CITATION: Litman v. Sherman, 2008 ONCA 485
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COURT OF APPEAL FOR ONTARIO

MacPHERSON, ROULEAU and EPSTEIN JJ.A.

BETWEEN:

MARK LITMAN

Applicant (Appellant/
Respondent by way of cross-appeal)

and

ADINA SHERMAN

Respondent (Respondent/
Appellant by way of cross-appeal)

Herschel I. Fogelman and Audrey A. Shecter for the appellant, respondent by way of cross-appeal

Sana Halwani and Heather Hansen for the respondent, appellant by way of cross-appeal

Heard: March 31, 2008

On appeal from the judgment of Justice Rose Boyko of the Superior Court of Justice, dated August 15, 2006.

EPSTEIN J.A.:

Overview

[1] At the centre of this action is a small child, Rachel Sherman-Litman, now five years old. The parties are her parents, whose marriage lasted less than a year. They

separated when the respondent, Adina Sherman (the "mother"), was seven months pregnant.

[2] At the conclusion of a fifteen-day trial, the trial judge dealt with custody, access, spousal and child support, and ancillary issues. The appellant, Mark Litman (the "father"), appeals the trial judge's decision granting custody to the mother, and he seeks leave to appeal the trial judge's costs order.

[3] The mother cross-appeals the trial judge's dismissal of her cross-motion in which she sought to vary the then existing support order.

The Background Facts

[4] The parties married on April 26, 2002. Their marriage was short-lived and acrimonious; they separated on April 2, 2003 and are now divorced. Rachel was born June 10, 2003.

[5] Shortly after Rachel's birth, the father brought an application for custody or joint custody of his daughter. In response, the mother claimed an equalization of the parties' net family property, spousal and child support, and exclusive possession of the matrimonial home. The mother also sought a restraining order.

[6] On July 30, 2003, MacKinnon J. ordered an assessment of the parenting issues. The assessment was to be conducted by Dr. Raymond Morris.

[7] The parties resolved their financial dispute through mediation. Among other matters, the parties agreed that the father would pay $2,000.00 in satisfaction of the mother's spousal support claim. This agreement resulted in minutes of settlement, dated October 2, 2003, which were incorporated into an order of Eberhard J., dated December 3, 2003.

[8] While these financial issues were being resolved, the assessment progressed. To the parties' credit, they agreed to be bound by the assessor's recommendations. On May 20, 2004, Nelson J. made a final order, on consent, which incorporated the assessor's recommendations. This order included several provisions outlining the parties' custody arrangement.

[9] A number of access issues remained outstanding. On March 30, 2005, Weekes J. attempted to resolve these issues by appointing Dr. Morris as a parenting co-ordinator and granting him the authority to arbitrate make-up access issues that arose as a result of the father's work schedule.

[10] The mother then commenced an action seeking an order to "set aside" the minutes of settlement and the order of Eberhard J. on the basis of fraud, non-disclosure, coercion and duress.

[11] On September 7, 2005, Nelson J. concluded that the case had become "unsolvable" and "unmanageable" and ordered that the matter proceed to trial.

[12] At the commencement of trial, the father moved to have the issues specifically defined. The trial judge ruled that neither party was making custody an issue and that the issues before her were access, child and spousal support, and contempt. She expanded on the access component by holding that it included the parenting report and the order implementing it and possibly issues surrounding the parenting coordinator.[1]

The Trial Judge's Reasons

[13] The trial judge started her reasons by reviewing the history of the matter and making specific note of the high degree of conflict that had marked the parties' efforts to address the consequences of their decision to separate.

[14] In keeping with her initial order identifying the issues in play, the trial judge set out the parties' positions. The father sought a new parenting coordinator to replace Dr. Morris. The mother sought to vary the orders of Eberhard J. respecting support and Nelson J. respecting the parenting plan. As well, the mother preferred that the parenting co-ordinator be replaced by strict access terms.

[15] The trial judge then made the clear finding, critical to the disposition of this appeal, that since Rachel's birth the parties had been incapable of cooperating with one another in matters concerning Rachel's upbringing. She described the parties' relationship at para. 8 of her judgment:

> There is a very high level of animosity between the parties and virtually no trust between them throughout much of the time they have known each other.…. There is no evidence that the parties have made any real effort to ameliorate their differences or that they have any intention of doing so.

[16] The trial judge went on to hold, "[i]n these circumstances joint custody is out of the question." In support of this finding, the trial judge observed that the parties had been unable to make decisions together, communicate effectively with each other, or reduce the level of conflict.

