COURT OF APPEAL FOR ONTARIO

CITATION: Perron v. Perron, 2012 ONCA 811
DATE: 20121123
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Blair, Rouleau and Hoy JJ.A.

BETWEEN

Monique Denise Perron (now Waring)

Applicant (Respondent)

and

Joseph Ferdinand Dave Perron

Respondent (Appellant)

Mark Power, François Larocque and Jo-Anne Thibodeau, for the appellant

Aaron Franks, Michael Zalev and Kathryn Junger, for the respondent

Heard: March 27, 2012

On appeal from the order of Justice Alan C.R. Whitten of the Superior Court of Justice dated March 8, 2010, with reasons reported at 2010 ONSC 1482, 91 R.F.L. (6th) 110.

Rouleau J.A.:

A. INTRODUCTION

[1] The respondent appeals an order granting the mother custody of the parties' three children and providing the appellant with access rights.

[2] On appeal, the appellant maintains that the trial judge should have considered whether it was in the best interests of the children to include

homogeneous French-language education as a condition of granting custody to the respondent. He asks this Court to order the respondent to enrol the children in a homogeneous French-language school.

[3] This appeal therefore raises a fundamental question: in the context of determining custody, what importance should be placed on the children's language of instruction?

[4] For the following reasons, and despite the fact that in my view the trial judge committed an error, I would dismiss the appeal. The error here was the failure to consider ordering homogeneous French-language schooling as a condition of the custody order. At the time of trial, there were factors that militated both for and against including such a condition. In my view, however, time is the decisive factor in this case. Given the time that has passed, it would not be in the children's best interests to order now that they change schools, in spite of the advantages generally provided by homogeneous French-language education.

B. FACTS

[5] The appellant and the respondent were married on August 31, 1996. They have three children: William, born in 2002, Matthew, born in 2004 and Emma, born in 2005.

[6] The appellant is a French speaker, whose first language learned and still understood is French. He learned English as an adult. He works as a teacher at

École élémentaire catholique Monseigneur-de-Laval, located in Hamilton, which is a homogeneous French-language school in the Conseil scolaire de district catholique Centre-Sud. He speaks to his children in French and wants them to develop both French language and culture. The father's family is also French speaking.

[7] The respondent is an English speaker who has some knowledge of French. She works for the Department of National Defence in Hamilton. The respondent helps her children with their homework in French and converses with them in French when they address her in that language. Her mother, Mona Waring, the children's maternal grandmother, is a Francophone and is bilingual in French and English. She lives near the respondent, and visits often. She talks to the children in French and reads with them in that language.

[8] The appellant's and the respondent's wills expressed the desire that their children attend a homogeneous French-language school.

[9] The parties separated on September 1st, 2006. At that time, William, the eldest child, was enrolled in Junior Kindergarten in a Catholic homogeneous English-language school, St. Mark Catholic Elementary School, located near the respondent's home.

[10] Since September 2007, William has been enrolled in a French immersion program at St. Eugene Catholic Elementary School, located in Hamilton.

Matthew and Emma are also registered in the French immersion program at that school. From Grade 1 to Grade 8, their classes are taught 50 percent in French and 50 percent in English.

[11] Initially, the appellant agreed to enrol William in the French immersion program at St. Eugene Catholic Elementary School. He subsequently opposed those educational plans, and now wants his three children to attend a homogeneous French-language school. As for the respondent, she wants her children to receive education in both French and English as occurs in a French immersion program.

C. DECISION BY THE SUPERIOR COURT OF JUSTICE

[12] At the trial, the appellant asked for sole custody or, in the alternative, joint custody of the children. The respondent asked for sole custody. The appellant also asked for an order stipulating the children's enrolment in a homogeneous French-language school.

[13] The disputed issues at trial were custody of the children and the financial obligations of the parties. The custody dispute focussed on the parenting skills of the parties and the language of the children's education. The trial judge assessed the merits of the respondent's request for sole custody in light of the best interests of the children.

[14] After a 10-day bilingual trial, the trial judge concluded that it was in the best interests of the children to grant custody to the respondent and access rights to the appellant. The trial judge's reasons include numerous findings of fact that are not favourable to the appellant and that support his decision not to grant joint custody to the parties. What the reasons do not address is the possibility of granting custody to the respondent and also making an order directing the children's language of education.

D. ISSUES

[15] The appellant maintains that the trial judge erred in his treatment of the children's language of education. In oral argument, the appellant abandoned his request for joint custody as well as his appeal on issues relating to the equalization of net family property. For this reason, the discussion that follows focuses solely on one incident of custody, namely the children's language of education.

