See paras. 12-16

Case Name:

Hildinger v. Carroll

Between
Jean M. Hildinger, applicant (respondent), and
Daniel I. Carroll, respondent (appellant)

[**2004**] **O.J. No. 291**

2 R.F.L. (6th) 331

128 A.C.W.S. (3d) 1143

2004 CarswellOnt 444

Docket No. C37923

Ontario Court of Appeal
Toronto, Ontario

Laskin, Cronk and Armstrong JJ.A.

Heard: April 4, 2003.
Judgment: February 5, 2004.

(33 paras.)

[Editor's note: Supplementary reasons for judgment were released April 7, 2004. See [2004] O.J. No. 1391.]

Family law -- Custody and access -- Considerations in awarding custody -- Welfare of child paramount -- Conduct of parents -- Barristers and solicitors -- Relationship with client -- Conflict of interest -- Where nonlawyer personnel joins opposite party's lawyer's firm.

Appeal by Carroll from the judgment awarding sole custody of the parties' child to Hildinger and for an order for increased access. The child was six years old. The parties had met in New York, and Hildinger had moved to Canada during the pregnancy. Carroll moved to Canada in order to be closer to the child. The parties' relationship was acrimonious. The trial judge found that it was in the

child's best interests to be in the sole custody of Hildinger as a result of the friction between the parties. Carroll argued that he was deprived of a fair trial because he was forced to go to trial without counsel, a legal secretary at the firm of his former lawyer went to work at the law firm where Hildinger's lawyer worked, and that Hildinger's counsel gave the trial judge a written copy of his opening statement before trial. Carroll's lawyer resigned shortly before the trial was scheduled to begin. Carroll chose to proceed with the trial.

HELD: Appeal allowed in part. Carroll was entitled to increased access to the child. Carroll had chosen to proceed without counsel. The legal secretary's employment did not give rise to a conflict of interest on the part of the lawyer. The written statement did not prejudice Carroll.

Statutes, Regulations and Rules Cited:

Children's Law Reform Act, R.S.O. 1990, c. C.12.

Appeal From:

On appeal from the judgment of Justice Douglas H. Lissaman of the Superior Court of Justice dated February 13, 2002.

Counsel:

Philip W. Augustine, for the appellant. Ian C. Vallance and Alan M. Riddell, for the respondent.

The following judgment was delivered by

LASKIN J.A.:--

A. Introduction

1 This appeal concerns the custody of a young girl, Nancy Mae Hildinger, four and a half years old at the time of trial and nearly six when the appeal was argued. The appellant, Daniel Carroll, and the respondent, Jean Hildinger, are Nancy Mae's parents. The trial judge, Lissaman J., ordered that Ms. Hildinger have sole custody of Nancy Mae and that Mr. Carroll have specified access. Mr. Carroll appeals, seeking an order for joint custody or a new trial. In the alternative he asks for increased access.

2 Ms. Hildinger and Mr. Carroll met in New York City in July 1996, where they both lived at the time. She was a nurse at a local hospital. He had a senior position with IBM. They began dating. Nancy was conceived in September 1996. Two months later Ms. Hildinger ended the relationship. She moved to Ottawa before the child was born, admittedly to try to eliminate Mr. Carroll from the child's life. That did not happen.

3 Nancy Mae was born in June 1997. In July 1998 McKinnon J. ordered that the parties share custody but that Nancy live primarily with her mother. Mr. Carroll was given access in New York City for one month in the summer and one week in the spring, fall and at Christmas.

4 In November 1998 Mr. Carroll arranged a job transfer to Ottawa to facilitate his access to his daughter. In April 1999 Binks J. ordered an assessment of the child and a trial of the issue of how the order of McKinnon J. was to be implemented. However, Ms. Hildinger then brought an application for sole custody of Nancy Mae. Mr. Carroll countered by claiming that he should have sole custody.

5 The relationship between Ms. Hildinger and Mr. Carroll has been acrimonious, beginning even before their daughter was born. While both love their daughter they cannot agree on any matter, however small, concerning her welfare. The trial judge held that the "continued conflicts between Nancy Mae's parents" exacerbated by Mr. Carroll's move to Ottawa amounted to a material change in circumstances justifying a variation of McKinnon J.'s joint custody order. The trial judge concluded that giving Ms. Hildinger sole custody was in Nancy Mae's best interests.

