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COURT OF APPEAL FOR ONTARIO

WEILER, ARMSTRONG and BLAIR JJ.A.

B E T W E E N :	)	
	)	
GEORGE KAPLANIS	)	**D. Smith and**
	)	**Susan E. Milne**
	)	**for the appellant**
	)	
Plaintiff (Respondent)	)	
	)	
- and -	)	
	)	
PATRICIA KAPLANIS	)	**George Kaplanis**
	)	**the respondent in person**
	)	
Defendant (Appellant)	)	
	)	
	)	**Heard: November 18 and 19, 2004**

On appeal from the order of Justice Ellen M. MacDonald of the Superior Court of Justice dated September 17, 2003.

WEILER J.A.:

[1] On July 8, 2003 Justice E. MacDonald awarded joint custody of the child of the parties' marriage to the appellant mother and respondent father. She further ordered the parties to attend counseling to improve their parenting skills and ordered that decisions with respect to choice of schools, activities and hobbies for the child were to be made by an unnamed counselor if the parties were unable to agree. After calculating the net family property, the trial judge ordered the father to pay the mother $4,950.26. The mother appeals the order of joint custody and seeks sole custody; the father cross-appeals the payment he was ordered to make.

[2] For the reasons that follow, I would agree with the mother that the order of joint custody should be set aside on the grounds that the trial judge erred in principle in awarding joint custody (a) where there was no evidence of historical co-operation and appropriate communication between the parents, and (b) in the hope that it would

improve the parenting skills of the parties. I would also agree that the trial judge exceeded her jurisdiction by making an order that the parties attend counseling and by imposing on them a requirement that, in the event they could not agree, the unnamed counselor was to decide the matter for them. Inasmuch as an order for joint custody is not appropriate, and the father did not seek sole custody of the child, I would order that the mother be awarded sole custody of the child. I would further order the trial of an issue with respect to the terms of the father's access. Pursuant to s. 112 of the *Courts of Justice Act*, I would request the Children's Lawyer to cause an investigation to be made and to report and make recommendations to the court on all matters concerning access to the child and the father's involvement with the child.

[3] I would dismiss the father's cross-appeal from the payment order. The trial judge made adverse findings about the father's credibility. The trial judge made findings of fact respecting the property in dispute and there is no basis on which we can interfere with her decision.

The Custody Appeal

[4] The background facts as found by the trial judge and her holding in relation to the issue of custody are as follows. The appellant and the respondent were married on June 6, 1998. The only child of the marriage, a daughter named Victoria, was born on October 11, 2001. The marriage was a tumultuous one. The parties separated two and a half years later on January 12, 2002 when the father left the matrimonial home after he was charged with uttering a death threat to the mother. The charge was subsequently withdrawn largely as a result of an affidavit sworn by the mother. In her affidavit she stated that she was not a victim of violence, that it would be in the best interests of Victoria if her husband were allowed to return to the matrimonial home, and that her husband was "…a good man and no doubt a good father." The father never returned to the matrimonial home and attempts at counseling were unsuccessful. Indeed the counselor had them leave his office because of the "uncontrollable invective being exchanged by them."

[5] The father, who was self-represented at trial, sought a form of joint custody, known as parallel parenting. Parallel parenting envisages that the parents have equal status and exercise the rights and responsibilities associated with custody independently of the other.

[6] The mother resisted the father's application on the basis that the parties could not communicate without screaming at each other. In addition to the evidence of the screaming incident in the marriage counselor's office she led evidence about a screaming incident that was witnessed by a neighbour when the father came to pick up the child at his in-laws' home in which the mother had returned to live.

[7] The trial judge held:

> I was unimpressed with his [the neighbour's] evidence. I saw it as an attempt, on the part of the wife, to buttress her claim for sole custody. My hope is that the parents will put closure on the disappointment and resentments that flow from their failed marriage. They have the support of extended families on both sides including aunts, uncles, grandparents, nieces and nephews. They aspire to raise Victoria in the Greek Orthodox faith into which she was baptized, not after some controversy, in mid 2002. I inferred from the evidence that the parents plan to have Victoria attend both public and Greek school.
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> …
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> It struck me that it is not in the wife's interests to try to communicate and cooperate with the facilitation of access. She would see this as weakening her claim for sole custody, because of the emphasis she puts on their inability to communicate as a justification for a sole custody order. In my view, considerations of the best interests of Victoria in the context of her extended familial relationships, must not preclude joint custody, merely because the parties, fresh from the wounds of their failed marriage, find it difficult to be civil to each other. See *Dagg v. Pereira* 12 R.F.L. (5th) and the decisions Bellamy J. referred to in paragraphs [39] to [46].
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> …
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> [T]heir marriage was short, but as responsible parents to Victoria, they have a long standing obligation, and responsibility to enhance her relationship with both parents. A disposition of sole custody, in favour of the mother, will be used by her to minimize the father's influence and contact. The mother has acknowledged that the father is a good father. For these reasons, Victoria [should] be in the joint custody of her parents.