[16] On appeal, the disputed issues are as follows:

(1) Did the trial judge err by failing to consider whether it was in the best interests of the children to make a custody order with a condition about the children's language of education?

(2) If there was such an error, should this court make the conditional order on appeal?

(3) What is the appropriate remedy?

E. ROLE OF FRENCH LANGUAGE

[17] The French language has special status in both Canada and Ontario. For example, access to homogeneous French-language schools is guaranteed by s. 23 of the *Charter.*[1]

[18] The education offered in a homogeneous French-language school is quite distinct from what is provided in a French immersion program. A homogeneous French-language school responds to the cultural and linguistic needs of the Francophone community. In contrast, the French immersion program is designed for English speakers in an English-language majority environment and provides bilingual instruction – usually 50 per cent in French and 50 per cent in English. See *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, at para. 50.

[19] In Ontario, the document entitled *Ontario's Aménagement Linguistique Policy for French-Language Education*[2] provides a framework for homogeneous French-language schools. This policy sets out guidelines for those schools in order to respond more effectively to the specific needs of the French-language community and "increase their capacity to create teaching and learning conditions that foster the development of the French language and culture to

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[1] Section 23 of the *Charter* guarantees Canadian citizens who belong to an official language minority certain rights to have their children educated in that language in primary and secondary school.
[2] Ontario, Ministry of Education, *Ontario's Aménagement Linguistique Policy for French-Language Education* (Ontario: Queen's Printer for Ontario, 2004) [*Aménagement Linguistique Policy*].

ensure the academic achievement of every student”: *Aménagement Linguistique Policy*, at p. 2.

[20] Homogenous French-language education brings many advantages. It promotes full mastery of the French language and the development of the child’s cultural identity. This type of instruction also allows the child to become bilingual in French and English, because a homogeneous French-language school helps the child to develop a high level of skill in both French and English: *Aménagement Linguistique Policy*, at p. 42. In addition, in a social environment dominated by English, a child will generally communicate in English in many aspects of daily life and, as a result, acquire knowledge of the language of the majority: *Aménagement Linguistique Policy*, at p. 23. It should also be noted that bilingualism provides a number of advantages in terms of employment: *Aménagement Linguistique Policy*, at p. 42.

[21] Apart from these advantages, where children have one Francophone parent, knowledge and mastery of the language and culture of the linguistic minority promotes and helps maintain the bonds between the children and the Francophone parent.

[22] It is against this backdrop that the court should consider a parent’s request for an order for French-language schooling.

F. ANALYSIS

(1) Standard of review applicable on appeal

[23] In an application for custody or its incidents, the powers of the court are set out in ss. 21(1) and 28(1) of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12., as follows:

> 21(1) A parent of a child or any other person may apply to a court for an order respecting custody of or access to the child or *determining any aspect of the incidents of custody of the child*.
>
> …
>
> 28(1) The court to which an application is made under section 21:
>
> a) by order may grant the custody of or access to the child to one or more persons;
>
> b) by order may *determine any aspect of the incidents of the right to custody or access* […] [emphasis added].

One "aspect of the incidents of custody of the child" is the choice of the child's school.

[24] Section 24(1) of the *Children's Law Reform Act* provides that, "[t]he merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child […]." Section 24(2) of the *Children's Law Reform Act* goes on to provide a non-exhaustive list of the factors that the court shall consider when evaluating the best interests of the child. One of those factors is the ability and willingness of each person applying

for custody of the child to provide the child with education: *Children's Law Reform Act*, s. 24(2)(d).

[25] Custody orders made at trial are entitled to great deference on appeal: *Van de Perre v. Edwards*, 2001 SCC 60, at para. 11. Because of this restricted power of review, an appellate court may only intervene when there has been a material error, a serious misapprehension of the evidence, or an error in law.

[26] Even where such an error is found, the court must put the children's best interests first in fashioning a remedy. That is, for this court to order a change in schools on appeal, it would have to be convinced by the evidence that the order is in the children's best interests: *Ursic v. Ursic* (2006), 32 R.F.L. (6th) 23 (Ont. C.A.), at para. 32.

[27] In the circumstances of this appeal, the appellant must first establish that there has been serious misapprehension of the evidence or an error in law. He must then demonstrate that there is convincing evidence that it would be in the best interests of the children to order a change of schools and that this is the appropriate remedy on appeal.

(2) Did the trial judge err by failing to consider whether it was in the best interests of the children to make a custody order with a condition about the children's language of education?

[28] On appeal, the appellant no longer seeks sole or joint custody of the children. His claim instead is that the trial judge should, after deciding to award

sole custody to the respondent, have considered the language of the children's education. According to the appellant, the trial judge failed to appreciate the importance and scope of the evidence at trial on the role of homogeneous French-language schools where French is the minority language. The appellant maintains that if the trial judge had understood the importance to his children of attending a homogeneous French-language school, he would have made it a part of the custody order.