6 Mr. Carroll advances three submissions on appeal.

1) He was deprived of a fair trial for four reasons:

    a) he was compelled to go to trial without counsel;
    b) his position was compromised because an employee of his former lawyer went to work at the law firm where Ms. Hildinger's lawyer was a partner;
    c) counsel for Ms. Hildinger gave the trial judge a written copy of his opening statement before the trial began; and
    d) he was denied a fair opportunity to present his case.

2) The trial judge erred in concluding that the "friction and disagreement" between the parents precluded an order for joint custody.
3) In the alternative, the trial judge erred in failing to grant him increased access.

7 For the brief reasons that follow, I do not agree with Mr. Carroll's first two submissions. I

would dismiss his appeal, other than to order that he is entitled to increased access to his daughter.

B. Discussion

First Issue: Was Mr. Carroll deprived of a fair trial?

8 I will deal first with the four branches of Mr. Carroll's argument that he was denied a fair trial.

a) Mr. Carroll was compelled to go to trial without counsel.

9 The background to this submission is as follows. During the proceedings leading up to the trial, Mr. Carroll had been represented by Mr. Levencrown, an Ottawa family law lawyer. The trial was scheduled to begin on October 15, 2001 and had been marked "peremptory". On October 3, 2001, Mr. Levencrown resigned as Mr. Carroll's lawyer and a few days later obtained an order removing himself as solicitor of record. Mr. Carroll sought an adjournment of the trial. Morin J. gave Mr. Carroll a choice: he ordered that the trial would be adjourned if Mr. Carroll paid Ms. Hildinger's costs thrown away in the amount of $12,000; alternatively, he ordered the trial to proceed as scheduled.

10 Mr. Carroll chose to proceed and represent himself. He now submits that the order of Morin J. deprived him of a fair trial. There are three answers to his submission. First, he has not appealed Morin J.'s order. Second, even if he can get over that hurdle, Morin J.'s order is discretionary and entitled to deference on appeal. I consider his exercise of discretion reasonable. His costs order was obviously made to address the financial imbalance between the parties. Ms. Hildinger earned less than $40,000 annually; Mr. Carroll earned over $200,000. Mr. Carroll did not show that he could not pay the costs order. Third, Mr. Carroll is articulate, intelligent and, as the trial judge pointed out, was very active in running his custody case for years. Also, during the trial he was assisted - behind the scenes - by Mr. Augustine, his counsel on appeal.

b) Mr. Carroll's position was compromised because an employee of his former lawyer went to work at the law firm where Ms. Hildinger's lawyer was a partner.

11 Mr. Carroll submits that Ms. Hildinger's counsel, Mr. Vallance, had a conflict of interest and should not have been allowed to conduct the trial for his client. He contends that the conflict compromised his right to a fair trial. We permitted the parties to lead fresh evidence on this issue. Here are the facts.

12 A legal secretary for Mr. Levencrown during part of the time he acted for Mr. Carroll was dismissed by Mr. Levencrown's firm and went to work at Kimmel, Victor, Ages, where Mr. Vallance is a partner. While working for Mr. Levencrown the secretary typed his correspondence to Mr. Vallance and prepared court documents. She took no part in any strategy discussions between Mr. Levencrown and Mr. Carroll. She left Mr. Levencrown's employ in May 2000. She began working for Kimmel, Victor, Ages in October 2000. She worked exclusively for Stephen Victor,

another partner in the firm. She did not work for Mr. Vallance.

13 Mr. Carroll nonetheless submits that her employment at Kimmel, Victor, Ages raised a conflict of interest, which should have precluded Mr. Vallance from acting for Ms. Hildinger. I see no merit in this submission.

14 Most conflict of interest cases in this area deal with lawyers changing law firms, not legal secretaries. Still, I accept that in some circumstances a non-professional employee's change of firms could give rise to a disqualifying conflict of interest. However, no such circumstances exist here.

