Morad v. Iannone, 2023 ABCA 293

Areas of Law: Family Law; Relocation; Mobility Application

~Non-compliance with the relocation notice provisions of the Divorce Act *is not a determinative factor in allowing relocation, but rather one to be weighed and assessed relative to other factors in an analysis of the best interests of the child~*

BACKGROUND

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The parties married in 2019 and separated in 2021. In May 2021, the respondent mother travelled with the parties' two children to Florida, where she had family and where she had lived prior to marriage. While the mother and children were in Florida, the appellant father had daily video calls with the children and visited them three times. In October 2021, the father commenced proceedings to have the children returned to Alberta; he obtained an interim without-prejudice order requiring the mother to return within 60 days and granting her primary care with generous parenting time to the father. In December 2021, the mother applied for a mobility order permitting her to relocate with the children to Florida. She returned with the children to Alberta in May 2022 and between July and October 2022 each party was granted two weeks of parenting time on an alternating schedule pursuant to a further interim parenting order.

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The mother's mobility application was heard in November 2022. The chambers judge held that it was in the children's best interests to relocate with the mother to Florida. The mother had been the primary caregiver for most of the children's lives, she would be able to meet the children's need for stability, and she had strong family support in Florida. The chambers judge found that the father had trouble understanding others' emotions and that there was a risk he would bring the children into the parental conflict or expose them to unsuitable environments. The chambers judge determined there had been a "technical" breach on the part of the mother with regard to the relocation notice requirements under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The father had consented in May 2021 to the children travelling to Florida; it was unclear whether this consent was temporary or contemplated a permanent relocation. Moreover, the judge found the situation was not one where the mother was attempting to block the father from having access to the children.

APPELLATE DECISION

On appeal, the father argued the chambers judge had erred in finding a merely "technical" breach of ss. 16.8 and 16.9 of the *Divorce Act* and that the statutory notice requirements should be viewed as the starting point for the relocation analysis. The court disagreed with the father's characterization of the notice requirements as a "trumping" factor or condition precedent; rather, the court confirmed Parliament's intent that any non-compliance with the notice provisions is one factor to be weighed among others in analyzing the best interests of the children. The chambers judge made no reviewable error in her factual findings or in her weighing of the relevant factors, which included consideration of the father's consent to the initial move to Florida, the mother's willingness to facilitate contact, and her eventual return to Alberta pending her mobility application. The chambers judge did not condone a self-help remedy—or a "move first, ask second" approach—in

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using the mother's time in Florida to establish a new parenting status quo, as it was clear she also considered the parties' parenting arrangements pre-May 2021 and post-May 2022 in her overall analysis. Finally, the court rejected the father's argument that the chambers judge had erred in applying the burden of proof provisions of the *Divorce Act*. The court dismissed the appeal.

COUNSEL COMMENTS

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Counsel Comments by Andy Hayher, K.C.,
Counsel for the Respondent

Andy Hayher, K.C.

"We acted for the Respondent mother in this Appeal. At the King's Bench level, Carruthers J presided over a three-day oral hearing where she determined that it was in the children's best interests to relocate to Florida with the mother. On appeal, the father argued that Carruthers J failed to consider the proper test under the *Divorce Act* and erred in assessing the factors under section 16 and 16.92.

The Appellant in oral argument tried to persuade the Court of Appeal that the notice requirement under the *Divorce Act* was the starting point for the analysis in a relocation matter. Essentially suggesting that if a party does not provide the correct notice, that a relocation application should fail. Despite the impassioned submissions of my Learned Friend, Ms. Huizinga KC, the Court of Appeal was not moved by this argument. The Panel chose to adopt our position that any breach of the notice requirement was a factor in the analysis but not *the* factor. The Appellant's approach was an attempt to stretch the intention of Parliament and create a hierarchy amongst factors where no such hierarchy exists.

On appeal, the Appellant also quarreled with the management of the oral hearing. The father advanced a procedural fairness argument on appeal that focused on the amount of time he was afforded to provide his evidence and how it did not align with the procedural order that set the terms of the oral hearing. The difficulty with this position was that his trial counsel did not raise any issue before Carruthers J regarding the amount of time afforded to the father to present his evidence. Had trial counsel raised this issue during the oral hearing, perhaps this argument would have held some water. However, on appeal, my Learned Friend, Ms. Huizinga KC, rightly conceded that the issue ought to have been raised at the court below but was not. This highlights how appellate counsel can sometimes be hamstrung by trial

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counsel when potential procedural issues are not raised at trial. The lesson: always remember your job as trial counsel is to build a record.

The balance of the Appellant's arguments were a critique of the application of factors under section 16 and section 16.92 of the *Divorce Act*. Our position was that Carruthers J applied the law to the facts that were before her and what resulted was a highly discretionary decision which is entitled to deference on an appeal. The Court of Appeal agreed. This case, like many other mobility cases that have come out of the Court of Appeal, shows the importance of marshalling the correct evidence before the trial court. Credit goes to Max Blitt KC who was hearing counsel for our client at the King's Bench and provided clear and cogent evidence that satisfied the required factors under the *Divorce Act*."