[29] During the trial, the appellant presented a significant amount of evidence on the challenges faced by the French-speaking linguistic minority in an English-language environment such as Hamilton. That evidence spoke to the risk of linguistic assimilation and cultural alienation in a minority linguistic setting, as well as to the essential role played by homogeneous French-language schools in maintaining French language and culture. The whole of this evidence equipped the court to properly assess what language of education would be in these children's best interests.

[30] The trial judge considered the question of language in assessing who should get custody and access. At para. 130 of his reasons, he acknowledged that there is a direct link between the risk of assimilation and the respect for the language rights of minorities. He also noted, at para. 132 of his reasons, that there "is no doubt that a fully French school would advance the French language capabilities of the Perron children more so than at French Emersion (sic) school."

However, the trial judge also expressed a concern that the appellant may use French language and culture as a wedge between the respondent and her children if joint custody were ordered. In his opinion, the French immersion program proposed by the respondent provided the children with sufficient exposure to the French language.

[31] At para. 135 of his reasons, the trial judge stated that, “[t]he language issue in this trial is in some ways a distraction from what is in the best interests of the children”. He then granted sole custody of the children to the respondent because, according to him, the language rights cannot take precedence over “the serious shortcomings [of the appellant] as a parent capable of sharing his children” (para. 135 of the reasons).

[32] The trial judge was not wrong to note the relative insignificance of the language issue as compared to the appellant’s shortcomings when determining who would get custody of the children. At the same time, the statement that the language question is “a distraction from what is in the best interests of the children” is incorrect. The language of the children’s education is important to considering their best interests. The trial judge needed to understand this factor and give it the appropriate weight in his determination of the issues.

[33] In this case, the trial judge granted sole custody to the respondent and limited access rights to the appellant. He did not subsequently consider whether

it would be in the best interests of the children to include in the custody order a condition about the language of education.

[34] In his response to the respondent's application, the appellant explicitly asked for an order requiring that the children enrol in a homogeneous French-language school. Section 16(6) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) provides that when a court makes an order for custody, it "may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just." There are several examples where courts have considered it appropriate to include conditions in custody orders. See for example *Crites v. Crites*, 2001 CanLII 32739 (Ont. C.J.); *Brown v. Brown*, 2011 ONSC 2101; *Madden v. Richardson*, 2004 ONCJ 10; *Chauvin v. Chauvin*, [1987] O.J. 2280 (Dist. C.).

[35] It is my view that in the circumstances of this case, the trial judge should have turned his mind to the possibility of a conditional order. That is, he should have considered whether including a French-language schooling condition as part of the order for custody would have been in the children's best interests.

[36] It may be that the trial judge did not consider the possibility of a conditional order because of the parties' approach during the proceedings. A review of the trial proceedings suggests that the focus at trial was on who would get custody and on terms of access. I have concluded nonetheless that it was an error under

the circumstances not to consider the option of ordering French-language schooling as a condition of awarding sole custody to the respondent.

[37] The appellant no longer contests the award of sole custody to the respondent. There were good grounds for that decision in this case. On the other hand, in light of my conclusion that the trial judge erred by failing to fully consider the question of the children's language of education, I must consider whether this court should grant the order requested by the appellant.

(3) If there was such an error, should this court make the conditional order on appeal?

[38] Having found an error, the next question is whether this court should make an order for French-language education . To make this order requires convincing evidence that a change in schools is in the children's best interests.

[39] Any assessment of the best interests of the children must take into account all of the relevant circumstances as to the needs of the children and the ability of each parent to meet those needs. The emphasis must be placed on the interests of the children, and not on the interests or rights of the parents: *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at para. 49.

[40] The question of the children's language of education must take into account all the factors set out in s. 24(2) of the *Children's Law Reform Act* as a whole. Linguistic and cultural considerations alone cannot dictate the result. See

for example *Van de Perre*, at para. 38; *Y.(L.) v. F.(B.J.)*, 2004 NSSF 22; *D.(W.) v. C.(L.)*, 2004 SKQB 10.

[41] The custodial parent should generally be left with the day-to-day decision-making about the child's life. This means that courts should be deferential to the decisions of the responsible custodial parent who "in the final analysis, lives the reality, not the speculation, of decisions dealing with the incidents of custody": *MacGyver v. Richards* (1995), 22 O.R. (3d) 481 (C.A.), at para. 31. At the same time, since the best interests of the children must always be paramount, where best interests dictate, the court must intervene.

