COURT OF APPEAL FOR ONTARIO

CITATION: Mader v. McCormick, 2018 ONCA 340
DATE: 20180406
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Hourigan, Pardu and Huscroft JJ.A.

BETWEEN

Larry Mader

Applicant (Appellant in Appeal)

and

Tracy McCormick

Respondent (Respondent in Appeal)

Glenda McLeod, for the appellant

Judy Byrne and Kaitlin Jagersky, for the respondent

Heard: April 4, 2018

On appeal from the final order of Justice Robert D. Reilly of the Superior Court of Justice, dated July 13, 2017 with reasons reported at 2017 ONSC 4283.

REASONS FOR DECISION

[1] Larry Mader appeals from the decision of the Superior Court of Justice upholding the Ontario Court of Justice decision dismissing his motion to appoint private counsel for two children, L.M., soon to be 16 years old, and N.M., now 13 years old.

[2] Mader and Tracy McCormick were married in 1999 and separated in 2010. The parties negotiated a separation agreement providing for the children's primary residence with the respondent mother, alternating weekends with the father, weekday access until 7:00 p.m. (later to 8:30 p.m.) on Mondays and Tuesdays and until 5:30 p.m. on Wednesdays and Thursdays.

[3] In or about 2013, the appellant initiated a motion to vary access. In this proceeding, the Office of the Children's Lawyer ("OCL") was appointed for the children. The OCL at Office conducted an investigation and concluded that the children did not want to vary the existing access schedule. The appellant withdrew his motion for an increase in access in October 2014. He maintained a motion to decrease child support, based on an argument that there was a shared custody agreement. That motion was dismissed in January 2015. One year later, the appellant elected to retire. In December 2015, he moved again to increase his time with the children and to decrease child support. He wanted half of his mid-week access visits extended to overnight visits. In May 2016, the appellant moved for an order appointing the Office of the Children's Lawyer. That motion was dismissed and no appeal was pursued.

[4] In August 2016, the appellant moved for an order appointing a private lawyer for the children, who proposed to conduct an investigation in the same way as would the Office of the Children's Lawyer:

I treat my private retainers for children the same way I do with the OCL appointments. In other words, I seek collateral information that confirms or contradicts the views and preferences of the children, and I require access to the children as requested.

Whenever possible, I meet with the children outside of either party's home to maintain neutrality. I would initially meet with the children together to explain my role, but after that, I would usually meet with them independently, unless requested by both children.

I would want the order to indicate that as the children's lawyer, I would have full power to act for the children as though they were parties to the proceedings and then have the right to:

- make a full and independent inquiry of all circumstances relating to the best interests of the children,
- to receive copies of all professional reports and all records relating to the children,
- have production and discovery according to the Rules,
- the right to appear and participate in the proceeding including the right to examine and cross examine witnesses, call evidence, and make submissions to the Court, including submissions regarding the positions, views and preferences advanced on behalf of the children,
- to take such appeal proceedings as deemed appropriate,
- seek costs relating to the proceedings when appropriate, and
- the usual attached Appendix A regarding the production of police records.

[5] The motion judge noted that the custody issues did not involve mobility issues and that this was not a fresh custody application. She dismissed the motion for appointment of private counsel for the children for the following reasons:

> (a) the children had OCL counsel two years ago and at that time, indicated that they did not want any change in the visitation arrangement;
>
> (b) the children are not exhibiting any behavioral or academic issues that would point to unhappiness with their time spent in each parent's care;
>
> (c) in one text exchange, the father indicated that L.M. did not want to talk about the issue of increased access to her father;
>
> (d) the father's insistence that the children become involved in the court application by having counsel appointed is not child focused;
>
> (e) as young teenagers, the investigation of their teachers and other collateral sources may be embarrassing and uncomfortable to them;
>
> (f) these children should not be burdened with being asked about their wishes again, so soon after they were last involved with an OCL counsel;
>
> (g) L.M. and N.M. are well-functioning young people who enjoy spending each weekday with both parents. This is what they have known for the past 6 years.

[6] On appeal to the Superior Court of Justice, the appeal judge observed that the motion judge had accurately reviewed the jurisprudence. He was satisfied that her decision was proper, concluded that there was no palpable and overriding error, and dismissed the appeal.

[7] The appellant argues that the motion judge was obliged to appoint counsel for the children and failed to pay heed to the *United Nations Convention on the Rights of the Child,* Can. T.S. 1992 No. 3, and that the appeal judge erred in upholding the decision below

[8] We do not agree.

[9] Rule 4(7) of the *Family Law Rules*, O. Reg.114/99 provides that "[i]n a case that involves a child who is not a party, the court may authorize a lawyer to represent the child, and then the child has the rights of a party, unless the court orders otherwise." The wording of the provision is permissive, not mandatory.

[10] Article 3 of the *United Nations Convention on the Rights of the Child,* ratified by Canada in 1991, provides in part that "[i[n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

[11] Article 12 of the same provides as follows:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate

> body, in a manner consistent with the procedural rules of national law.

[12] The decision whether or not to appoint a lawyer for children is a discretionary decision which should focus on the best interests of the children. Deference is owed to a motion judge's assessment of the advantages and disadvantages of such an appointment: *Fiorito v. Wiggins*, 2014 ONCA 603.

[13] As Fleury J. noted in *Reynolds v. Reynolds*, [1996] O.J. No. 2230, at para. 3:

> This remedy [appointing a lawyer for the children] should not be available only for the asking. In as much as it implicates the children very directly in the entire litigation, it is a very blunt instrument indeed. It can cause untold harm to impressionable children who may feel suddenly inappropriately empowered against their parents in a context where the children should be protected as much as possible from the contest being waged over their future care and custody. All actions involving custody and access over children should be governed by one paramount consideration: no one should be allowed to act in a way that might endanger their well-being. The test of "the best interests of the children" as insipid and fluid as it might be, still remains the benchmark against which any person wishing to interfere in their lives should be measured.

[14] We are not persuaded that the motion judge erred in balancing the children's best interests or that the appeal judge erred in his consideration of the appeal. The appeal is dismissed with costs to the respondent fixed at $12,000 all-inclusive.

"C.W. Hourigan J.A."
"G. Pardu J.A."
"Grant Huscroft J.A."