IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Godin v. Godin, 2013 NSSC 401

Date: 20131209
Docket: 1201-065295
Registry: Halifax

Between:

Cindy Mae Godin

Petitioner

and

Marc Kenneth Godin

Respondent

Judge: Associate Chief Justice Lawrence I. O'Neil

Oral Decision Rendered: October 31, 2013

Counsel: Donna D. Franey, Counsel for the Petitioner
LouAnn Chiasson, Q.C., Counsel for the Respondent

By the Court:

Introduction

[1] The issue that brings us here is a motion on behalf of Ms. Godin to transfer the custody, access and child support issues forming part of the corollary proceeding in this matter to British Columbia for adjudication there as provided for by s.6 and s.16 of the *Divorce Act*, RSC 1985, c 3 (2nd Supp). They read as follows:

Transfer of divorce proceeding where custody application

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.

Transfer of corollary relief proceeding where custody application

(2) Where an application for an order under section 16 is made in a corollary relief 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 former spouse or on its own motion, transfer the corollary relief proceeding to a court in that other province.

Transfer of variation proceeding where custody application

(3) Where an application for a variation order in respect of a custody order is made in a variation proceeding to a court in a province and is opposed and the child of the marriage in respect of whom the variation order is sought is most substantially connected with another province, the court may, on application by a former spouse or on its own motion, transfer the variation proceeding to a court in that other province.

Exclusive jurisdiction

(4) Notwithstanding sections 3 to 5, a court in a province to which a proceeding is transferred under this section has exclusive jurisdiction to hear and determine the proceeding.

. . . . .

Order for custody

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.

Interim order for custody

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of and access to,

> any or all children of the marriage pending determination of the application under subsection (1).
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> . . . . .
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> **Factors**
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> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
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> **Past conduct**
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> (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
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> **Maximum contact**
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> (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[2] We are within a trial. Evidence was first heard April 2, 2013 and a written decision was released by me late last week (October 24, 2013). It is reported as *Godin v. Godin*, 2013 NSSC 316. In that decision I made reference to the custody and access issue not having been fully addressed as part of that adjudication and I referenced the fact that a motion to transfer the proceeding had been filed and was to be considered by this Court on October 30, 2013. As counsel are aware and the parties are aware, we did meet yesterday and the issue on the transfer motion was put over for a decision this morning.

[3] For the record, I did not read the materials filed with that motion prior to the release of my earlier decision. They were not part of the evidence before me. However, I have now read all the additional material filed by counsel, including the extensive documentation from British Columbia, an assessment report, the child's wishes report and other materials of an evidentiary nature from British Columbia.

[4] The Petition for Divorce was filed in Nova Scotia in 2012 by Ms. Godin. There is an order dated July of 2012 issued by Justice Beaton, as everybody is aware. The order of Justice Beaton applied with respect to the child, Olivia. For purposes of this motion, I understand that the motion pertains to the custody and access, or perhaps the child support issue for Joey as well, but certainly on the custody issue and access, it is more relevant to Olivia. That is the essence of the motion to transfer before the Court.

[5] As we discussed yesterday, the *Divorce Act*, RSC 1985, c 3 (2nd Supp) provides for the transfer of proceedings in section 6. Section 6 makes a distinction between a divorce proceeding and a corollary relief proceeding. section 6(1) addresses the circumstances dealing with a divorce proceeding and section 6(2) deals with a corollary relief proceeding. Each of these proceedings is defined by section 2 of the *Divorce Act supra*. The Divorce proceeding means:

> a proceeding in a court in which either or both spouses seek a divorce alone or together with a child support order, a spousal support order or a custody order.

[6] The divorce order in this case has been granted. The Court is being asked to transfer corollary proceedings. The Court ruled on matrimonial property issues as part of this divorce proceeding. Although often referred to as corollary relief within the divorce proceeding, the rulings under the *Matrimonial Property Act*, RSNS 1989, c 275 are simply merged with the divorce proceeding but they find their origin and disposition under that statute. Our pleadings permit those matters to be considered together. The corollary proceedings that we are speaking about are those that are defined by the *Divorce Act supra* itself.

[7] Corollary relief proceeding means:

> a proceeding in a court in which either or both former spouses seek a child support order, a spousal support order or a custody order.

[8] I am satisfied that spousal support is an aspect of a corollary proceeding. I am also satisfied that the parenting issue was the subject of discussion on April 2, when we appeared and at that time, there seemed to be an acceptance that the British Columbia Court had declined to accept jurisdiction over Olivia. That is over the parenting issue. In any case, there was discussion that the consideration of the parenting issue by this Court would be deferred until the parental capacity report with a psychological component was completed.

[9] On April 2, after a break, the Court was told on behalf of Ms. Godin that there had been discussion with clients and counsel and that the parties would seek an order for a psychiatric evaluation to be completed in Ms. Godin's jurisdiction and the report would be submitted to this Court and the other party and then a determination would be made on whether the parties could agree on the parenting issues, with a target resolution date of June 2013 in mind. That report has not been completed. The parties disagreed as to the terms of the proposed order.

[10] Clearly, in my view, there was acceptance by both parties that the parenting issue would be considered by this Court as part of this proceeding and a step was taken with respect to achieving that. In the course of the evidence in this proceeding, substantial evidence was heard that is relevant to the parenting issue. All of that is before me. Substantial resources of the individuals and this Court have already been expended that are relevant to an assessment of the parenting issue as it pertains to Olivia.

