COURT OF APPEAL FOR ONTARIO

CITATION: Fiorito v. Wiggins, 2015 ONCA 729
DATE: 20151030
DOCKET: C57453

Feldman, Juriansz and Brown JJ.A.

BETWEEN

Anna Maria Fiorito

Applicant (Appellant)

and

Jefferson Ross Wiggins

Respondent (Respondent)

Donna Wowk and Mark DeGroot, for the appellant

Brian Ludmer, for the respondent

Heard: October 1, 2015

On appeal from the orders of Justice R. John Harper of the Superior Court of Justice, dated June 27, 2011, June 28, 2013, and October 17, 2013, with reasons reported at 2011 ONSC 1868, 2013 ONSC 4272 and 2013 ONSC 7770.

Brown J.A.:

OVERVIEW AND ISSUES

[1] The appellant, Anna Maria Fiorito (the mother), appeals the order of Harper J. dated June 27, 2011 (the "2011 Order"), with reasons released the same day, and his order of June 28, 2013 (the "2013 Order"), with reasons

released the same day, as well as his costs order dated October 17, 2013 (the "Costs Order").

[2] The mother and the respondent, Jefferson Ross Wiggins (the father), have three daughters, who are now 14, 13, and 12 years of age.

[3] Upon the separation of mother and father in February, 2008, the three daughters lived with their mother. A consent interim order of October 24, 2008, provided the father with access on Tuesdays and alternating weekends, and a March 5, 2010 order directed counselling and the continued involvement of a parenting coordinator.

[4] A dispute arose over whether the mother was complying with the consent access order. The father brought a contempt motion, originally returnable in October, 2009, and in his Amended Answer sought shared custody of the children. On the eve of the trial of those issues, the parties entered into October 19, 2010 Minutes of Settlement. Under them, the mother would have custody of the children, while the father would have "substantial access to the children, equivalent to 40 percent of the residential time." No order was taken out embodying the terms of the Minutes.

[5] Performance of the access provisions in the Minutes became a matter of dispute almost immediately after the Minutes were signed. Nolan J. then directed

a trial of custody and access issues, and the father renewed his motion to find the mother in contempt of the access order.

[6] A 19-day trial of the financial issues between the parties was held before another judge.

[7] The trial judge conducted a 22-day hearing on custody and access in early 2011. By order dated June 27, 2011, he held the mother in contempt of the orders dated October 24, 2008 and March 5, 2010. He sentenced the mother to six months' probation and set terms of probation dealing with custody and access with which she was required to comply. Under those terms, custody of the children remained with the mother, but the trial judge ordered a stepped-up access transition scheme under which the father would eventually have access one evening a week and on alternating weekends. The Children's Aid Society was ordered to perform supervision and to arrange for counselling. The trial judge directed a review before him in six months to determine if both mother and father were making gains in reducing their respective denigrations of the other to the children.

[8] For a variety of reasons, the ordered six-month review did not commence until July 2012. The "review" turned into a 23-day trial-like hearing spanning 10 months. By order dated June 28, 2013, the trial judge granted custody of all three children to the father. He limited the mother's access to the children to weekly

therapy sessions with the children's therapist, Dr. Ricciardi. The order required the mother to bring a motion to change in order to change her access.

[9] The mother filed a notice of appeal dated August 7, 2013 which, in effect, sought to appeal both the 2011 and 2013 Orders.

[10] Before dealing with the issues raised on the appeal, it is worth recalling for mother and father the bigger picture. The trial judge devoted 45 hearing days to their custody and access dispute. The 2013 Order reversed the custody of the children. More than two years then elapsed before the parties were ready to argue the appeal. During that time, the children have lived with their father. They are now 14, 13 and 12 years old, and they have lived the last seven years of their lives in the shadow of their parents' litigation. The children are entitled to a stable childhood, not one marked by uncertainties over their living arrangements and contact with their parents resulting from the bitter dispute between mother and father.

[11] The appeal record filed by the parties is voluminous. In the months prior to the hearing, the parties generated a blizzard of new paper with their competing motions for fresh evidence and the respondent's motion to quash the appeal of the 2011 Order. Accordingly, it is also worth recalling for father and mother what this court stated in *C.S. v. M.S.*, 2010 ONCA 196, 76 R.F.L. (6th) 14 at para. 4:

> It is not our task to retry the case; we must approach the appeal with considerable respect for the task facing a

> trial judge in difficult family law cases, especially those involving custody and access issues. As expressed by Bastarache J. in *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014 at para. 13:
>
> > Custody and access decisions are inherently exercises in discretion. Case-by-case consideration of the unique circumstances of each child is the hallmark of the process. This discretion vested in the trial judge enables a balanced evaluation of the best interests of the child and permits courts to respond to the spectrum of factors which can both positively and negatively affect a child.

