COURT OF APPEAL FOR ONTARIO

CITATION: Goldman v. Kudelya, 2017 ONCA 300
DATE: 20170413
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Epstein, Benotto and Trotter JJ.A.

BETWEEN

Jesse Irwin Goldman

Applicant (Appellant)

and

Larisa Kudelya

Respondent (Respondent)

Bryan R. G. Smith, for the appellant

Larisa Kudelya, in person

Heard: March 16, 2017

On appeal from the order of Justice Richard T. Bennett of the Superior Court of Justice, dated December 17, 2015.

Benotto J.A.:

[1] The parties are the parents of a 10 year old girl. They have been disputing custody since she was three. In 2013, a trial judge made a final order with detailed provisions for "parallel parenting". In 2014, the appellant (father) launched a motion to change seeking sole custody. After a six day hearing, the motion to change was dismissed. The motion judge found that there had not been a material change in circumstances and added that he would not, in any event, have awarded sole custody to the father. The father appeals claiming that the motion judge erred in

failing to find a material change in circumstances and also erred in not granting him sole custody.

[2] For the reasons that follow, I would dismiss the appeal.

A. FACTS

[3] The parties were married in 2004. The father is a lawyer; the mother is a registered nurse. They have one child, born January 2007. They separated in January 2010 when the mother was contacted by a woman who provided her with evidence of the father's affairs. This was the genesis for ongoing mistrust, anger and a sense of betrayal that the mother felt towards the father.

[4] The parties immediately embarked upon what has been accurately described as "high conflict" litigation. The police, children's services agencies and the courts became involved. In August 2010, the court appointed Dr. Irwin Butkowsky to conduct an assessment pursuant to s. 30 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12.

[5] Dr. Butkowsky conducted an extensive assessment and prepared detailed recommendations with respect to parenting. In his opinion, both parents were loving and had good parenting skills. The difficulty was the lack of mutual trust leading to ongoing conflict. His recommendation for decision-making for the child focused on a concept known as "parallel parenting" or "divided custody". This means that each parent has decision-making authority in certain areas after consultation with the other. For example, the father has decision-making authority over education, the mother over health issues. Dr. Butkowsky was of the view that in situations of intense conflict, shared parenting, which involves joint decision-making, would increase the likelihood of the child being exposed to conflict.

[6] Dr. Butkowsky further recommended that the parties attend joint education/facilitation with a qualified mental health professional who could serve as a "parenting coordinator" and assist in the implementation and maintenance of the recommended parenting plan.

[7] Dr. Butkowsky met with the parties to achieve agreement. The parties did not agree. They proceeded to settle the financial issues and went to trial on child related matters in June and July 2012.

Trial before Kaufman J.

[8] After a 15-day trial, Kaufman J. concluded that Dr. Butkowsky's recommendations should be implemented. The trial judge's reasons reflect a keen awareness of the extent of the conflict between the parents. He referred to Dr. Butkowsky's testimony that "these parents are incapable of cooperative communication and mutually trusting interaction". He also acknowledged that the parents display "mutual mistrust, underlying mutual hostility, high levels of conflict and apparently poor conflict resolution skills".

[9] The trial judge accepted Dr. Butkowsky's recommendations with respect to parallel parenting and the appointment of a mutually agreed upon parenting coordinator with arbitral powers. The trial judge concluded, at para. 193:

> Awards of custody should not reflect a winner and a loser; the mere fact that [the child's] parents have been involved in the prolonged and somewhat sordid case, if the trend continues, could make the child a loser…
>
> Having heard the evidence of the witnesses and placing considerable emphasis on the most thorough report of Dr. Butkowsky, this court is satisfied that the recommendations set out in the report provide a complete package for checks and balances to ensure that these parents pay more than lip service to the concept of the best interests of their daughter.

[10] The trial judge ordered that if the parties could not agree on a parenting coordinator, Dr. Butkowsky would choose. No appeal was taken from this order.

[11] The judgment was released on August 6, 2013. Fourteen months later, on October 23, 2014, the father commenced his motion to change.

Motion to change

[12] The motion was heard by Bennett J. in June and August 2015. The father sought to change Kaufman J.'s judgment to grant the father sole custody and primary residence of the child. The primary basis for his motion – as understood by the motion judge – was that a parenting coordinator had not been put in place. The father claimed that this was the mother's fault. The mother, of course, disputed this.

[13] The motion judge instructed himself that in order to vary the initial order, he must find a material change in circumstances. He reviewed in some detail the trial judge's findings about the relationship between the parties. He concluded that the parties were incredibly hostile, and that the mother, in particular, was the cause of much of the drama. He then considered the parties' current situation. He found that the father had tried to rise above the conflict, but that he "continues to subtly intimidate the [mother] provoking an adverse reaction." He further found that the mother is an intelligent woman who loves her daughter, but is unable to dissociate her anger at the father from her parenting responsibilities.