[8] After acknowledging that because Victoria was so young she had not yet been overnight at her father's home, the trial judge ordered a gradual expansion of access to

take place over a two-month period and made a detailed order to that effect.[1] In addition the trial judge ordered:

> The parents shall attend counseling on how to improve their communication skills, respecting all matters pertaining to Victoria, including adjustments to scheduled access to accommodate special family events. Decisions about choice of schools, activities and hobbies as Victoria grows older will be made jointly. In the event that they cannot agree, their counselor who [sic] will decide the matter for them. The costs of such counseling will be split equally between the mother and the father.

Analysis

[9] Family law cases are, by their nature, fact-based and discretionary. It is unnecessary to address this court's prior jurisprudence regarding the issue of joint custody to resolve the issue of custody in this appeal.

[10] As in any custody case, the sole issue before the trial judge was the best interests of the child. The fact that both parents acknowledged the other to be "fit" did not mean that it was in the best interests of the child for a joint custody order to be made. The evidence before the trial judge should have revealed what bonds the child had with each of her parents and their ability to parent the child. In addition to detailing the mother's current arrangements respecting the care of the child, the evidence should also have indicated what practical plan to care for the child the father proposed to make when he had the child with him and the benefits to the child of such an arrangement. The trial judge had no evidence to this effect. Indeed, as the trial judge acknowledged at the time she made her order, the child had never spent an overnight with the father alone.

[11] The fact that one parent professes an inability to communicate with the other parent does not, in and of itself, mean that a joint custody order cannot be considered. On the other hand, hoping that communication between the parties will improve once the

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[1] Beginning July 14, 2003, she ordered that the father would have Victoria twice a week on Mondays and Thursdays from 8:00 a.m. to 4:30 p.m., and, in addition, that she spend every second Sunday with her father beginning July 21, 2003 from 8:00 a.m. to 4:30 p.m. If, owing to the father's schedule, the scheduled Monday and Thursday times were impractical, he was to have access every Saturday instead from 8:00 a.m. to 4:30 p.m. Beginning September 14, 2003, Victoria was to spend every second Saturday overnight with her father. When Victoria reached her third birthday, the father was to have weekend access every second weekend from Friday at 5:00 p.m. to Sunday at 5:00 p.m. and, if the weekend was a long holiday, to Monday at 5:00 p.m. She made provision for Victoria to be with her mother on Mother's day and her father on Father's day, as well as on their birthdays, notwithstanding the schedule. Victoria was to spend religious holidays as "arranged by her parents in such a way that Victoria spends half of the time of the celebrations with her father and half with her mother." Beginning in the summer of 2004, Victoria was to spend two weeks in the summer with her father.

litigation is over does not provide a sufficient basis for the making of an order of joint custody. There must be some evidence before the court that, despite their differences, the parents are able to communicate effectively with one another. No matter how detailed the custody order that is made, gaps will inevitably occur, unexpected situations arise, and the changing developmental needs of a child must be addressed on an ongoing basis. When, as here, the child is so young that she can hardly communicate her developmental needs, communication is even more important. In this case there was no evidence of effective communication. The evidence was to the contrary.

[12] Insofar as the ability of the parties to set aside their personal differences and to work together in the best interests of the child is concerned, any interim custody order and how that order has worked is a relevant consideration for the trial judge and any reviewing court. At trial the father testified that an interim custody order made prior to trial on August 1, provided that the mother have custody and that the father have access on Mondays and Thursdays from 11 to 4 p.m. The father testified that during the time he was with his child, they visited his parents, his niece, Woodbine Centre, McDonald's and Burger King. He also testified that he had sought increased access and had not received it.