[12] The mother appeals on numerous grounds relating to a wide array of alleged factual and legal errors made by the trial judge. I do not propose to consider them individually. They can be grouped into four main grounds of appeal.

FIRST GROUND: THE FINDING OF CONTEMPT IN THE 2011 ORDER

[13] The mother appeals the 2011 Order, including the finding that she was in contempt. The father moves to quash the appeal of that order as out of time. The mother submits that the 2011 Order was not a final order, but a mid-trial ruling, with the trial not ending until the release of the 2013 Reasons.

[14] I do not accept the mother's characterization of the 2011 Order. A contempt order is a final order: *Mantella v. Mantella*, 2009 ONCA 194, 61 R.F.L. (6th) 259 at para. 17. In the unusual circumstances of this case, however, in which the 2013 Order was clearly informed by many of the factual findings made

in the 2011 proceeding, as well as the trial judge's finding that the mother had failed to meet the expectations he had set out in the 2011 Order, I would grant the mother an extension of time in which to appeal the 2011 Order, and shall deal with it on the merits.

[15] The mother submits that the trial judge erred in failing to consider whether a breach of any order was continuing at the time of the contempt hearing and failed to specify the particular occasions on which she had breached the 2008 and 2010 Orders.

[16] As this court has emphasized, the civil contempt remedy is one of last resort and should not be granted in family law cases where other adequate remedies are available to the aggrieved party: *Hefkey v. Hefkey*, 2013 ONCA 44, 30 R.F.L. (7th) 65, at para. 3.

[17] The civil contempt remedy exists where a party fails to comply with a live or operative order of the court: *Family Law Rules*, r. 31(1); *Prescott-Russell Services for Children and Adults v. G. (N.)* (2006), 82 O.R. (3d) 686 (C.A.), at para. 27. In the present case, by the time of the 2011 hearing, the 2008 and 2010 Orders no longer were operative. Those were interim orders. They were superseded by the parties' 2010 agreement on custody and access contained in the final Minutes of Settlement. Consequently, there was no order outstanding in

respect of which the trial judge could find the mother in contempt. His finding of contempt and imposition of sentence on the mother therefore is set aside.

SECOND GROUND: THE TRIAL JUDGE'S RELIANCE ON THE *CHILD AND FAMILY SERVICES ACT* IN THE 2011 ORDER

[18] Although in his 2011 Order the trial judge described his custody and access conditions as part of the probation sentence imposed for contempt, it is clear from his reasons that he relied on s. 16 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) and ss. 24 and 34 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, to fashion those conditions.

[19] The trial judge went further, however, and found that all three children were in need of protection within the meaning of the *Child and Family Services Act*, R.S.O. 1990, c. C.11 ("*CFSA*"), s. 37: para. 171. The hearing took place in Windsor. The trial judge observed that in Windsor a Superior Court judge lacks the jurisdiction to hear child protection applications; only judges of the Ontario Court of Justice have such jurisdiction. He therefore reasoned that he needed to draw on his *parens patriae* jurisdiction as a Superior Court judge in order to make a finding that the children had suffered emotional harm which resulted from the actions of their mother, within the meaning of s. 37(2)(f) of the *CFSA*. Having found that the children were in need of protection, the trial judge then described the jurisdictional basis on which he intended to rest his custody and access conditions:

> These children are in need of protection as defined by section 37(2)(f) and (g) of the *Child and Family Services Act*. However, I feel that I am able to combine my ability to structure terms of probation and with the utilization of the *Children's Law Reform Act*, section 34 and my *parens patriae* in order to craft an order that gives these children and this family a chance to break out of this destructive and abusive situation. (para. 188)

[20] The mother submits the trial judge erred in exercising his *parens patriae* jurisdiction to find that the children were in need of protection within the meaning of the *CFSA*. I agree. There was no need to resort to the *CFSA* or his *parens patriae* jurisdiction. In his 2011 Reasons, the trial judge found that the children's expressed fear and dislike of their father was rooted in the mother's fear and dislike of him (para. 149), and the transformation of the children's perception of their father was primarily caused by the mother's role in helping to create a distorted reality of their father (para. 147). That led him to find that the mother's conduct over the previous 2.5 years had amounted to emotional abuse of the children that distorted their reality of their father (para. 185). It was open to the trial judge to take that finding into account under s. 24(2) of the *CLRA* as part of the children's "needs and circumstances" in determining their best interests. There was no need for the trial judge to resort to the *CFSA* or his *parens patriae* jurisdiction, and he erred in so doing.

