IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *A.H. v. R.B.*, 2022 NLCA 9
Date: February 15, 2022
Docket Number: 201901H0063

BETWEEN:

A.H. APPELLANT

AND:

R.B. RESPONDENT

Coram: Fry C.J.N.L., Hoegg and Goodridge JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, Family Division 201602F1000 (2019 NLSC 103)

Appeal Heard: October 21, 2021
Judgment Rendered: February 15, 2022

Reasons for Judgment by: Fry C.J.N.L.
Concurred in by: Hoegg and Goodridge JJ.A.

Counsel for the Appellant: Self-Represented
Counsel for the Respondent: Amanda J. Summers

Authorities Cited:

CASES CITED: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014; *J.W. v. M.G.*, 2018 NLCA 40, 3 C.A.N.L.R. 97; *Slade v. Slade*, 2001 NFCA 2, 197 Nfld. & P.E.I.R. 4; *Winsor v. Winsor*, 2017 NLCA 54, 2 C.A.N.L.R. 179; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259; *Cabana v. Newfoundland and Labrador*, 2014 NLCA 34, 356 Nfld. & P.E.I.R. 103.

STATUTES CONSIDERED: *Children's Law Act*, RSNL 1990, c. C-13, section 31; *Family Law Act*, RSNL 1990, c. F-2; *Divorce Act*, RSC 1985, c. 3 (2nd Supp), section 16.

REGULATIONS CONSIDERED: *Child Support Guidelines Regulations*, NLR 40/98, section 7.

Fry C.J.N.L.:

[1] The appellant seeks to overturn an order of equal shared parenting of the parents' five-year-old child. She seeks sole custody or alternatively a new trial as well as corresponding changes to the child support and special expenses order. The appellant also claims the judge made procedural errors and interacted with her in a manner that raised a reasonable apprehension of bias.

BACKGROUND

[2] A.H., the mother, and R.B., the father, have one child, born in September of 2016. Following several interim orders, a five-day hearing to deal with the issues of parenting and financial support was scheduled for October 29, 2018. The mother and her legal counsel attended two proceedings in September of 2018 and the dates for trial were confirmed each time.

[3] The mother's counsel attended court on October 29, 2018 and sought leave to withdraw due to a breakdown in the solicitor-client relationship with the mother. The mother had, on October 17, 2018, filed a notice of intention to proceed in person with the court. Counsel advised the court that she had been unable to reach the mother or serve her with any documents. Her application to withdraw was granted.

[4] The mother did not attend court on the scheduled trial dates.

[5] The judge found that the mother's failure to attend without proper excuse delayed resolution of the matter with the effect of denying the possibility of the father having increased parenting time with their child. The trial did not proceed despite the request of the father's counsel.

Interim Application and Order

[6] Leave was granted for an interim application, which was heard on November 27, 2018 with both parents present and appearing with counsel. The applications judge found that it was in the child's best interests that the mother and the father have joint custody and shared parenting (2018 NLSC 247). His order, to be phased in over two months, resulted in the father having weekly parenting time as follows: Saturday from 8:30am – Sunday 8:30am, Tuesday 5:30pm – Wednesday 5:30pm, and Thursday 8:30am – Friday 8:30am. According to that order, the father was to have three full days and the mother four full days of parenting each week. Trial dates were rescheduled for March 25-27, 2019.

The Trial and Order

[7] At trial, the father sought shared and equal parenting, proposing an alternating weekly schedule. The mother opposed the application submitting that either it was best to continue with the existing parenting schedule, or to have the father's parenting time reduced by one night. The mother also sought an order for child support, on both a retroactive and go forward basis, as well as special or extraordinary expenses under section 7 of the *Child Support Guidelines Regulations*, NLR 40/98.

[8] The judge, in his decision of May 17, 2019 (2019 NLSC 103), made two orders, one pertaining to the parenting arrangements and the other pertaining to financial support. As the parents were unmarried, those orders were made pursuant to the *Children's Law Act*, RSNL 1990, c. C-13, and the *Family Law Act*, RSNL 1990, c. F-2, respectively.