[14] The motion judge reviewed a number of high conflict incidents relating to family holidays, religious occasions, summer camp, schooling and the appointment of a parenting coordinator. The motion judge found that although the mother was responsible for most of these incidents, the father was not "totally blameless".

[15] In a 30-page decision, the motion judge concluded, at para. 151:

> For the reasons extensively set out above I find that there has been no material change in circumstances and that the events that have taken place since the first trial are events that are within the realm of what was anticipated by Justice Kaufman.

[16] The motion judge found that even if there had been a material change in circumstances, he would not have granted the father sole custody. In his view, there was a risk that the father would alienate the child from her mother.

[17] He ordered the parties to agree to a parenting coordinator within 10 days, failing which – in accordance with the trial judgment of Kaufman J. – Dr. Butkowsky would appoint one.

[18] The father appeals this order alleging that the motion judge erred in not finding a material change in circumstances and erred in not granting him sole custody. Further, the father submits that the motion judge erred in authorizing Dr. Butkowsky to appoint a parenting coordinator in the absence of agreement by the parties. If he is granted sole custody, seeks a termination of his child support payments.

The fresh evidence

[19] Both parties seek to rely on fresh evidence describing the ongoing conflict. The fresh evidence details the recent conflict concerning appointing a parenting coordinator and arranging counselling for the child. Predictably, each spouse points the finger at the other.

[20] The father's fresh evidence focuses largely on efforts to arrange counselling for the child. He alleges that, even though the mother told the motion judge that she agreed to obtain counselling for the child, she has not done so. (It appears to be common ground that counselling falls within the purview of health, a topic over which the mother has decision-making authority.) The mother's evidence suggests that it is the father who has been thwarting her efforts to arrange counselling.

B. ISSUES

[21] The issues to be addressed are:

1. Should the fresh evidence be admitted?
2. Has there been a material change in circumstances?
3. Did the motion judge err in authorizing Dr. Butkowsky to appoint a parenting coordinator if the parties could not agree on one?

[22] In light of my conclusions on the above issues, it is not necessary to address the motion judge's refusal to change custody or the father's request to terminate child support payments.

C. ANALYSIS

(1) Should the fresh evidence be admitted?

[23] The principles governing the admissibility of fresh evidence on appeal are outlined in *R. v. Palmer*, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759, at p. 775. The *Palmer* test requires the applicant to satisfy four criteria: (i) the evidence could not have been adduced at trial; (ii) the evidence must be relevant in that it bears on a decisive or potentially decisive issue; (iii) the evidence must be reasonably capable of belief; and (iv) the evidence must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[24] If these were the only criteria for admissibility, the proposed evidence would not meet the test. The evidence reflects nothing new but a continuation of the conflict that existed at the first trial and at the time of the motion to change. On this basis, it would not reasonably have affected the result. Further, the evidence consists largely of an exchange of allegations and denials which this court is not in a position to resolve.

[25] But the test here is different. The *Palmer* criteria are more flexible where an appeal involves the best interests of a child, and it is important to have the most current information possible when determining the child's best interests "[g]iven the inevitable fluidity in a child's development": *Children's Aid Society of Owen Sound v. R.D.* (2003), 2003 CanLII 21746 (ON CA), 178 O.A.C. 69, at para. 21. Even on this expanded test, the proposed evidence fails.

[26] The proposed evidence is predominantly focused on the parents' inability to appoint a parenting coordinator and arrange counselling for the child.

[27] Ironically, the most relevant portion of the fresh evidence is that with which both parties agree and which could have been admitted on consent. That is, the parties now have a parenting coordinator in place. The parties have retained Linda Chodos and have started meeting with her. The father raises the issue that Ms. Chodos is not complying with the order of Bennett J. because she has not agreed to stay on for a two-year term. Instead, she has agreed to work with the parties for six months at a time and evaluate the ongoing suitability of the process at each six-month interval. In my view, Ms. Chodos cannot be faulted for requiring regular evaluations. It would make little sense to continue an unsuitable process. In addition, the father, having agreed to this sensible process, cannot now raise it as an issue.

[28] The issue of counselling factors predominantly in the fresh evidence. The father alleges that the child is floundering. The mother does not agree. The more flexible approach to the *Palmer* test in custody matters is not an opportunity for parents to continue an affidavit war. The reason for the more flexible approach is to provide the court with current information about the condition, means, needs, circumstances and well-being of the child. Nowhere in the fresh evidence here is this addressed.

[29] The evidence of the child's need for counselling is not new. The evidence was before the motion judge and put to him as a basis for a finding of a material

change; he was not asked to decide that the evidence demonstrated a need for counselling. The evidence related to three events of conflict between the parents which greatly upset the child: Rosh Hashanah 2014; the cancelling of summer camp in 2014; and Thanksgiving 2014. The motion judge fully considered all three events.

[30] The three events are not new and there is no "fresh" evidence about them. They do not relate to the child's current need for counselling.