15 The Supreme Court of Canada has approved a straightforward test for determining whether a conflict of interest should disqualify a lawyer or a law firm from acting. The party against whom the allegation of conflict is made must demonstrate that a "reasonably informed person would be satisfied that no use of confidential information would occur." See MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235 at paras. 44-51 and Davies, Ward & Beck v. Baker and McKenzie (1998), 40 O.R. (3d) 257 at 258-59 (C.A.). Ms. Hildinger and her law firm easily satisfied this test for these reasons:

* The secretary did not work for Mr. Vallance. She worked for another lawyer on a different floor of the firm's offices.
* The secretary gave unchallenged evidence that she was told by her new firm not to discuss the case with Mr. Vallance, she did not discuss the case with him and she did no work for him on it save for photocopying a single book of authorities, not knowing that it was for this case.
* Mr. Vallance did not have a financial relationship with the secretary. She was employed by the firm's management company. Kimmel, Victor, Ages is a loose association of five separate financial partnerships and economic entities and each lawyer hires his or her own support staff.
* Kimmel, Victor, Ages instituted password protection on Ms. Hildinger's file so the secretary could not gain access to it.

16 In the light of these considerations any reasonably informed member of the public would be satisfied that Mr. Vallance did not use confidential information obtained from Mr. Levencrown's office.

c) Mr. Vallance gave the trial judge a written copy of his opening statement.

17 Before the trial began Mr. Vallance sent a written copy of his opening statement to the trial judge. He said that this is a common practice. Mr. Carroll, however, submits that it was unfair. I find it an odd practice, especially in a case where the other side is unrepresented. But nothing in the record suggests that what Mr. Vallance did prejudiced Mr. Carroll.

d) Mr. Carroll was denied a fair opportunity to present his case.

18 The gravamen of this submission is that the trial judge prevented Mr. Carroll from reading in portions of the examination for discovery evidence of Ms. Hildinger. This submission has no merit. Although Mr. Carroll was not permitted to read from Ms. Hildinger's discovery transcript, the trial judge gave him great latitude in his closing argument, including permitting him to file his own written submissions, which contained extensive quotes from Ms. Hildinger's discovery evidence.

19 I would therefore not give effect to Mr. Carroll's submission that he was deprived of a fair trial.

Second Issue: Did the trial judge err in holding that the "friction and disagreement" between the parents precluded an order for joint custody?

20 Mr. Carroll makes two arguments here. First, he argues that the question of sole custody should not have been an issue at the trial because the order of Binks J. limited the jurisdiction of the trial judge to determining how to implement the joint custody order made by McKinnon J. Second, he argues that the trial judge erred by relying on this court's judgment in Baker v. Baker (1979), 23 O.R. (2d) 391 to order that Ms. Hildinger have sole custody of Nancy Mae. I do not accept either argument.

21 The order of Binks J. did not prevent Ms. Hildinger from seeking sole custody of Nancy Mae or deprive the trial judge of jurisdiction to make this order. Ms. Hildinger was entitled to seek a variation of the order of McKinnon J. if she could show a material change in circumstances since the making of that order. The trial judge was fully justified in finding that the increase in hostility between Nancy Mae's parents, aggravated by Mr. Carroll's move from New York City to Ottawa, amounted to a material change in circumstances. Moreover, neither party any longer wished to be governed by McKinnon J.'s joint custody order. Indeed, Mr. Carroll claimed sole custody and termed McKinnon J.'s order "obsolete".

22 Having found a material change in circumstances warranting a variation of the order, the trial judge then held that granting Ms. Hildinger sole custody was in Nancy Mae's best interests. In so holding he relied on Baker, in which Lacourcière J.A. wrote that a joint custody order is inappropriate where the parents are not willing to cooperate in raising their child. In applying Baker, the trial judge wrote:

> In making Nancy Mae's mother sole custodial parent, this is being done in accordance with the well-known Court of Appeal decision of Baker and subsequent decisions which make it clear that joint custody is an appropriate remedy only where the parties can communicate with each [other] without continual friction and disagreement [citation omitted].

23 Mr. Carroll contends that Baker and the cases following it have been overtaken by the custody provisions of the Children's Law Reform Act, R.S.O. 1990, c. C.12 and by several recent trial decisions in which courts, in the face of uncooperative relations between parents, have nonetheless

granted joint custody in the form of parallel parenting. Under a parallel parenting regime decision-making responsibility on major matters affecting a child's welfare is divided between the parents. That is what Mr. Carroll seeks. He wishes to choose Nancy Mae's church and after-school activities, while leaving Ms. Hildinger to choose Nancy Mae's school and healthcare providers. He submits that the "friction and disagreement" between him and Ms. Hildinger should not preclude an order for joint custody under a parallel parenting regime. He contends that the trial judge was unfairly pre-disposed against making such an order.