[9] He ordered that the existing shared parenting schedule was to continue until August 16, 2021, (when the child would be turning 5 and starting kindergarten) at which point the parents would transition to an equal shared parenting arrangement on a 2-2-3 day rotation.

[10] He further ordered that the father was to pay the mother $1,523.50 in retroactive child support and section 7 childcare expenses incurred from October 1, 2016 until January 31, 2019.

[11] The judge then addressed child support and the section 7 childcare expenses incurred after February 1, 2019. Based on the parents' incomes, the judge ordered the father to pay $506 a month in child support and the mother to pay $522 a month in child support from February 1, 2019 onwards. The judge offset the amounts resulting in a payment by the mother to the father of $16 a month in child support.

[12] The judge ordered that the section 7 expenses be shared between the parents proportionate to their incomes (49.3% for the father and 50.7% for the mother).

[13] The judge also ordered that the parents recalculate the child support and sharing of section 7 expenses annually starting on June 1, 2020, using the previous year's CRA Notice of Assessments.

The Appeal

[14] Between July 16 and September 24, 2019, the mother filed several applications that were heard and disposed of by this Court, and on October 1, 2019, the mother filed a Notice of Appeal appealing both the parenting order and the financial support order. The mother now seeks sole custody of the child and corresponding changes to the child support and special expenses order. Alternatively, she asks this Court to remit the matter for a new trial.

[15] Between October 1, 2019 and May 6, 2020 several further procedural applications by the mother were heard in this Court and, on May 6, 2020, the parties were given dates to complete the filing of materials and a hearing date for the appeal was set for September of 2020.

[16] The mother further requested and was granted multiple extensions to file her materials between July of 2020 and April of 2021. The appeal was perfected in June of 2021 with a hearing scheduled for October 21, 2021.

[17] At the time of the appeal, the child, now five years old, had been in a shared parenting arrangement for nearly three years.

ISSUES

[18] The issues on appeal arising from the decision of the trial judge are as follows:

1. Did the trial judge err in finding that equal shared parenting was in the best interests of the child?

2. Did the trial judge err by denying the mother, as a self-represented litigant, adequate procedural fairness?

3. Did the trial judge's interactions with the mother during the hearing create a reasonable apprehension of bias?

STANDARD OF REVIEW

[19] The Supreme Court of Canada has stated that the applicable standard of review for questions of law is correctness and for questions of fact and mixed fact and law is palpable and overriding error (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235). And, further, that deference must be shown to discretionary decisions made in a parenting context (see *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014).

[20] This Court provided a fulsome discussion of the standard of review pertaining to appellate review of a trial judge's decision involving parenting of a child in *J.W. v. M.G.*, 2018 NLCA 40, 3 C.A.N.L.R. 97, and concluded:

> [32] ... the trial judge's decision is afforded deference, as a starting principle. This Court must be satisfied that a material error, or error in principle, has been made by the trial judge before it can undertake a "fresh assessment of the evidence" or disturb the trial judge's findings.

[21] Decisions involving the best interests of the child are by their very nature discretionary and this Court has frequently held that a trial judge's fact-based and discretionary decision in a family law context "should not be disturbed absent an error in principle, a significant misapprehension of the evidence or an award which is clearly wrong" (see *Slade v. Slade*, 2001 NFCA 2, 197 Nfld. & P.E.I.R. 4, at para. 10; *Winsor v. Winsor*, 2017 NLCA 54, 2 C.A.N.L.R. 179, at para. 9).

ANALYSIS

Issue 1

Did the trial judge err in finding that equal shared parenting was in the best interests of the child?

[22] The mother submits that the judge's decision is not entitled to appellate deference as the judge committed errors in principle, including misapplying the law and making findings of fact not based on evidence.

[23] The mother argued that the judge erred by applying a presumption of shared parenting as the default position and that the best interests of the child should override the maximum contact principle referenced in section 16 of the *Divorce Act*, RSC 1985, c. 3 (2nd Supp).

[24] The parties were never married and the judge did not rely on or reference the maximum contact principle in his decision. The judge's decision presents an accurate description of the law and principles with respect to shared parenting. He stated, "Section 31 of the *Children's Law Act* compels me to consider [the child's] best interests." The judge goes on to say, "there is no presumption for joint custody and equal sharing of parenting." He noted that this Court "rejected the presumption of shared parenting in *Pumphrey* in the divorce context and in *MacDonald v. MacDonald* in the *Children's Law Act* context" (see 2019 NLSC 103, at paras. 19-20; citations omitted).