[31] With the exception of the agreed-upon fact that a parenting coordinator is now in place, I would not admit the fresh evidence.

(2) Has there been a material change in circumstances?

[32] The authority for a change of a final custody order is found in s. 17 of the *Divorce Act*, R.S.C. 1985, c. 3. The relevant portions are as follows:

> **17 (1)** A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
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> …
>
> **(b)** a custody order or any provision thereof on application by either or both former spouses or by any other person.
>
> …
>
> **(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.
>
> …
>
> **(9)** In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into

> consideration the willingness of that person to facilitate such contact.

[33] For over two decades the law has been clear about the test to be applied when the court is asked to vary a custody order. In *Gordon v. Goertz*, 1996 CanLII 191 (SCC), [1996] 2 S.C.R. 27, the Supreme Court clarified that s. 17 calls for a two-stage inquiry. First, there must be a material change in the situation of the child which "represent[s] a distinct departure from what the court could reasonably have anticipated in making the previous order": *Gordon*, at para. 12.

[34] If there is no material change, the inquiry ends. If there is a material change, the court must move to the second stage and consider the best interests of the child and whether to vary the original order.

[35] The material change relied on by the father before the motion judge was that "a parenting coordinator has not been put in place as was a requirement of the consent portion of Justice Kaufman's Order". Before this court, the material change alleged was reframed somewhat. The father alleged that the material change was the fact that the expectation of the trial judge of a "failsafe" appointment of a parenting coordinator was not realized, and thus the "checks and balances" anticipated were not in place.

[36] I would not give effect to either iteration of the alleged material change.

[37] First, it is clear from the trial decision of Kaufman J. that he anticipated that either party might frustrate or just not agree to the appointment of a parenting coordinator. That is why he provided the alternative of having Dr. Butkowsky make the appointment.

[38] Second, a fair reading of Kaufman J.'s reasons indicates very clearly that, far from assuming any solution was "failsafe", he was concerned that the "prolonged and somewhat sordid" situation would make the child a loser "<u>if the trend continues</u>" (emphasis added). In my view, he was aware that the trend of conflict might continue and was attempting to make the best decision in a difficult set of circumstances.

[39] Third, the ongoing problems associated with the appointment of a parenting coordinator were symptomatic of the long-standing conflict between the parties. Those problems were not unanticipated. As stated by the motion judge, at para. 139:

> I find that rather than this being a material change in circumstances, it was in fact contemplated by both Dr. Butkowsky and by Justice Kaufman that the [mother] may well attempt to reject any parenting coordinator recommended by Dr. Butkowsky.

[40] And, at para. 143:

> [T]he court finds that the [mother] not being cooperative is in fact something that was in fact contemplated by Justice Kaufman and was provided for in his decision. The [mother's] lack of cooperation is hardly a material change but in fact is a continuation of her actions since the [father's] mistress arrived at her door with revelation and proof of his indiscretion.

[41] The conflict here began when the parties separated. It continued throughout the litigation, and it was considered and anticipated by Kaufman J. A continuation of the conflict does not establish a material change in circumstances. This court confirmed this principle in *Litman v. Sherman*, 2008 ONCA 485, 238 O.A.C. 164, when it found no reason to re-open custody in a situation where "conflict between the parties was, regrettably, the norm". At paras. 36-37, the court said:

> 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 [the child]." 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 … 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 [the original] order.

[42] The father submits that *Litman* is distinguishable because the change in circumstances in this case is not the continuing conflict. Rather, it is the failure of the plan put forth by the trial judge. I have already addressed this submission and would add that the parenting coordinator is now in place, thus the plan has not in fact failed. That it took longer than usual is not surprising given the level of conflict here.

[43] I see no error in the motion judge's finding that there was no material change in circumstances and that the events that took place after the trial were within the realm of what "could reasonably have been anticipated" by the trial judge.

(3) Did the motion judge err in authorizing Dr. Butkowsky to appoint a parenting coordinator if the parties could not agree on one?

[44] The father submits that it was not open to the motion judge to delegate custody, access and parenting decisions to a third party. There was no agreed-to process for selecting a parenting coordinator. The father is no longer willing to submit to the parenting coordinator process given the mother's lack of cooperation.

[45] The content of the motion judge's order was not new. The motion judge's order simply restated Kaufman J.'s original order after the first trial, when he accepted Dr. Butkowsky's recommendation that if the parties did not agree on a parenting coordinator, he would have the authority to name one. No appeal was taken from this judgment. In fact, the basis for the father's motion to change was the fact that a parenting coordinator had not been appointed. I see no reason for appellate intervention on this issue.

D. DISPOSITION

[46] I would dismiss the appeal with costs payable to the respondent (mother) in the amount of $1,000.00 inclusive of disbursements and HST.

Released: April 13, 2017

"M.L. Benotto J.A."
"I agree Gloria Epstein J.A."
"I agree G.T. Trotter J.A."