NOVA SCOTIA COURT OF APPEAL
Citation: ***Fuller v Fuller***, 2006 NSCA 137

Date: 20061215
Docket: 269018
Registry: Halifax

Between:

Robbie D. Fuller

Appellant

v.

Eleanor T. Fuller

Respondent

Judges:	Bateman, Oland and Hamilton, JJ.A.
Appeal Heard:	December 4, 2006, in Halifax, Nova Scotia
Held:	Application to quash dismissed; appeal brought by appellant allowed per reasons for judgment of Bateman, J.A.; Oland and Hamilton JJ.A. concurring.
Counsel:	appellant in person Matthew Darrah, for the respondent

Reasons for judgment:

[1] The parties are divorced with a Corollary Relief Judgment (the "CRJ") granted in November, 1999. The respondent, Eleanor T. Fuller, applied to vary the CRJ. She sought to alter the appellant's child support obligations and his access with their two children, now ages twelve and fourteen.

[2] In May of 2006 they participated in a settlement conference, hoping to resolve the variation application short of a hearing. Ms. Fuller was present and represented by counsel, Mr. Fuller was self-represented and Justice Allan P. Boudreau of the Supreme Court of Nova Scotia presided. Over the course of three hours it was thought by all that they had reached agreement on the issues. Justice Boudreau summarized the agreed terms for the record.

[3] The drafting of a consent variation order was left to counsel for Ms. Fuller. As drafted by counsel the order contained a term for summer "Friday access" by the father, the details of which I will discuss below. A revised form of order was prepared by the judge and issued. Mr. Fuller has appealed from that order. It is the Friday access provision which concerns him. Ms. Fuller has applied to quash the appeal, or, in the alternative, asks that it be dismissed.

[4] The parties acknowledge that they agreed to some form of Friday access during the settlement negotiations although it was not mentioned in the summary placed on record. Mr. Fuller says this part of the order does not reflect his understanding of their agreement.

[5] As initially drafted by counsel for Ms. Fuller, the provisions read:

> 2(b) From the last week of school prior to summer vacation until the first week of the new school year, the Respondent shall have the children every second weekend. During this time the Respondent shall have the children earlier on Friday if he is not working on that day.

[6] Upon receiving the draft from counsel for Ms. Fuller, Mr. Fuller took issue with the wording of this clause and some of the other terms of the order. In a letter of June 6, 2006 he communicated these concerns to counsel. In respect to the "Friday access" provision he said:

> Item 2 b) the agreement to which we consented indicated that I was to have the children Friday's. The section which states "if he is not working that day", was never part of the agreed upon points. I was to get the children for the entire day on Friday and this was supposed to be part of my time with the children, to make up for the time the children were losing. [Mr. Fuller had access every summer weekend prior to this variation.]

[7] Counsel responded by letter of June 9. He advised that Ms. Fuller would agree with the change suggested for item 1(b). However:

> . . . she does not agree with the changes you suggested in items 2(b), 3(a)(c) and (d). During the settlement conference, it was agreed that you could have an extra parenting day with the children on Friday of each week, provided that you were not working. Ms. Fuller only agreed with that extension on the basis that you would have those days off. If you were not working on Fridays, the children would be spending their time with Ms. Wanda Fuller [Mr. Fuller's now wife] and Ms. Eleanor Fuller pointed out that the children would rather spend their time with their mother, if you were not at home.
>
> . . .
>
> If you are still not in agreement with items 2(b), 3(a)(c) and (d), then the only way to confirm the contents of the agreement would be to appear before Justice Boudreau, since the conference itself was held off the record. I have canvassed this issue with Justice Bureau's assistant, who requested that I provide the Court with a copy of the draft Consent Order. Judge Boudreau will review the transcript of the agreement placed on the record at the end of the conference, and if he finds that the Order to be consistent with what was agreed to, he will issue it at that time. However, if there are terms that were not clarified during the conference, a phone conference will be scheduled. If we are not able to come to an agreement at that time, I will be taking steps to have a hearing scheduled for this matter. . . .

[8] On June 12th counsel forwarded to Justice Boudreau Mr. Fuller's June 6th letter and the draft order. On June 14th Mr. Fuller replied to counsel. He wrote, in part:

> Please carry through with having Justice Boudreau's review of the order. I also ask that you forward both pieces of correspondence, yours of June 9th and mine of June 6th highlighting the areas of disagreement.

> I perhaps didn't clarify my concern well enough on clause 2 b). My problem with this clause is the "earlier on Friday" section. It had nothing to do with me taking the children even if I was working, as I have every intention of being off work this day. My problem was that I wanted the entire day and no confusion if I wanted to pick them up first thing in the morning.

[9] On June 21st counsel wrote to the judge:

> Pursuant to Mr. Fuller's request of June 14, 2006, please find enclosed a copy of my June 9, 2006 correspondence to Mr. Fuller, outlining Ms. Fuller's position on the proposed changes to the varied Corollary Relief Judgment. Ms Fuller has advised me that Mr. Fuller has rescinded his waiver of his right to the Child Tax Benefit, as he is not in agreement with the entirety of the Order agreed upon May 24, 2006. Mr Fuller is also unilaterally changing the access arrangements with the children causing them great distress. If Your Lordship were to require further explanation of these concerns, I would be prepared to participate in a telephone conference with Mr. Fuller.