THIRD GROUND: THE TRIAL JUDGE'S ANALYSIS OF THE BEST INTERESTS OF THE CHILDREN

[21] In his 2011 Order, the trial judge granted custody of the children to the mother and granted access to the father on a stepped-up basis to culminate in one evening a week and alternating weekends, essentially the access arrangement agreed upon by the parties in the Minutes of Settlement. In the 2013 Order, the trial judge reversed custody, and he limited the mother's access to weekly therapy sessions with Dr. Ricciardi.

[22] The mother submits that the trial judge made two main errors in reaching that result. First, she argues that the trial judge erred in admitting into evidence surreptitious recordings made by the father of conversations between the mother and father during two access exchanges. I do not agree. The trial judge acknowledged that in family law cases courts discourage the surreptitious taping of the other party, but he correctly proceeded to determine the admissibility of the recordings by balancing their prejudice against their probative value, including their reliability: 2013 Reasons, para. 54. I see no reason to interfere with that decision.

[23] Second, the mother submits the trial judge erred in reversing custody because he failed to consider all relevant factors when determining the best interests of the children, including giving sufficient weight to the principle of

maximum contact. She contends the trial judge focused on the interests of the parents, instead of the best interests of the children.

[24] The trial judge gave extensive reasons for both his 2011 and 2013 Orders. At the heart of both orders lay his factual finding that the children were suffering emotional abuse caused by their mother. While different courts could weigh the evidence in different ways, I see no basis to conclude that the trial judge committed a palpable and overriding error in making that finding. The trial judge expressly considered and weighed the principle that a child should have as much contact with each parent as is consistent with the best interests of the child: 2013 Reasons, para. 141. While the 2013 Reasons did not deal specifically with each of the factors set out in s. 24(2) of the *CLRA*, the trial judge's primary concern that the children have a meaningful relationship with both parents is clear throughout the reasons. Moreover, the trial judge found that this was “an extreme case”: 2013 Reasons, para. 143. In those circumstances, and in light of the deference owed to the findings of trial judges in family law matters, I cannot conclude that the trial judge made any reversible error in his analysis of the best interests of the children.

FOURTH GROUND: THE ABSENCE OF A TIMEFRAME IN WHICH TO CONDUCT AN ACCESS REVIEW

[25] In his 2013 Reasons, the trial judge stated that: “I am still of the view that these children need both of their parents. It is my intention that access be

increased given input with Dr. Ricciardi": 2013 Reasons, para. 144. To that end, para. 4 of the 2013 Order provided that therapy sessions with Dr. Ricciardi "shall be increased to at least once per week," and para. 3 stated:

> The mother will have to bring a motion to change in order to change the access, if she is able to demonstrate that she is able to both act and articulate to the children in a manner that promotes the ability of the children to have a loving relationship with both of their parents, and with the input of Dr. Ricciardi. *The intention being that access is to move forward in order to maximize contact with both parents.* [Emphasis added.]

[26] Read as a whole, the trial judge's 2013 Order put in place a review-like process, albeit one that he required the mother to initiate. While the trial judge quite properly regarded the future increase in access for the mother to be in the best interests of the children, in my respectful view he erred in failing to set a fixed timeframe in which the issue of access would be further reviewed. Given his finding that the children needed both of their parents, he should have imposed a timeline for a further review.

ALTERATION OF ACCESS

[27] The fresh evidence filed on this appeal included September 14, 2014 and September 20, 2015 reports from Dr. Ricciardi, the therapist who has seen the parents and the children on a weekly basis pursuant to the 2013 Order. In his 2014 Report, Dr. Ricciardi stated:

> It is my opinion that it would be advantageous at some point in time to consider moving towards the separation of therapy and its stated goals (i.e., the continued promotion of the children's relationship with their father), from the typical aspects of access encountered with a non-custodial parent (i.e., [the mother]). In this instance for example, additional access between the children and their mother could be supervised and controlled within a setting separate and distinct from therapy and supervised by another party.

