a psychological assessment be done of him. Following completion of these assessments, Mr. Doncaster's interim access application was heard by Justice Cindy A. Bourgeois, then a judge of the Supreme Court. At the end of that hearing on December 19, 2012, Justice Bourgeois addressed the parties orally indicating that Mr. Doncaster's access with his children would be reintroduced starting with letters to be vetted by the children's counsellor. Her written reasons were released on March 7, 2013 (2013 NSSC 85).

[5] On March 25, 2013, before Justice Bourgeois granted an order, Mr. Doncaster made a motion seeking an order requiring the children's counsellor to deliver his letters to his children. During the hearing of that motion before Justice Bourgeois, the children's counsellor indicated that she was no longer willing to vet the letters and that Mr. Doncaster had filed a professional misconduct complaint against her. Justice Bourgeois' written reasons dismissing Mr. Doncaster's motion were dated May 7, 2013 (2013 NSSC 149). Her subsequent July 5, 2013 Order provided that Mr. Doncaster would have no access or contact, direct or indirect, with his four children. She also ordered him to get medical treatment and cognitive

behavioural therapy to give him (1) insight into how his behavior is perceived by others and (2) strategies to enable him to conduct himself more positively. She ordered that he was not to initiate an access review for a minimum of three months.

[6] Mr. Doncaster's appeal of Justice Bourgeois' decision to this Court was dismissed (2014 NSCA 39). He was permitted to initiate another access review and an Order dated April 15, 2014 was issued. Leave to appeal to the Supreme Court of Canada was denied October 9, 2014.

[7] The parties were then divorced by Divorce Order and Corollary Relief Order dated December 3, 2014. Mr. Doncaster successfully appealed to this Court the equalization payment which he was ordered to pay to Ms. Field (2016 NSCA 25). This Court's Order, allowing this aspect of his appeal, was issued on April 12, 2016. Subsequently, the parties consented to an Amended Corollary Relief Order, which was granted on April 6, 2017 by Justice Campbell. It provided, among other things, that Ms. Field would consent to an access review no earlier than October 31, 2017.

[8] Accordingly, Mr. Doncaster again applied for access with his four children and a pre-trial conference was held with Justice Campbell on October 25, 2017. During this conference both parties agreed that a Voice of the Children Report would be prepared. With respect to such a report the judge stated:

> It would seem to me as though the Voice of the Child Report is … information critical to going forward isn't it?

Hearing

[9] The hearing itself commenced November 1, 2017. It was completed on March 22, 2018, with the judge giving his oral decision that is under appeal on the same day.

[10] During the hearing on November 1, 2017, the parties sought a short adjournment to negotiate potential agreement to give Mr. Doncaster access with his two oldest children, Max and Mia, then 17 and 16. The judge suggested they also discuss access with respect to the two youngest children, and asked the following question, suggesting they agree to be bound by the result of the Voice of the Children Report:

> Would there be any benefit to having a face-to-face discussion about the rest of the matter and if there's a Voice of the Child Report done, about some agreement

> as to abiding by the results of that report or if there's anything that you might be able to do to avoid more litigation in the matter?

[11] The agreement reached by the parties with respect to Max and Mia was read into the record:

> Ralph Doncaster shall have access with Max and Mia as arranged directly by Max and Mia with him. Jennifer Field shall provide Max and Mia with an email address and phone number to contact Ralph Doncaster. … Ralph Doncaster may write to Max and Mia by mail no more than once per month care of Jennifer Field at her requested mailing address. … the mailing address requested by Miss Jennifer Field will be provided to Ralph Doncaster within 10 business days of today …

[12] No agreement was reached with respect to access with Grace and Kate or with respect to the Voice of the Children Report being binding on the parties.

[13] Referring to the Voice of the Children Report to be prepared for Grace and Kate, the judge stated:

> [The Voice of the Children Report] will certainly give us some valuable information I expect in terms of the go forward on the matter.
>
> …
>
> I would encourage the parties, once you get the [Voice of the Children Report], to have some kind of discussion if you think it's necessary to have that moderated by the Court in some way, I'm prepared to do that.

[14] The December 14, 2017 Voice of the Children Report was prepared. It describes Grace and Kate as mature and doing very well academically, socially and recreationally. It also indicates they do not want to see their father.

Judge's Decision

[15] In his oral decision, Justice Campbell stated that his main concern was the best interests of Grace and Kate:

> The interests of their parents are not my main concern. My main concern [is] the best interests of those two adolescent girls. That's what my focus is on.

[16] He referred to the children's dignity, privacy and wishes:

> Fourteen year olds deserve to have their personal dignity respected. So do twelve year olds and I think respect in this context means not only having some due

> regard to their well being and their well considered wishes, but respecting their own rights to privacy.

[17] When considering what weight to give the Voice of the Children Report, the judge suggested the parents' agreement to have it prepared was important and that the wishes of Grace and Kate are entitled to "considerable weight", "inform the decision" and "are a factor to be taken into account":

> The weight to [give the Report] depends on a few things. It would appear as though that agreement to have one done would suggest that both parties thought it should be given some weight or there wouldn't be agreement to have it done.
>
> …
>
> … So you have a 12 year old and a 14 year old who are functioning at a very high level. Their … expression of their wishes is entitled to considerable weight. … Their wishes inform the decision. They are a factor to be taken into account.