[25] The mother also submitted the judge should not have ordered shared parenting based on the past and present behaviours of the father towards her. During her testimony at trial, the concerns she raised were that the father had the child's hair cut two days earlier than he had told her, the child's picture was posted on the daycare's Facebook group and the father did not tell her about a Christmas party at the daycare.

[26] At trial, the judge reviewed the evidence, which supported the finding that the mother enrolled the child in the daycare, that she was the primary contact and that she had signed forms which permitted the daycare to post pictures on Facebook. The father could not be held responsible for actions or lack thereof by the daycare.

[27] Regarding cutting the child's hair, the father testified that he must have accidentally said Thursday in the text when he meant Tuesday. The judge accepted his response but advised him it should not happen again, and that repeating this behaviour could indicate a control issue. There was no further evidence put before the court that this was anything other than a onetime issue.

(See Transcript, March 26, 2019, at 11, 13, 14)

[28] The mother also submitted that, based on her observations, the child was suffering from sleep deprivation due to time spent with the father. The father testified that the child slept well, was full of energy and did not demonstrate any signs of sleep deprivation. There was no evidence called from daycare workers or any other service provider to support the mother's contention that the child was suffering from the effects of sleep deprivation. The judge did not find that

there was sufficient evidence to support the mother's position that overnight access with the father should be limited.

[29] In determining that shared parenting was in the best interests of this child, the judge not only considered the factors set out in section 31(2) of the *Children's Law Act*, but also that the parties had agreed to shared parenting prior to the commencement of the hearing on March 25, 2019. This negated the necessity of calling a number of witnesses, which the parties had planned to call, as neither party was contesting the parenting of the other. The judge gave the parties time at the beginning of the hearing to step outside the courtroom and encouraged them to see if they could work out an appropriate schedule. As they were unable to do so, the hearing continued.

[30] At the time of trial, the father was parenting three days per week and the mother was parenting four days per week. The father was looking for an extra half day. The trial transcript confirms that the mother, in referring to the November 2018 order stated: "Again, I'm not looking for changing any orders or anything. Moving time around…" and later by the Court: "Dad is looking to alter that. Every second weekend he gets another overnight on the weekend. So he's looking for three and a half days. So we're talking about a half a day…" and the mother: "I'm not opposed to that half-day. I think time is absolutely valuable." The testimony from both parties, and cross-examination, provided the judge with information to assist him in ordering the very detailed parenting order described in his decision.

(Transcript, March 25, 2019, at 9 and 23)

[31] The judge observed that the parents agreed that it was in the best interests of their child to spend time with both parents and that they had settled into co-parenting. Both testified that they were generally satisfied with the co-parenting interim order, although the mother would have liked one less overnight and the father would have liked an additional half day.

[32] In making the 53 paragraph parenting order, the judge rejected the father's request for three days one week and four days the next week on the basis that the child was too young for that type of parenting plan. Instead, the judge found that it was in the child's best interests to provide the parents with a detailed gradual transitional schedule, which would, by the time the child turned five years old, consist of a 2-2-3 shared parenting rotation.

[33] The judge was in the best position to assess the facts based on the evidence presented at the hearing. A review of the transcript and the decision

reflect that the judge carefully considered the submissions of the parties and focused on the best interests of the child. Given that the parents were approximately a half day away from equal shared parenting, the decision could not be characterized as unreasonable.

[34] The mother has not established any palpable and overriding error committed by the judge in his assessment of the evidence put before him during the hearing, nor in his application of it to the principle of shared parenting and the best interests of the child.

[35] The financial order for retroactive and ongoing child support and sharing of childcare expenses was determined in the context of the shared parenting arrangement. The judge also provided for an annual recalculation based on the parents' incomes. No other adjustments are required as long as shared parenting continues. Should that change in the future either party would be able to make a variation application.

Issue 2

Procedural Unfairness

[36] The mother frames this issue in terms of proper trial procedure and alleges three specific types of errors made by the trial judge.