[42] In my opinion, the court should be particularly sensitive to the language of education in circumstances where there is only one Francophone parent and the English-speaking parent has been granted custody. In such circumstances, there is necessarily less contact with the French-speaking parent and the linguistic and cultural environment of the children is likely to become that of the linguistic majority.

[43] It is true that, in this case, the children would have some exposure to French in the French immersion program. But since French immersion instruction largely reflects the majority culture, the risk of cultural and linguistic alienation of the children from their father and their father's family is increased.

[44] In a linguistic minority environment, homogeneous French-language schools are generally preferable to French immersion programs for ensuring that both languages, namely French and English, are maintained at the highest level. In a region with a large English-speaking majority, homogeneous instruction in French does not result in losing the language and culture of the linguistic majority. This does not therefore imply a choice of preferring the culture and language of the minority over those of the majority. In a minority setting, homogeneous French-language schools in fact make it possible to maintain cultural and linguistic links with both the French-speaking and English-speaking parents. In accordance with s. 24(2)(d) of the *Children's Law Reform Act*, the children's language of education should therefore be taken into account when determining their best interests.

[45] As stated in s. 16(10) of the *Divorce Act*, by issuing an order for custody, "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." Sharing the language and culture of both parents makes that contact more enriching for the children and increases the possibility that they will want to maintain both languages and cultures.

[46] Homogeneous instruction in French also promotes an in-depth knowledge of both official languages of Canada, which opens doors to a wider array of university and job opportunities. In addition, as mentioned by the appellant, if the

children receive their primary-level instruction in French, they will acquire the right under s. 23 of the *Charter* to have their future children educated in the language of the minority.

[47] To summarize, at the time of trial, the following factors supported an order for homogeneous French-language schooling:

> 1) the desire of the appellant and the respondent during their marriage to have their children educated at a homogeneous French-language school;
>
> 2) the higher level of mastery of French and higher level of bilingualism likely to result;
>
> 3) the maintenance of cultural and linguistic links with the French-speaking parent and with the father's family and the maternal grandmother, as well as with the English-speaking parent and family;
>
> 4) the greater degree of choice of universities and employment opportunities that bilingualism affords; and
>
> 5) the certainty that the children would have the right to have their future children educated in French, as provided by s. 23 of the *Charter*.

[48] On the other hand, there were also factors in this case that favoured a decision that the children should continue their education in a French immersion program. In particular:

> 1) William was having some difficulties with English;

2) there were concerns that the appellant would try to use French language and culture to isolate the respondent; and

3) the reality that a change of schools would have been disruptive to the children, particularly in the case of William, who had already changed schools once before.

[49] It is also important to emphasize that it is quite exceptional to include in a custody order a condition concerning the choice of school. As already mentioned above, educational decisions and other decisions relating to the incidents of custody are almost always left to the custodial parent (or parents). In general, it is desirable to leave the day-to-day decision-making about parenting to the custodial parent(s): *MacGyver*, at paras. 30-31; *Sawatzky v. Sherris* (2002), 170 Man. R. (2d) 51, at para. 5.

[50] In my view, depending on the trial judge's appreciation of the evidence, the circumstances of this family could have warranted a conditional order for French-language education, tailored to the needs of this family.

[51] We are not, however, on appeal well-placed to assess all the evidence relevant to the children's best interests. The trial judge would have been in a better position to weigh all of the relevant factors, decide the issue and, if appropriate, tailor a condition about the children's language of education, taking into account the circumstances and needs of these particular children.

(4) What is the appropriate remedy?

[52] I turn now to the appropriate remedy.

[53] The fact that more than two years have passed since the date of the order on March 8, 2010 must be considered. The overall situation and the needs of the children have changed since the original order was made: William is in Grade 5, Matthew is in Grade 3, and Emma is in Grade 2. We do not have any evidence about the children's current situation apart from the fact that they are getting satisfactory marks in school.

[54] At this point, the fact that the children have spent three additional years at St. Eugene Catholic Elementary School must be added to the original reservations the trial judge expressed about ordering a change in schools. I note that the reasons in *Ursic* emphasize the need for convincing evidence to support an order requiring children to change schools. It is therefore my view that despite the advantages these children would have enjoyed through enrolment in homogeneous French-language instruction, a change in schools at this stage would not be in their best interests.

G. CONCLUSION

[55] For these reasons, I would dismiss the appeal.

[56] If the parties are unable to agree on costs, the respondent should file submissions on costs within thirty days of the release of these reasons. The

appellant will then have fifteen days to file responding submissions. The submissions of each party must be limited to ten pages.

"Paul Rouleau J.A."
"I agree R.A. Blair J.A."
"I agree Alexandra Hoy J.A."

Released: November 23, 2012