SUPREME COURT OF NOVA SCOTIA
Citation: *Sauer v. Vilandré*, 2019 NSSC 166

Date: 20190522
Docket: SYD 111383
1208-003770
Registry: Shelburne

Between:

Philip Sauer

Petitioner

v.

Stacey Vilandré

Respondent

Decision

Judge: The Honourable Justice John P. Bodurtha

Heard: February 14, 2019, in Shelburne, Nova Scotia

Decision: May 22, 2019

Counsel: Celia Jean Melanson, for the Petitioner
Marian F. Mancini, for the Respondent

By the Court:

[1] The Respondent brought an application on November 21, 2018, pursuant to subsection 6(1) of the *Divorce Act*, R.S.C., 1995, c. 3, to transfer the divorce proceedings to Quebec where she currently resides with the two children of the marriage. The Petitioner opposed the application on the basis that custody and access are not opposed, and therefore, subsection 6(1) of the *Divorce Act* is not invoked. Accordingly, the Petitioner says the Respondent's application should be dismissed.

[2] The application was heard on February 8, 2019. The parties have been before the Quebec Superior Court (Family Division) on a number of occasions. An interim judgment from that Court dated July 10, 2018 addressing custody and access was no longer valid as of January 10, 2019.

[3] I accept the position of the Petitioner for the reasons that follow.

Facts

[4] The Petitioner and Respondent began a relationship in 2005 and married on June 26, 2014.

[5] The parties separated on August 14, 2017.

[6] The Respondent relocated to the Province of Quebec in August, 2017. Following the separation, proceedings were initiated in the Province of Quebec. This was done with the written consent of the Petitioner.

[7] As a result of court proceedings in Quebec, the Respondent was named primary care giver on an interim basis. Child support and spousal support were awarded to the Respondent.

[8] The Petitioner filed for Divorce on August 23, 2018 in the Supreme Court of Nova Scotia, to which the Respondent filed an Answer in Nova Scotia on November 20, 2018.

[9] The Petitioner consents to the Respondent having custody of the children and for their primary residence to remain in Quebec with the Respondent. The Petitioner wishes to have continued access to the children, as was granted in the interim judgment dated July 10, 2018.

Legislation

[10] Subsection 6(1) of the *Divorce Act* reads:

> **6 (1)** Where an application for an order under section 16 is made in a divorce proceeding to a court in a province and is opposed and the child of the marriage in respect of whom the order is sought is most substantially connected with another province, the court may, on application by a spouse or on its own motion, transfer the divorce proceeding to a court in that other province.

[11] Subsection 16(1) of the *Divorce Act* reads:

> **16 (1)** A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

Analysis

[12] In *Morris v. Morris*, 2005 ABQB 540 Justice Veit outlined the threshold that must be met for subsection 6(1) of the *Divorce Act* to be invoked. He states:

> [3] Because Ms. Morris is contesting the issue of custody in reliance upon the provisions of s.16 of the *Divorce Act*, she has met the pre-requisite to the use of the transfer provisions set out in s. 691) [sic] of that Act. In deciding whether it should exercise its discretion under s. 6 to transfer the proceedings to British Columbia, the court concludes, in relation to the primary factor, that it is in the best interests of the child of the marriage – who has always resided in British Columbia – for the divorce proceedings to be dealt with in British Columbia and, in relation to the secondary factor, that a transfer does not contravene or impede the proper administration of justice.

[13] Even when custody and access is opposed, the court still has discretion in exercising its jurisdiction to transfer a proceeding from one province to another. (*Morris*, para. 19)

[14] I have summarized the Petitioner's analysis of subsection 6(1) under the *Divorce Act* as follows: for subsection 6(1) to be invoked it requires an opposed application pertaining to custody and/or access under section 16 of the *Divorce Act*. If there is an opposed application, the court then conducts an analysis of where the child is most substantially connected to, and what is in the best interests of the child (*Shields v. Shields*, 2001 ABCA 140, at paras. 19-20). The court retains discretion as to whether to transfer the divorce proceeding to another province even if the court determines there is an opposed application. The wording of subsection 6(1) makes the decision discretionary, not absolute. I accept this analysis.

[15] Subsection 6(1) is invoked only regarding opposed applications under section 16 of the *Divorce Act*. In this case, the Petitioner is not opposing custody or access. The Petitioner consents to the children being in the Respondent's primary care. The Petitioner seeks access to the children as was outlined in the Quebec interim judgment dated July 10, 2018. The access outlined in the interim judgment was telephone access three times per week and access on the Petitioner's vacation from August 13, 2018 until August 24, 2018. The interim judgment is valid until another judgment is rendered or for a maximum period of six months (January 10, 2019). The interim judgment is no longer valid.

[16] The Respondent has provided no evidence to oppose the Petitioner's position on custody and access other than to say access is not working. However, there is no elaboration on what is not working with the current arrangement or any evidence to oppose the Petitioner's request to maintain the status quo. The Respondent references outstanding issues that need to be resolved but neither elaborates nor provides any evidence to demonstrate the Petitioner is opposing custody or access.

[17] The Respondent says since separation her role as parent has evolved into being the sole custodial parent and she wants an Order to reflect this reality. The Petitioner does not oppose this based on his affidavit and the representation by his counsel at the hearing.

[18] The Respondent stated in her affidavit at para. 22, "…there are issues that relate directly to access that may be contested…" and in her supplementary affidavit at para. 3(b) she says, "The access schedule as it currently exists has not been working…". However, in neither affidavit does she suggest any changes to the schedule or insight into what is not working with the current arrangement. There is no evidence before me to suggest access as described in the interim judgment is opposed.

[19] The primary argument of the Respondent was that the Petitioner was being disingenuous in his position because prior to the hearing he attempted to amend the custody provision in his Petition for Divorce from joint custody to giving the Respondent sole custody. Whether this is disingenuous, or not, the fact is the Petitioner has conceded to the Respondent's request for custody. It is unopposed. If the Petitioner's position is truly disingenuous, there will be an opposed application in the future upon which the Respondent can bring an application squarely engaging section 16 of the *Divorce Act*.

[20] Currently, the application is premature because there is no evidence before the court representing an opposition under section 16 of the *Divorce Act*. The Petitioner has conceded custody through his affidavit evidence and the draft amended Petition dated January 30, 2019, which he intends to file.

[21] In *Bains v. Kaur*, the plaintiff brought an application to have the divorce proceedings transferred from Alberta to Ontario. The plaintiff had proposed joint custody and day-to-day parenting with the plaintiff and an access arrangement for the defendant. The defendant contested the proposal. The court found that where custody or access is opposed, subsection 6(1) is sufficiently invoked. This case differs from *Bains v. Kaur* because custody and access are not the subject of competing positions. The parties' positions on custody and access do not collide and an application under section 16 of the *Divorce Act* is not inevitable (*Bains* para. 28). If anything, given the concessions by the Petitioner, an application is highly unlikely.

Conclusion

[22] Subsection 6(1) of the *Divorce Act* is invoked with an opposed application for custody or access under section 16. It is only when custody or access is an issue that the court has discretion to transfer divorce proceedings. In the current case, custody and access is not opposed. The Respondent's application is dismissed.

[23] Given my finding that subsection 6(1) of the *Divorce Act* is not invoked, there is no need to discuss the governing principles for the two-step analysis for section 6 laid out in *Shields v. Shields*, 2001 ABCA 140.

[24] If the parties are unable to agree on costs, I will receive written submissions within 30 calendar days of this decision.

Bodurtha, J.