[18] A significant portion of his oral decision is taken up with summarizing their wishes as set out in the Voice of the Children Report.

[19] The judge stated that the Report was not determinative, however his focus on the children's wishes and his criticism of Mr. Doncaster for not withdrawing his access application once he became aware of them suggests he, in fact, treated it as determinative:

> The Voice of the Child [Report] is, of course, not determinative but a parent upon reading what's contained in this report might take it as encouragement for a pause for some self reflection, a pause to ask why are my intelligent, mature for their age, well adjusted and now reasonably happy children expressing these kinds of views? Why? How can … I deal with their best interest in that case?
>
> Mr. Doncaster's response has been somewhat different. He contacted [Ms. Field's lawyer] proposing an access order involving counselling to help the girls resolve … "false negative memories", to help abate their fear of [their father].
>
> …
>
> These girls know what's going on. They're not young children who are unaware of the context. They know that they've spoken with Miss Cluett and that their wishes have been clearly expressed. They know what they want. They expressed what they want and they also know that their father, Ralph Doncaster, doesn't appear particularly to care what they say. His actions in continuing with this application feed into every concern they have expressed about Ralph Doncaster.
>
> …

> **This matter involves the children and their wishes. … They deserve to … have their wishes and … their privacy respected. … That said, Mr. Doncaster's motion is dismissed. It is a motion that should never have been brought. Having been brought it should have been abandoned as soon as the girl's wishes were made clear.** [Emphasis added]

[20] At no point in his reasons does the judge refer to the principle of maximum contact between parents and children provided for in s. 16(10) of the *Divorce Act*.

Issue

[21] The issue to be determined in this appeal is—did the judge err in law when considering whether access with their father was in the best interests of Grace and Kate, by treating their wishes as determinative of their best interests or by failing to apply the maximum contact principle set out in s. 16(10) of the *Divorce Act*?

Standard of Review

[22] In *Doncaster v. Field*, 2014 NSCA 39, Justice Oland sets out the applicable standard of review:

> [27] In *Haines v. Haines*, 2013 NSCA 63, Farrar, J.A., for the Court stated:
>
> > [5] This Court has consistently stressed the need to show deference to trial judges in family law matters. In the absence of some error of law, misapprehension of the evidence, or on the award that is clearly wrong on the facts we will not intervene. We are not entitled to overturn an order simply because we may have balanced the relevant factors differently. (*Hickey v. Hickey*, [1999] 2 S.C.R. 518, ¶10-12.)
> >
> > [6] Findings of fact, or inferences drawn from the facts are reviewed on a standard of palpable and overriding error. Matters involving questions of law are subject to a correctness standard. When the matter is one of mixed fact and law and there is an extricable question of law, the question of law will be reviewed on a correctness standard. Otherwise, it is reviewed on a palpable and overriding standard. (*Housen v. Nikolaisen*, 2002 SCC 33).

Analysis

[23] Section 16 of the *Divorce Act* authorizes a judge to make an order respecting access to children of a marriage. It provides in part:

> **Factors**

> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
>
> **…**
>
> **Maximum contact**
>
> (10) In making an order under this section, the court **shall** give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact. [Emphasis added]

[24] In *Young v. Young*, [1993] 4 S.C.R. 3, the Supreme Court of Canada considered the "best interests of the child" test in s. 16(8) of the *Divorce Act*. McLachlin, J. (as she then was) wrote at pp. 116-118:

> Parliament has adopted the "best interests of the child" test as the basis upon which custody and access disputes are to be resolved. Three aspects of the way Parliament has done this merit comment.
>
> First, the "best interests of the child" test is the only test. The express wording of s. 16(8) of the *Divorce Act* requires the court to look only at the best interests of the child in making orders of custody and access. This means that parental preferences and "rights" play no role. (emphasis in original)
>
> Second, the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has been left to the judge to decide what is in the "best interests of the child", by reference to the "condition, means, needs and other circumstances" of the child. Nevertheless, the judicial task is not one of pure discretion. By embodying the "best interests" test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all legal tests, it is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do.
>
> **Third, s. 16(10) provides that in making an order, the court shall give effect "to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child." This is significant. It stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider. By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this**

> **contact is maximized. The modifying phrase "as is consistent with the best interests of the child" means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted. But only to that extent. Parliament's decision to maintain maximum contact between the child and both parents is amply supported by the literature, which suggests that children benefit from continued access**: Michael Rutter, *Maternal Deprivation Reassessed* (1981), Robin Benians, "Preserving Parental Contact: a Factor in Promoting Healthy Growth and Development in Children", in Jo Tunnard, ed., *Fostering Parental Contact: Arguments in Favour of Preserving Contact Between Children in Care and Their Families* (1982). [Bold emphasis added]

[25] In *Gordon v. Goertz*, [1996] 2 S.C.R. 27, McLachlin, J. (as she then was) stated:

> [24] The second factor which Parliament specifically chose to mention in assessing the best interests of the child is maximum contact between the child and both parents. Both ss. 16(10) and 17(9) of the Act require that "the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child". The sections go on to say that for this purpose, the court "shall take into consideration the willingness of [the applicant] to facilitate" the child's contact with the non-custodial parent. **The "maximum contact" principle, as it has been called, is mandatory, but not absolute. The Act only obliges the judge to respect it to the extent that such contact is consistent with the child's best interests; if other factors show that it would not be in the child's best interests, the court can and should restrict contact:** *Young v. Young*, [1993] 4 S.C.R. 3, at pp. 117-18, *per* McLachlin J. [Emphasis added]

[26] Subsections 16(8) and (10) of the *Divorce Act*, effectively incorporated into a variation proceeding by virtue of s. 17(6), dictate that the best interests of the children is the only test to be applied in determining whether access will be granted and that the maximum contact principle between each parent and the children **must** be considered in deciding what is in their best interests.

[27] In his reasons, the judge referred to the best interests of the children as being his main concern, but he at no time mentioned or considered the maximum contact principle. As set out in the quote from pp. 116-118 of *Young* at paragraph 24 above, the maximum contact principle is a significant consideration as it is the only specific factor which Parliament has seen fit to single out as being something which a judge **must** consider when determining the best interests of a child.

[28] I am satisfied the judge erred by failing to consider the value to the children of having maximum contact with their father when he considered whether access of some kind with Mr. Doncaster was in the best interests of Grace and Kate.

[29] I am also satisfied from his references to the importance of the Voice of the Children Report, from the time of the pre-trial conference, through the hearing and in his reasons, that the judge erred by treating the children's wishes as determinative, despite his statement to the contrary. I repeat what he said in conclusion:

> This matter involves the children and their wishes. … They deserve to … have their wishes and … their privacy respected. … That said, Mr. Doncaster's motion is dismissed. It is a motion that should never have been brought. **Having been brought it should have been abandoned as soon as the girl's wishes were made clear**. [Emphasis added]

[30] The wishes of a 14 and 13 year old are certainly to be carefully considered in determining their best interests, but they remain only one factor among the conditions, means, needs and other circumstances of the children that a judge must assess in reaching a decision.

[31] Given these errors of law, I would allow Mr. Doncaster's appeal.

[32] The question is—what should be done now? Should access be referred back to a Nova Scotia Supreme Court judge for a fresh hearing or should we decide this issue? Given the record before us, including: the wishes of Grace and Kate set out in the Voice of the Children Report; the agreement the parties reached relating to access with Max and Mia; the time involved if the matter is sent back; the current age of Grace, now 15, and Kate, now 14; Ms. Field's indication that she is no longer afraid of Mr. Doncaster; Ms. Field's agreement that there was no evidence before the judge that Grace or Kate would be harmed by contact with Mr. Doncaster and that Justice Campbell's decision was not intended to be a final one, I would decide the issue rather than send it back.

[33] Mr. Doncaster did not make clear to Justice Campbell the nature of the "access" he was seeking with Grace and Kate. On appeal, he indicates he was seeking, at a minimum, written communication with them.

[34] Grace and Kate's indication that they do not wish to see their father is understandable given they have not had access with him for seven years, approximately one-half of their lives. They are now 15 and 14 years old and doing

well in the secure care that Ms. Field has provided. They have memories of their father's erratic and out-of-control actions that gave rise to the termination of his access. Since then, he has showed up in their lives once or twice without any warning.

[35] Section 16(10) mandates us to consider the principle that children should have as much contact with both parents as is consistent with their best interests. The literature suggests children benefit from access with both parents. Perhaps most importantly, Ms. Field agrees there is no evidence contact with Mr. Doncaster would harm the children and that it is extremely unusual for a parent not to have had access with his children for seven years.

[36] Taking all of this into account, I would order that Mr. Doncaster have access with Grace and Kate on the same basis as the parties agreed with Max and Mia, namely that he will have access with Grace and Kate as arranged directly by Grace and Kate with him. Ms. Field shall provide Grace and Kate with an email address and phone number to contact Mr. Doncaster. Mr. Doncaster may write to Grace and Kate by mail no more than once per month care of Ms. Field at the address she provided to him for Max and Mia.

[37] Mr. Doncaster will have no other contact or access with Grace and Kate. He shall not attend any events or activities that Grace or Kate are involved with or attend at their home or schools, unless he is invited by them or Ms. Field to do so. Hopefully Mr. Doncaster's compliance with this will reduce the concerns of Grace and Kate of him imposing on their privacy.

[38] Mr. Doncaster may apply for an access review no earlier than six months from the date of the Order to be issued allowing this appeal.

[39] The judge's Order that Mr. Doncaster pay costs of $5,000 to Ms. Field is reversed. If Mr. Doncaster has paid these costs, Ms. Field will return them to him forthwith. There will be no costs with respect to this appeal.

Hamilton, J.A.

Concurred in:

Wood, C.J.N.S.
Farrar, J.A.