IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Freda M. Steel
Madam Justice Diana M. Cameron

B E T W E E N :

ANGELA MARIE COULING	)	***R. G. Waugh***
	)	*for the Appellant*
	)	
(Petitioner) Appellant	)	***R. H. Johnston, Q.C.*** *and*
	)	***S. R. Golden-Greenwood***
- and -	)	*for the Respondent*
	)	
	)	*Appeal heard:*
BRYCE WAYNE COULING	)	***March 22, 2017***
	)	
	)	*Judgment delivered:*
(Respondent) Respondent	)	***June 5, 2017***

On appeal from 2015 MBQB 50

MONNIN JA

[1] This is an appeal from the denial of an application by the mother to relocate with her two children from Winkler, Manitoba to Bismarck, North Dakota.

[2] The mother also appeals the decision to grant to the father final decision-making authority on medical issues and the celebrating of Halloween by the children.

[3] Finally, the mother appeals from the trial judge's refusal to impute income to the father.

[4] The mother is originally from Bismarck. The father is from Brandon. The parties met online and married in 2006. The mother commenced residing in Brandon prior to her marriage. The parties moved to Winkler in 2010, where the father secured employment in his chosen field of psychiatric nursing. The mother is a stay-at-home mother as the parties had agreed that she would be. The parties separated on January 11, 2014.

[5] There are two children of the marriage; the daughter was born on August 4, 2009, and the son was born on February 25, 2012.

[6] By interim orders dated in April, May and June 2014, the mother was granted primary care and control of the children with the father receiving specified periods of care and control every second weekend from Friday Noon until Sunday evening and every Wednesday overnight.

[7] A parent capacity assessment was prepared by Dr. Michael Stambrook who also was qualified as an expert and testified as such during the course of the trial. In his assessment report, as well as in his evidence, Dr. Stambrook opined that it would not be in the best interests of the children if the mother relocated to Bismarck.

[8] The mother sought to move to Bismarck, along with the children, with a plan of living with her parents while continuing her post-secondary education with the goal of completing a human resource management bachelor degree at Dickenson State University.

[9] In denying the mother's request to relocate the trial judge stated (at paras 63-65):

> There is overwhelming evidence in this case that it is in [the children's] best interest[s] to grow up with their father as the consistent "major player" that Dr. Stambrook describes. This includes providing constant presence and participation in all domains of the children's lives, i.e. helping with school, taking them to extracurricular events, being there when they hurt themselves, watching their sports, their concerts, addressing their daily concerns, in short, the ongoing parenting that children need every day. Relocation would significantly diminish his ability to provide this nurturing and would jeopardize the loving relationship that is so critical for the children's healthy psychological development. It is unrealistic to suggest that the same enriched, nurturing, constant relationship that is optimum for their development can be maintained by a long distance relationship.
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> Now that her marriage has ended, the mother wishes to return to her childhood home and live with her parents. She wants the emotional and financial support of her mother and father. Ironically, satisfying the mother's wish to live with her own mother and father comes at the expense of her children's best interests — that is their need for the consistent presence of their own father. The law is clear that in a relocation analysis the parent's interests and wishes are secondary to the best interests of the children. Raising children involves putting your children's best interests first. Parents make sacrifices on a daily basis for their children. The court understands that remaining in Winkler will be one such sacrifice for the mother.
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> It is contrary [the children's] best interests for the mother to be permitted to relocate with them to Bismarck, North Dakota.

[10] The standard of review when dealing with an application to relocate was set out as follows in *Delichte v Rogers*, 2011 MBCA 50 (at para 18):

> The standard of review in custody cases is not disputed. With respect to this type of order, an appellate court should not disturb the decision in the absence of a material error, a serious misapprehension of the evidence or an error of law. See *Hickey v. Hickey*, [1999] 2 S.C.R. 518. As noted by Justice L'Heureux-Dubé in that case (at para. 10):
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> > …. [Trial judges] must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
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> In *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, Justice Bastarache affirmed that the basic principles of appellate review were fully applicable to child custody cases.

[11] In dealing with the issue of relocation, the mother argues that the trial judge failed to give appropriate deference to the principles set out in *Gordon v Goertz*, [1996] 2 SCR 27, and in particular, that she failed to give the mother's plan appropriate deference. The mother further argues that the trial judge erred in accepting the father's argument that the mother exercised restrictive gatekeeping and that in that context she also misapprehended the evidence that was before her.

[12] I have been satisfied that the trial judge erred in permitting counsel for the father to argue the issue of restrictive gatekeeping on the basis of what the trial judge in the case of *Morrill v Morrill*, 2014 MBQB 161 permitted and considered. In *Morrill v Morrill*, 2016 MBCA 66 (leave to appeal to the SCC refused, 2016 CarswellMan 499) we stated that it was an error for a trial judge to rely on psychological theories and research that had

no foundation in the evidence, was not subject to cross-examination and had not been accepted by the jurisprudence. Of course, the trial decision of *Morrill* had not yet been overruled when it was quoted in the case at bar. As we said with respect to the *Morrill* case, the trial judge here should have declined to consider the father's argument with respect to this theory, given it had not been tested in the evidence of the case, and should not have considered it in arriving at her decision.