[13] While the child's best interests are not necessarily synonymous with the child's wishes, the older the child, the more an order as to custody requires the co-operation of the child and consideration of the child's wishes. Here, we are dealing with a very young child, incapable of communicating her wishes. When the child is too young to communicate her wishes, expert evidence may be necessary to enable a judge to determine how the child's psychological and emotional needs would be advanced by the proposed custody order or parenting plan. Ideally, judges conducting a pre-trial would canvass the issue with the parties to alert them to the need to bring forward evidence of how the child's needs will be met by the proposed parenting plan. The assistance of the Children's Lawyer pursuant to s. 112 of the *Courts of Justice Act*, R.S.O. 1990, c.-43, could also be requested. In this case the trial judge did not have the benefit of expert evidence or input from the Children's Lawyer respecting the child.

[14] It may certainly be desirable for parents to take counseling on how to better parent their child and to hire a counselor or parenting coach to resolve disputes. The order provided by the trial judge was, however, problematic. The legislation does not specifically authorize the making of an order for parental counselling and, while some trial judges have held the court has inherent jurisdiction to make a counselling order, carrying out the order requires the co-operation of the parents. There was no evidence that the parties would be able to agree on whom to appoint. There was no agreed process for the appointment of a counselor in the event that they could not agree who should be their counselor. Nor was there any evidence that they were willing to submit their

disputes to be decided by a counselor outside the court process envisaged under the *Divorce Act* and without recourse to it.

[15] Having regard to the above factors, the trial judge erred in making an order for joint custody of the child. She further erred in making the orders she did that the parties attend counseling and appoint a counselor to resolve their disputes. In the absence of any request for sole custody by the father and detailed parenting plan put forward by him, the court's only other choice was to make an order for sole custody of the child to the mother. Accordingly, I would, as indicated, allow the appeal and order that the mother have sole custody of the child. The extent of the father's involvement in the life of the child is a matter that remains to be addressed by way of a new trial on the issue of access, hopefully with the assistance of the Children's Lawyer. I would therefore order a new trial on the issue of the parties' access.

[16] The father represented himself at trial and on this appeal. His factum filed on this appeal did not comply with the rules in that it contained statements as to what had occurred from his point of view following the trial. When advised that such references were not appropriate and could not be considered by the court, the father sought leave of the court to file fresh evidence in the form of an affidavit by himself concerning the post-trial events. Consideration of the fresh evidence would not have been of assistance in resolving this appeal and I would decline to admit it. If anything, the proposed fresh evidence only serves to confirm that the parties continue to be unable to co-operate with one another in the best interests of their child.

The Cross-Appeal Respecting the Payment Order

[17] When deciding the issue of net family property, the trial judge made reference to the father's extensive gambling problem and the "absurdity" of his testimony respecting the valuation of his business interests. She stated that he "told lie after lie in his attempt to tailor his evidence on the value of his various business ventures."

[18] In relation to the father's extensive claim respecting intra-family debts, the trial judge held:

> The extent of Mr. Kaplanis' debts and other liabilities on valuation date is not proven. He led no evidence from family members that supposedly lent him large amounts of money without security. His debts, according to his financial statement, total $174,000 on valuation date and $294,000 on the date of his statement, October 25, 2002. The increase of over $120,000 is largely debt to members of his family and is unproven.

She further stated that:

> The husband was motivated to exaggerate his debt recognizing that if his level of debt is accepted by the court, his net family property will be zero. He must know that when he has such large debt, it must be proven. Without proof, which to my mind, is easily obtained, I will not permit such debt to be included in the calculation of his net family property.

[19] With respect to the household contents, the trial judge ordered that specified items were to be delivered to the husband and then attributed $10,000 to the mother's net family property to reflect the contents that were to remain in her possession.

[20] Concerning certain funds held in Greece, the trial judge found that the funds were gifted and hence excluded from the parties' net family property.

Analysis

[21] The father's cross-appeal is really an attempt to relitigate the findings of fact already made by the trial judge. The trial judge did not significantly misapprehend the evidence or err in principle in her assessment of it. She was entitled to make the adverse findings she did about the father's credibility. There is no basis on which we can interfere with her assessment of the evidence or her decision respecting the payment order she made.

[22] I would dismiss the cross-appeal.

Costs

[23] The mother has had some success on this appeal. I would order that she is entitled to a portion of her costs of the appeal and I would fix those costs in the amount of $10,000 all inclusive.

RELEASED: January 31, 2005 ("KMW")

"Karen M. Weiler J.A."
"I agree Robert P. Armstrong J.A."
"I agree R. A. Blair J.A."