[10] There were no further communications between the judge and the parties. On June 28th a "Consent Variation Order" issued. The judge had redrafted certain parts of the order, presumably in an effort to give effect to the concerns outlined in Mr. Fuller's June 6th letter. Clause 2(b) became:

> 2(b) From the last week of school prior to summer vacation until the first week of the new school year, the Respondent shall have the children every second weekend. During this time the Respondent shall have the children earlier on Friday if he is available.

[11] Mr. Fuller says his understanding of both the parties' agreement and the wording proposed by counsel was that he would have the children every Friday during the summer. He thought the phrase "during this time" referred to the period running from the last week of school prior to summer vacation until the first week of the new school year - during which period he was to have the children each Friday. Ms. Fuller apparently understood the agreement to be that he was to have Friday access only adjacent to his weekend access during the summer months. Mr. Fuller has only learned of their different interpretations since the CRJ was issued. He remains concerned about the vagueness of the Friday pick-up time for the children.

[12] Citing s. 39 of the **Judicature Act**, R.S.N.S. 1989, c. 240, counsel for Ms. Fuller says this appeal should be quashed because, *inter alia*, no appeal lies from a consent order:

> 39 No order of the Supreme Court made with the consent of the parties is subject to appeal, and no order of the Supreme Court as to costs only that by law are left to the discretion of the Supreme Court is subject to appeal on the ground that the discretion was wrongly exercised or that it was exercised under a misapprehension as to the facts or the law or on any other ground, except by leave of the Court of Appeal. RS, c. 240, s. 39; 1992, c. 16, s. 60.

[13] While the interpretation of s. 39 is not entirely clear (i.e. whether an appeal may lie with leave of the court), (**Irving v. Irving** (1997), 164 N.S.R. (2d) 330 (C.A.)), there is strong authority for the view that a consent order, save for exceptional circumstances, cannot be the subject of an appeal (**Brown v. Brown** (1999), 173 N.S.R. (2d) 41 (C.A.); see also **Messom v. Levy** (1997), 159 N.S.R. (2d) 252 (C.A.)).

[14] Therefore the threshold issue is whether the Order on appeal is, in fact, a consent order. In **Lund v. Walker**, [1931] S.C.R. 597 the Supreme Court of Canada considered the nature of a "consent judgment". There, in the midst of a trial and after an unfavourable evidentiary ruling, the plaintiff asked that the action be dismissed on his undertaking to pay costs. While that relief was the most the defendant could have gained, had the action proceeded, the defendant expressly refused to consent to that resolution. The judge dismissed the action with costs, noting on the record that it was done at the request of plaintiff's counsel. The plaintiff appealed asserting the judge had erred in the evidentiary ruling. A question arose as to whether the judgment amounted to a consent order which could not be appealed. Section 23 of the applicable **Judicature Act** was the equivalent of our s. 39. Because the defendant had refused to consent to the order for dismissal, Anglin, C.J.C., for the majority of the Court, concluded that it was not a consent judgment. He wrote at p. 597:

> A judgment by consent within s. 23 is a judgment determining an issue between parties to the litigation with the consent of the parties to the issue so determined. It is only when the "parties' consent that the right of appeal is taken way. It is not for the court to extend the scope of the section so as to deprive a litigant of a right to appeal unless he comes within the express language of the Act.

[15] Here, at the conclusion of the settlement conference the judge said:

> Mr. Darrah [counsel for Ms. Fuller] would you prepare the order. It'll be a consent order, consented by either yourself or Ms. Fuller and a place for the consent of Mr. Fuller so that Mr. Fuller can review the terminology of the order and satisfy himself that it accurately reflects what we've just put on record.

[16] Clearly it was contemplated that the wording contained in the order would be that agreed by the parties. While the summer Friday access was not directly addressed on the record, there is no dispute that it was a part of the negotiations.

[17] The judge's motives here in altering the draft order to give effect to what he understood the settlement to be were well intentioned. However, here, where the particulars of the Friday access were not outlined on the record, the parties should have been afforded an opportunity to review the revised order to ensure that it accurately reflected the terms to which they had agreed. This was not done. The order that issued was not a consent order. In fact, the order that issued does not reflect the wording agreed to by either party, although Ms. Fuller has not objected to its contents.

[18] The judge made a fatal procedural error by issuing an order not agreed to by either party, effectively denying them the right to a hearing. This was not a situation where the agreed terms were clearly reflected in the record and needed only to be committed to writing. There was no reference on the record to the provision which is now in dispute. Had the parties been heard on the wording of the order, a mutually acceptable resolution may have been reached. Alternatively, it might have been discovered that there was, in fact, no agreement at all with respect to the Friday access.

[19] In my view we have no alternative but to remit the matter in its entirety to the Supreme Court. It is hoped that the parties will take advantage of the significant progress they have made in settling the issues in dispute and find common ground on those that remain. Failing that, there must be a hearing on Ms. Fuller's application to vary.

[20] I would dismiss the application to quash, allow the appeal brought by Mr. Fuller, set aside the Order and direct a hearing of Ms. Fuller's application to vary. The hearing shall be before a different judge of the Supreme Court.

[21] In these unfortunate circumstances, there will be no costs of the appeal.

Bateman, J.A.

Concurred in:

Oland, J.A.

Hamilton, J.A.