[13] Also in dealing with the issue of restrictive gatekeeping, I have been satisfied that the trial judge misapprehended the evidence with respect to the father's access to the children. As an example, she wrote (at para 59):

> Even while the couple was still married there was evidence of restrictive gatekeeping by the mother. The Las Vegas incident where she refused to allow the children to go on an extended paternal family holiday is illustrative. The paternal grandfather had just received a serious diagnosis of lung cancer. This diagnosis triggered the plan for the entire family to go to Las Vegas. The father's distress about his children having to miss this family holiday was still evident a year and a half later when he testified about it in court.

[14] First, the grandfather's diagnosis of lung cancer had occurred a year and one-half prior, albeit this was an opportunity for the entire extended family to get together. The mother felt that Las Vegas was not an appropriate vacation destination for young children and the father testified:

> I wasn't going to try to really convince her. I thought, okay, well, if you don't want to go, but she said if you want to go, you go.

In the mother's interpretation, the father's lack of resistance equated to agreement because she testified:

> Yes, but Bryce and I both felt like Vegas was not a place for kids, so we didn't want the kids to go, so again, I stayed home with them because what were the kids going to do in Vegas in the winter when the pools weren't even opened?

Thus, in relying on this incident to conclude that the mother was restricting access to the children, the trial judge misapprehended the evidence.

[15] However, these errors are not sufficiently material in the context of this case to set aside the trial judge's central finding that it would not be in the best interests of the children to allow the mother to relocate. Contrary to the fact situation in *Morrill*, where we set the trial judge's decision aside and allowed the relocation, there is in this case clear, cogent and compelling evidence to justify the decision at which the trial judge arrived. That evidence is found in Dr. Stambrook's 44-page assessment report and in his *viva voce* evidence. I would, accordingly, dismiss her appeal with respect to the issue of relocation.

[16] This leaves the issue of final decision-making authority on medical issues and the celebrating of Halloween by the children and the imputing of income to the father.

[17] In as far as final decision-making authority, the trial judge wrote (at para 71):

> Neither parent will have final decision making authority, except with respect to medical issues. The father is to have final decision making authority on medical issues, after consultation,

> if the parties cannot agree. The evidence regarding the parties' actions and attitudes towards the vaccination of their children has satisfied the court that the father is better equipped to make medical decisions if the parties cannot agree.

[18] The evidence was that the parties could not agree regarding the vaccination of the children. Thus, a determination had to be made in that regard. The mother has not demonstrated that the trial judge erred in reaching her conclusion regarding the father's ability to make that decision. However, the ruling that the father have final decision-making authority over all medical issues was too wide. There was no evidence concerning the parties' ability or inability to agree regarding decisions concerning medical issues aside from the issue of vaccination. Indeed, the original decision not to vaccinate was jointly made by the parties. Thus, based on the above, aside from the issue of vaccination, the parties should continue to share, as they always had, final decision-making authority regarding medical issues.

[19] Regarding Halloween, the trial judge stated the following (at para 69):

> Given that the parties did not know what the court would decide regarding relocation, neither counsel was able to make submissions regarding the specific details of the care and control schedule. The court orders the following to assist with the specifics of the schedule, but is also prepared to hear further submissions regarding the detailing of the schedule.

She then proceeded to make a care-and-control order dividing up both Canadian and American holidays, allowing the father care and control for Halloween. In light of the above statement, her order was not final. It took into account the lack of ability of the parties to make representations on the

issue. On this basis, I cannot say that she erred. If the mother wishes to return to the trial judge regarding this issue, she is free to do so.

[20] Finally, in dealing with the issue of the father's income, she stated (at para 72):

> The father changed his employment to gain flexibility to allow for more time with his children. Given his own testimony that he believes he can earn the same amount as in his last full time position, there is no reason that his income should not continue to be set at the amount of $89,744. However, the court is not prepared to impute rental income that does not exist. The court accepts the father's evidence that the person who lives with him currently pays no rent but contributes to utility payments and does renovation work around the house. While these contributions may reduce the father's living expenses somewhat or ultimately increase the value of his house, were it to be sold, it cannot be classified as income.

[21] What the trial judge decided with respect to both of these issues is well within the purview of a trial judge to decide. I have not been persuaded, based on the evidence led in this case, that the trial judge erred in coming to the conclusions that she did. This decision is owed deference as it is fact-based and should not be interfered with unless a palpable or overriding error can be demonstrated or the decision is so wrong as to render it unjust. Such is not the case.

[22] The appeal is allowed in part. The father will have final decision making authority regarding all vaccinations for the children. In all other respects, the parties will share decision making regarding medical decisions concerning the children.

[23] In all other respects, the appeal is dismissed.

[24] As the mother was largely unsuccessful, I would order costs to the father.

Monnin JA

I agree: Steel JA

I agree: Cameron JA