[17] While the trial judge acknowledged that both parents love and are able to care for Rachel, she concluded, "[s]hared parenting to any significant extent is not possible in this [acrimonious] situation". She then decided that it was in Rachel's best interests for the

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[1] The transcript reveals that later in the trial the trial judge advised the parties that since both had raised issues relating to custody, it had become an issue before her.

mother to have sole custody. The trial judge selected the mother as sole custodian because she was more cooperative in terms of access arrangements, was the more experienced parent having already raised a child, and had a good ability to articulate her daughter's needs to the father.

[18] The trial judge then concluded that Dr. Morris, despite his best efforts, was ineffectual as a parenting coordinator. The trial judge further found that requiring the parties to cooperate with decisions of any parenting coordinator would only aggravate the parties' already poor relationship. As a result, the trial judge declared that the use of a parenting coordinator would have to end.

[19] With respect to access, the trial judge discussed the parties' lack of trust and communication, and their corresponding inability to work around the father's work schedule. The trial judge then outlined a new access schedule, which included provisions on issues such as make-up time, access on holidays and other special occasions, and how the parties were to pick up and drop off Rachel. The access schedule also included changes for when Rachel grew older.

[20] The trial judge therefore awarded custody of Rachel to the mother, dispensed with the parenting coordinator and made detailed access provisions.

[21] Turning then to the issue of support the trial judge did not accept the mother's allegations of misrepresentation, duress, coercion or fraud. Also, after describing the mother's evidence as being of poor quality, scattered and not well presented, the trial judge found that the mother had not demonstrated a material change in circumstances. Accordingly, the trial judge refused to set aside the support order of Eberhard J.

[22] Next, the trial judge dealt with several ancillary matters. First, the trial judge ordered the father to maintain a life insurance policy to be held in trust for Rachel. Second, she fixed the parties' s. 7 expenses and apportioned responsibility for these expenses at 75% to the father and 25% to the mother. Third, the trial judge dismissed the mother's motion for contempt but granted the restraining order the mother had requested. The trial judge reasoned that without a restraining order there would be a risk of escalating hostility between the parties that could result in physical harm.

[23] On the issue of costs, the trial judge determined that there was "mixed" success and therefore declined to make any order as to costs.

Analysis

(a) The Custody Appeal

[24] It is common ground that s. 17 of the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3 is the operative legislative provision. It provides as follows:

> 17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses; or
>
> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
>
> (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.
>
> (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

[25] The pivotal point the father raises is that the trial judge's jurisdiction to interfere with a final order pertaining to custody must be grounded on a finding that there has been a material change of circumstances between the time the previous order was made and trial. According to the father, the trial judge made no such finding, nor was any such finding available to her on the evidence; as such, her order cannot stand. I agree.

[26] In *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at para. 10, the Supreme Court held that before a court can consider the merits of an application for variation, it must be satisfied that there has been a material change in circumstances since the last custody order was made. To be more specific, McLachlin J. held at para. 13 that the trial judge must be satisfied of (1) a change in the condition, means, needs or circumstances of the child, (2) which materially affects the child, and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order. If the applicant is unable to meet this threshold requirement, the inquiry can go no further.

[27] The parties do not dispute that the trial judge was required to find a material change in circumstance before she could vary Nelson J.'s custody order. What is in dispute is whether the trial judge made that critical finding.

[28] The father submits that while the transcript reveals that the trial judge was clearly aware of the law in this respect, the fact that her reasons are silent on the issue demonstrates that she failed to apply the law.

[29] The mother submits that a finding of a material change in circumstance is implicit in the trial judge's reasoning. According to the mother, the trial judge's finding is grounded on the inability of the parents to avoid conflict in their dealings with each other in issues pertaining to Rachel.

[30] The transcripts of the trial clearly demonstrate that the trial judge was aware that the mother had to establish a material change in Rachel's circumstances before the issue of custody could be re-opened. In addition to numerous other references, the trial judge counselled the parties that she had to find, "not just any change; a material change that happened after the date of the Final Order such that this court should therefore intervene and make a change."

[31] The problem is her reasons make no mention of this threshold issue. This omission is in contrast to that part of her reasons pertaining to the mother's application to vary the father's support obligations where the trial judge explicitly finds that the mother failed to satisfy her that there had been a material change in circumstances.

[32] To counter the father's argument that the trial judge erred in failing to deal with the threshold issue necessary to re-open matters pertaining to Rachel's custody, the mother contends that a finding of a material change in circumstances is implicit in the trial judge's repeated references to the acrimony between the parties.

[33] As a specific example, the mother argues that the parties' agreement to submit to parenting coordination was made with the expectation that the parenting coordinator would reduce the conflict between them. She contends that the continued and escalating conflict that undermined the parenting coordinator constituted a change in the parties' ability to meet Rachel's needs that could not have been reasonably anticipated at the time the parenting coordinator was agreed upon.