(a) Did the trial judge err in not following proper trial procedure when the self-represented appellant claimed that her lawyer left her in a legal lurch?

[37] The mother claims she was "left in a legal lurch" by counsel. The mother, being dissatisfied with her previous counsel at the time, filed a Notice of Intention to Act in Person on October 17, 11 days before the original trial scheduled for October 28, 2018. The transcripts of proceedings filed with the appeal show that her next counsel clearly stated on both November 27, 2018 at the hearing of the interim application, and on a further application heard on January 31, 2019, that he had been retained for each of those appearances on a "limited scope". He specifically stated he was not representing the mother at the hearing scheduled for March 25-27, 2019. The mother was present at each of those hearings. At the commencement of the trial, she advised the court that she was self-represented and made no request for postponement.

[38] The judge made no error in proceeding with the trial, especially since the matter involved parenting of a young child and the mother's lack of attendance caused the postponement of the previously scheduled trial.

(b) Did the trial judge err in not properly ensuring the appellant had notices of court dates?

[39] The mother submits that the court did not ensure she received key notices of court dates.

[40] The mother claims in her factum that it is unclear how the trial dates commencing on October 29, 2018 were secured. In fact, the mother was present in court when the dates were set. The transcript of the September 11, 2018 trial readiness hearing states that trial would proceed on October 29, 2018 with five days reserved. The mother and her then counsel were both present when the date was set and participated in discussions about potential witnesses to be called.

[41] The mother further submits that the judge made the interim order following the November 27, 2018 application without any input from her. The transcript of the hearing reveals that the mother was present, represented by counsel, and submitted a two hundred paragraph affidavit in response to the interim application for consideration by the judge. His written decision and interim order followed.

[42] The mother was also in attendance, with counsel, at a further application heard on January 31, 2019. The mother was present in court when the dates for the rescheduled March 25-27, 2019 hearing were set, she appeared on those dates and represented herself.

[43] The mother also claims that she was "completely unaware that the judge had written his final decision including two orders on May 17, 2019." She submits that she was not advised of the judge's decision or the subsequent formal orders arising until they were filed on September 6, 2019.

[44] The transcript of September 5, 2019 relates to a hearing called to discuss issues pertaining to the finalization of the draft orders. The transcript indicates that the Registry called the mother to advise that the decision was filed on May 17, 2019 and she advised that she was going out of town and to use her work email address. The mother outlined to the court that the father's counsel was contacting her during May and June of 2019, at the work email address she requested be used, to discuss finalization of the orders arising out of the May

2019 decision. This suggests that she was aware that the decision of the court had been rendered and that the orders were being prepared. The mother was also in discussion with the Registry of this Court and filed two applications in July of 2019 pertaining to her appeal of the judge's decision.

[45] There is no evidence to support that the mother was uninformed of key notices of court dates. There is no evidence to support that she was uninformed that the decision following the March 2019 hearing had been filed or that her input was being sought with respect to the filing of the formal orders. There is no merit to this ground of appeal.

(c) Did the trial judge err by issuing court orders absent any substantive decisions grounding same?

[46] The orders that the mother is seeking to appeal were filed after a hearing and were accompanied by a written decision, which was contained in the mother's appeal book. There is no merit to the suggestion that there is no substantive decision grounding the orders.

Issue 3

Did the trial judge's interactions with the mother during the hearing create a reasonable apprehension of bias?

[47] The mother submits that the judge dealt with her "in a somewhat condescending, abusive and dismissive manner."

[48] The test for bias or reasonable apprehension of bias described in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at 394-395, and confirmed in *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, at paras. 59-60 and 76, set out the following principles:

- A judge's impartiality is presumed and a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified.

- The criterion of disqualification is the reasonable apprehension of bias.

- The question is what would an informed, reasonable and right-minded person, viewing the matter realistically and

> practically, and having thought the matter through, conclude. Would they think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly?

- The grounds for apprehension must be substantive.

[49] In the present case, the mother is calling the judge's personal integrity into question, as the alleged bias towards her consists of comments made by the judge that the mother interpreted as disparaging. She alleges the comments occurred not only during the trial, but also during the interim applications and other case management hearings leading up to the trial.