[28] In his 2015 Report, Dr. Ricciardi noted that "this separation of therapy and access did not transpire as [the father] and [the mother] could not agree to a methodology of how this increased contact was going to transpire." He also reported that, this past February, the oldest child "raised the issue of 'what do I have to do to make things change.'" He continued:

> She was clearly evidencing her frustration with the stagnation of therapy. What was implied in this statement was [the child's] feeling that things had not moved forward in terms of the nature and extent of contact that she and her siblings experienced with her mother… (as had been communicated would occur with improved relations with their father).

[29] Dr. Ricciardi also stated:

> [I]t is my opinion that there exists the real risk that the children will experience a regression in their functioning (i.e., losing the gains that were observed with respect to their interactions and relationships with [the father & his new wife]) should substantive changes not occur, particularly in relation to the children's interactions and relationship with [the mother] (i.e., increased contact outside the context of therapy).

[30] Dr. Ricciardi's view is hardly surprising: the children resided with their mother for many years, and the children understand what the trial judge intended – i.e. that access should move forward to maximize contact with both parents. Two years have passed without an increase in their mother's access to them. At the same time, the children obviously enjoy the time they spend with their mother. The father acknowledged as much in his fresh evidence when he deposed about the mother's therapy sessions with the children:

> I sit in an adjacent office within Dr. Ricciardi's office premises and even though I am not trying to listen in, I hear through the doors and walls laughter and play as opposed to any serious discussion about the matters that are the subject of Justice Harper's two decisions.

[31] In my view, the best interests of the children require a review of the present access arrangements in the immediate future. I would therefore set aside para. 3 of the 2013 Order and direct that a review of access arrangements be held before a judge of the Superior Court of Justice in Windsor no later than February 15, 2016. The review must not be like the 20-plus day review held previously in this matter or generate the disproportionate legal fees seen so far in this proceeding. I see no reason why the review should take more than a few days. I exhort the review judge to manage the review process to achieve that result.

[32] Over two years have passed since the 2013 Order was made, an order intended by the trial judge to foster the development of a relationship between

the children and their father. The children are now older and have a relationship with the father, but they understandably are frustrated by their limited contact with their mother. It is in the best interests of the children to have a relationship with both parents. That is what the trial judge sought to achieve.

[33] Consequently, pending the ordered review hearing, I see no reason not to increase the mother's access in the interim, as intended by the trial judge and supported by the fresh evidence. Considering the appeal record and the fresh evidence in light of the passage of time, I would order that that the mother have unsupervised access to the children one weekend each month and overnight during the week once every two weeks. As there was no evidence before us about the children's daily schedule or calendar for the next few months, I would direct the parties to consult and agree on the details of a schedule implementing such revised access. If no agreement has been reached by November 13, 2015, the parties shall appear before a judge of the Superior Court of Justice in Windsor no later than November 20, 2015 to settle the details of the revised access.

DISPOSITION

[34] By way of summary:

(i) I would dismiss the respondent's motion to quash, extend the time to appeal the 2011 Order, allow the appeal of the 2011 Order, in part, and set aside paras. 1 and 2 of the 2011 Order;

(ii) I would allow the appeal of the 2013 Order, in part, and set aside para. 3 thereof;

(iii) I would allow the parties' respective motions to file fresh evidence and direct that a review of access arrangements be held before a judge of the Superior Court of Justice no later than February 15, 2016;

(iv) pending that review hearing, I would vary para. 2 of the 2013 Order to increase the mother's access to include, in addition to the access during the weekly therapy sessions, unsupervised access one weekend each month and overnight during the week once every two weeks, in accordance with the directions set out in para. 33 above.

[35] The trial judge ordered the mother to pay the father costs in the amount of $400,000 for the 2011 and 2013 proceedings. The mother seeks costs of the appeal on a full indemnity basis in the amount of $207,886, while the father seeks full indemnity costs of $124,440.

[36] The parties enjoyed mixed success on the appeal and, as a consequence, mixed success in respect of the proceedings below. The fairest disposition of the costs of this matter is that the parties bear their own costs of the appeal, and I would reduce the costs payable by the mother to the father under the Costs Order for the proceedings below from $400,000 to $200,000, inclusive of fees, disbursements and taxes.

Released: October 30, 2015 (KF)

"David Brown J.A."
"I agree K. Feldman J.A."
"I agree R.G. Juriansz J.A."