[11] That was the context of our earlier discussions and that is where we are. One of the questions that arises, and I could not find a precedent in the case law, is whether in the course of a trial, after substantial evidence, a motion to transfer could be made. When I look at section 6 of the *Divorce Act supra*, it references a transfer of corollary proceedings, for example. One of the questions that arises is whether that empowers the Court to transfer <u>part</u> of a corollary proceeding. It may or may not.

[12] I must look at other jurisdictional clauses in the *Divorce Act supra*, and in particular, those provisions that deal with petitions being filed in different jurisdictions within Canada. Section 3 and 4 deal with those situations. What is interesting is that the first in time determines the forum for the adjudication when two petitions are filed in the circumstances described in the statute. When petitions are filed on the same day in different jurisdictions however, the proceedings are transferred to the Federal Court. Reading now from section 4(3):

> Where proceedings between the same former spouses and in respect of the same matter are pending in two courts that would otherwise have jurisdiction under subsection (1) and were commenced on the same day and neither proceeding is discontinued within thirty days after it was commenced, the Federal Court has exclusive jurisdiction to hear and determine any corollary relief proceeding then pending between the former spouses in respect of that matter and the corollary

> relief proceedings in those courts shall be transferred to the Federal Court on the direction of that Court.

[13] I conclude that the desirability of not having competing jurisdictions dealing with different aspects of corollary relief or even the divorce proceeding, is an important objective under the legislation. Part of what I must consider here is the fact that I have already ruled on spousal support with is a corollary proceeding. No order has been taken out. There is a right of appeal with respect to that issue that exists for both parties. There are also, as I indicated yesterday, cost implications.

[14] As stated, section 6(4) reads:

> Notwithstanding sections 3 to 5, a court in a province to which a proceeding is transferred under this section has exclusive jurisdiction to hear and determine the proceeding.

[15] The section does not state a divorce proceeding or a corollary relief proceeding, or it doesn't say part of a corollary relief proceeding. It says a proceeding. If I read that broadly, one could argue that jurisdiction extends to all issues arising under the petition. Reading it more narrowly and drawing a line between divorce and corollary relief, one could say it is only that proceeding that has been transferred. That is, whether it is the divorce or the corollary relief proceeding, if I take a narrower view.

[16] The Court is being invited to take the argument a step further and conclude that that it applies only to that aspect of the corollary relief proceeding that is transferred. As I already indicated, it is not being suggested that all the corollary relief proceedings should be transferred. Part of the corollary proceeding has been completed at this level. That, in my view, weighs against transferring the custody and access issue under s.6 of the *Divorce Act supra*.

[17] On that basis, I am not prepared to transfer part of the corollary relief proceeding because we are in the middle of the trial.

[18] If I am mistaken in that analysis, I will rule on the basis of an assessment of the child being more substantially connected with one province or another. I will move to that test.

[19] I have concluded that this child has a substantial connection, at this point in her life, to both Nova Scotia and British Columbia. I do not conclude that she has a more substantial connection to British Columbia than Nova Scotia. That child has a history here, attended school here, her father lives here, she had a home here, she had health and educational service providers here. All of those persons could offer relevant evidence. It is reasonable to conclude that their evidence would be deemed relevant by one or both parties.

[20] Similarly in British Columbia, there is no doubting that there is relevant evidence as well. Dr. Chow, the assessor, her teachers, her mother lives there, Mr. MacDonald lives there, she has siblings who live there. All of that is relevant as well.

[21] I am satisfied that evidence can be accessed electronically. The Court is prepared to, on this end, make arrangements for that to happen. That is, given the enormous costs that would flow from a decision to have the matter transferred or even not transferred, the court is sensitive to those costs. These are practical considerations. These are costs that will arise regardless of whether the hearing is here or there.

[22] However, we will have to make video conferencing available. It is important that this matter be moved quickly, as fast as it can be. We are in a trial. There is an order and it was determined in April that certain evidence was important to the parenting issue. That order was made in April. The paper form of the order has not been created. It was the subject of discussion yesterday in furtherance of that decision.

[23] I am aware and I have concluded that the children are in British Columbia in contravention of an outstanding order. I am aware of the case law that says that self help remedies should not be rewarded and that a person should not be permitted to change the status quo on the issue of parenting, then rely upon that new status quo to further their application.

[24] For the record, I wish to say that my decision is not influenced by those legal observations. I need not go there, given my conclusion about the connection of the child, the state of this proceeding and the wording of the statute itself. The reason I say that is ultimately, the best interest of this child, an assessment of

those best interests and the best forum for those interests to be determined is where this proceeding should be concluded, that is on the parenting issue.

[25] I am satisfied that Nova Scotia is the better forum. The fact that a hearing would occur here, the decision would be made here does not pre-judge the issue of the ultimate living arrangements for Olivia. That will be based on evidence offered which may be local, that is in Halifax or in British Columbia. It does not in any way favour an order directing Olivia to be in the custody of her father, for example, in Nova Scotia. That is the existing order.

[26] The Court is aware of the state of the development of this child in terms of her age and having read the evidence filed in support of the motion, the Court is aware of at least some of the reports that are available to be considered.

[27] The importance of cross examination can not be overstated in matters of this kind. Ms. Godin will have the opportunity to offer those witnesses through video conference, which is typically used if that is the choice. The stay which is in place in British Columbia of course, I make no comment on that.

[28] Olivia is living with her brother. It appears that she is doing relatively well, or her circumstances have stabilized, which is a positive thing.

[29] I am satisfied that the interests of justice require that this proceeding be concluded in Nova Scotia.

ACJ