[50] Neither the mother nor her counsel, who represented her at the interim applications on November 27, 2018 and again on the January 3, 2019, suggested any perceived bias towards her that would impact the judge's ability to decide the matter with an impartial, open mind. Nor was there any request or application for the judge to recuse himself from hearing the matter.

[51] The mother's factum contains multiple examples where she suggests the judge lectured her, was dismissive of her arguments, or was condescending to her. A thorough review of the transcript reveals otherwise. A few examples follow.

[52] The mother stated the judge gave her a lengthy lecture to the point that it was "extremely abusive and inappropriate". She refers to pages 27 and 28 of the March 25, 2019 transcript. A review of the transcript reveals that the judge was encouraging both parties to settle the details of the parenting schedule. The judge stated that he would make a decision if the parties could not. He suggested that judges encourage parties to settle and come to their own agreement rather than have a judge, a virtual stranger to the parties and their children, decide the matter of parenting and what is best for the child. As the parties indicated that they were having discussions, the judge gave them time to leave the hearing room to see if they could resolve some of the scheduling issues related to parenting time. I do not consider this discussion by the judge abusive or inappropriate.

[53] The mother gave an example, on page 60 of the March 25, 2019 transcript, where she submitted that the judge cut her off while she was trying to explain the child's emotional distress. A review of this portion of the transcript reveals a discussion of scheduling, retroactive child support and the effect on the

child of overnights on weekdays. The mother then began asking about a witness waiting outside the courtroom indicating that she did not know that the witness would be there today. The transcript shows that the judge stopped the mother to discuss protocols around potential witnesses who were subpoenaed for the father. She was not discussing the child directly at this time.

[54] The mother submits that the judge argued with her and spoke to her in a degrading manner during the discussion about the right of first refusal to pick up the child at daycare. A review of the March 26, 2019 transcript at pages 60 and 61 reveals a short discussion about the length of time requested. The mother requested 60 minutes and the judge said, "Okay – you say 60." There was no further comment on this issue.

[55] At paragraph 36 of her factum, the mother says, "The remainder of the transcript is replete with evidence of manipulative, controlling and abusive behaviour of the father of the child including, as an example, posting pictures of the child on Facebook without the mother's permission, tricking the mother in terms of when the child would be picked up or would have a haircut or would attend a Christmas party...". These issues have been earlier addressed.

[56] As previously discussed, the burden is upon the mother to establish an apprehension of bias on a balance of probabilities. The burden is a heavy one and a mere suspicion or possibility of bias will not suffice.

[57] The mother references *Cabana v. Newfoundland and Labrador*, 2014 NLCA 34, 356 Nfld. & P.E.I.R. 103, in her factum and suggests that the use of hostile and intemperate language can raise a reasonable apprehension of bias. I agree.

[58] However, a thorough review of the transcript in the trial and other related proceedings does not rise to a level that could be defined as "hostile and intemperate". The language used by the mother in her factum to describe her interactions with the judge as "shocking" and "ominous", compared with a reading of the transcripts by a reasonable person, underscore the importance of the principle that the grounds be substantial and not be related to the "very sensitive or scrupulous conscience" (see *Committee for Justice and Liberty*, at 395).

[59] The mother has not established on the balance of probabilities that the judge's management of the trial could have raised a reasonable apprehension of bias to an informed person. On the contrary, at the conclusion of the hearing, the

judge complimented the mother, stating: “For not being a lawyer, you’ve done a very good job, so I’m impressed with that.”

(See Transcript, March 26, 2019, at 240)

COSTS

[60] The mother sought costs in the amount of $34,010.00, which included the costs of legal fees from four private law firms, costs of transcript preparation and personal time off work.

[61] The father characterized this appeal as a frivolous one and submitted that the mother should not be entitled to a costs award. The father’s position was if successful on appeal, he would not seek a costs award against the mother, as it would ultimately impact the child.

DISPOSITION

[62] I would dismiss the appeal for the foregoing reasons with no order as to costs.

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D. E. Fry C.J.N.L.

I concur:_____

L. R. Hoegg J.A.

I concur:_____

W. H. Goodridge J.A.