[34] To support her argument, the mother cites *Griffin v. Bootsma*, [2004] O.J. No. 2781 (S.C.J.), where the parents' chronic difficulties in resolving parenting issues were found to amount to a material change in circumstances.

[35] In *Griffin*, however, the trial judge held that the parties could not have anticipated the conflict at the time they settled their custody dispute. The subsequent turn of events,

their turning into a "high-conflict couple", was therefore a "change" that was not foreseen according to the words of McLachlin J. in *Gordon, supra*.

[36] That is anything but the case here. According to the trial judge, "since the birth of their child, the parties have been altogether incapable of cooperating with one another in order to raise Rachel". This finding is well supported by the evidence. The parties' willingness to work through a parenting coordinator does not detract from that finding; rather it reinforces it, given one was necessary to begin with and given this regime quickly deteriorated and proved unworkable. It follows that, unlike in *Griffin,* the conflict between the parties did not constitute either a change or a situation that could not have been foreseen by them at the time of Nelson J.'s order.

[37] Since the threshold issue was not established, the trial judge had no jurisdiction to vary the custody order of Nelson J.; therefore, the order granting custody of Rachel to the mother must be set aside.

(b) The Support Cross-Appeal

[38] The mother raises three issues in the cross-appeal. She contends that the trial judge erred in:

- failing to find that the father was in arrears in child support ($675);
- failing to address properly the issue of Rachel's day care needs in considering the s. 7 expenses; and,
- failing to find a material change of circumstances so as to re-open the issue of spousal support.

[39] With respect to the mother's claim for arrears, the trial judge observed that the Family Responsibility Office had looked into the matter and determined that an adjustment to the amount of child support the father was paying was warranted and that at the time of trial he was not in arrears. I see no reason to interfere with that finding.

[40] I also see no reason to interfere with the trial judge's treatment of the s. 7 expenses. The trial judge carefully examined the evidence of Rachel's childcare costs and, relying on the mother's evidence, concluded that not all of the costs were incurred as a result of the mother's work or education demands. Then, based on the evidence before her, the trial judge reasonably fixed the allowable childcare expenses and apportioned those costs in relation to the parties' respective incomes.

[41] Finally, I cannot accept the mother's submission that the trial judge erred in finding that there was insufficient evidence to support the conclusion that there had been a material change in circumstances justifying a variation of the father's spousal support obligations. According to the mother, the trial judge should have found a material change

in circumstances based on the mother's changed financial circumstances due to both her role as primary care-giver and the parties' acrimonious relationship. The trial judge, however, found that there was insufficient evidence of a change in the mother's financial circumstances – a finding deserving of deference absent an obvious error.

[42] Even if the evidence supported the mother's submission that there was a change in her financial circumstances, the causes of that change would not amount to a material change of circumstances as contemplated in *Gordon*, *supra*. I refer back to my reasons regarding the mother's failure to establish a material change in circumstances sufficient to re-open custody: conflict between the parties was, regrettably, the norm. As well, the mother's role as primary caregiver was obviously foreseeable at the time of Eberhard J.'s order, dated approximately six months after Rachel's birth.

Conclusion

[43] It is clear that the parties' relationship has been relentlessly acrimonious and conflictual since young Rachel's birth. The fact that there has been no change in this sad state of affairs is what grounds my conclusion that the trial judge erred in re-opening the custody issue and did not err in deciding not to re-open the financial matters.

[44] The person occupying the most unfortunate position throughout this conflict is, of course, Rachel herself. Regrettably, she has known no other state of affairs. For her sake, I would encourage the parties to pursue and resolve their disputes in a more amicable fashion.

Costs and Disposition

[45] At trial, the judge awarded no costs on the grounds that success was "mixed". The father sought leave to appeal this award. Given the disposition of the appeal and cross-appeal, the parties' submissions on this issue are no longer relevant; however, it can no longer be said that success was "mixed". Rather, the father has been substantially successful and he should be entitled to costs. In the circumstances of this case, an award for the costs of the trial of $15,000, including interest and Goods and Services Tax, is appropriate.

[46] I would also award the father his costs of this appeal and cross-appeal fixed in the amount of $10,000 including interest and Goods and Services Tax.

[47] In conclusion, I would allow the appeal and set aside the order below granting sole custody of Rachel to the mother. The order of Nelson J. is restored. Given the difficulties the parties have had in working with Dr. Morris, the issue of who will be the parenting coordinator may need to be re-visited. If the parties are unable to agree, the selection of the new parenting coordinator shall be dealt with by way of a motion to the Superior Court.

[48] I would dismiss the cross-appeal.

RELEASED: "JUN 18 2008" "G. Epstein J.A."
"PR" "I agree J.C. MacPherson J.A."
"I agree Paul Rouleau J.A."