24 The trial judge cannot be faulted for applying the established jurisprudence of this court. However, assuming without deciding that parallel parenting is now a viable option where the parties are uncooperative, I see no justification for it in this case. The overwhelming evidence accepted by the trial judge pointed to but one conclusion: granting Ms. Hildinger sole custody was very much in Nancy Mae's best interests.

25 The trial judge relied principally on the two independent assessors who testified before him: Lena Jones, of the Centre for Counselling and Mediation in Ottawa, and Christopher Cooper, a psychiatrist. Both testified that joint custody was unworkable and could be harmful to the child.

26 In Ms. Jones' opinion, successful joint custody at least requires that the parents separate their own needs from those of the child. In her view, that did not happen here. Instead, Mr. Carroll put his own needs ahead of his daughter's. He has a combative personality and used threats and intimidation to get his way. Therefore, Ms. Jones testified that Ms. Hildinger needed a sole custody order to put limits on Mr. Carroll's inappropriate parenting requests.

27 Dr. Cooper echoed Ms. Jones' opinion. In his view, Mr. Carroll has personality traits that clashed with his daughter's best interests. Like Ms. Jones, Dr. Cooper believed that Mr. Carroll put his own interests ahead of Nancy Mae's. Because of Mr. Carroll's and Ms. Hildinger's historical lack of "shared values" and respect for one another as parents, Dr. Cooper concluded that this case fell "a fair way outside" the parameters of a joint custody regime. Even parallel parenting risked tensions between the parents, which would carry over to Nancy Mae and disrupt her well-being.

28 Having regard to the significant deference given to the findings of trial judges in family law matters, the evidence of Ms. Jones and Dr. Cooper, which was accepted by Lissaman J., forecloses appellate interference with his sole custody order. Indeed, in my opinion, that was the only sensible order that he could have made. The parties have no history of joint parenting; Nancy Mae has lived with her mother from the day she was born; Ms. Hildinger is a good and loving parent; and Mr. Carroll's hostility towards Ms. Hildinger infects every aspect of Nancy Mae's day-to-day upbringing.

29 I would therefore not give effect to this ground of appeal.

Third Issue: Did the trial judge err in failing to grant Mr. Carroll increased access?

30 During the trial, the trial judge commented that he was considering expanding Mr. Carroll's access. In his reasons he emphasized that Ms. Hildinger "must be as flexible as possible as far as access is concerned." Yet he simply replicated the access ordered by Binks J. in April 1999 - every second weekend, every second Wednesday, and on the American holidays - and added a provision for "such additional and further access as may be informally agreed upon, such access to be open ended."

31 Mr. Carroll submits that he is entitled to an order for increased access, with the additional access detailed in an order. I agree.

32 In addition to having access every second weekend and on American holidays as ordered by the trial judge, I would give Mr. Carroll the following access to Nancy Mae:

1) Every Wednesday (instead of every second Wednesday) from after school until 8:00 p.m.
2) One week in either July or August of each year, to be agreed on by the parties, and failing agreement to be designated by Ms. Hildinger no later than April 30 of the year in question.
3) From December 20 at 10:00 a.m. to December 25 at noon, in even numbered years beginning in 2004; and from December 25 at noon to December 30 at 6:00 p.m. in odd numbered years, beginning in 2005.

If these terms are unworkable the parties may, within fifteen days of the release of these reasons, make written submissions to the panel on substitute terms.

C. Conclusion

33 Mr. Carroll received a fair trial. The trial judge's order granting Ms. Hildinger sole custody of Nancy Mae is overwhelmingly supported by the evidence. Mr. Carroll, however, is entitled to an order for increased access. Apart from ordering increased access, I would dismiss the appeal. Ms. Hildinger is entitled to her costs of the appeal on a partial indemnity basis. I would fix those costs in the amount of $12,000 inclusive of disbursements and GST.

LASKIN J.A.
CRONK J.A.
ARMSTRONG J.A.