

IN THE FAMILY COURT OF NOVA SCOTIA

Citation: McCullough v. Smith, 2007 NSFC 23

Date: May 22th, 2007

Docket: FNGMCA 33183

Registry: Halifax

Between:

Lori McCullough

v.

Christian Smith

DECISION

Judge: The Honourable Judge Jamie S. Campbell

Heard: May 1st, 2007, in NewGlasgow, Nova Scotia

Written decision: May 22, 2007

Charge: Mobility Hearing

Counsel: Dena J. Bryan counsel for Lori McCullough
Chris Boyd counsel for Christian Smith

By the Court:

1. This case deals with the issue of the proposed relocation to Alberta by the mother of seven year old Caleb McCullough- Smith. It involves the need to recognize both the reality of his mother's desire for mobility and the reality of the strong emotional bonds that his father and other family members in Nova Scotia have for him.

2. While those competing parental interests are present, the decision must be made based solely on what is in Caleb's best interests. His parents' aspirations for themselves are not what are being weighed. It would be artificial however, if the consideration of Caleb's best interests did not openly deal with his parents' hopes for their respective futures. Their own senses of independence and the ability of each to make a life for himself or herself can be separated from Caleb's best interests only in the most theoretical of worlds.

3. These parents both have the best interests of Caleb at heart. Neither has shown by his or her actions or in their testimony a sense of self indulgence that would put their interests before his. They have, despite some differences in their evidence and a clear disagreement about this matter, shown some level of respect for each other as parents. Each believes that the other does not show that respect, but neither significantly disparaged the character, parental abilities or motives of the other.

4. Mr. Smith is not seeking custody if Ms. McCullough does not leave the area. Ms. McCullough would not leave the area without the legal ability to take Caleb with her. She has expressed no concerns about Mr. Smith's ability to have Caleb with him for extended periods of block access.

5. There has been no evidence to suggest that either believes that the other is not a capable loving parent. The only issue is whether a proposed move to Alberta would be best for Caleb.

Facts:

6. Lori McCullough and Christian Smith have known each other since they were children. They started dating when Ms. McCullough was 16.

7. Ms. McCullough and Mr. Smith lived together for a very short time before Ms. McCullough became pregnant with Caleb. They separated in the early stages of the pregnancy. Ms. McCullough was then a university student and left university during her second year because she had become pregnant.

8. Caleb was born on May 1, 2000. His parents resumed a relationship just before his birth but did not live together until late 2002. In the meantime, Caleb was in the day to day care of his mother, Ms. McCullough. The parties remained together for about seven months, until May 2003, when Ms. McCullough and Caleb moved to Dartmouth. They remained there until she completed her certificate in Practical Nursing from the Nova Scotia Community College in December 2003.

9. Ms. McCullough and Caleb moved to Pictou County in January 2005. She now works as a dialysis technician at Sutherland Harris Memorial Hospital in Pictou. She works on average 37.5 hours a week doing 12 hour shifts. She also does some work at the Colchester County Hospital and part-time for the VON.

10. Ms McCullough is highly motivated and articulate. She wants to continue with her education and she is obviously no stranger to hard work. She is an active parent. She took action to insure that a special program was put in place to assist with a learning difficulty that he was experiencing. Rather than simply playing the part of the demanding parent, which itself might have been an understandable response, Ms. McCullough sought to understand the nature of the problem and learn about the ways in which it might addressed. She clearly appreciates that things are rarely a simple as they appear.

11. She involves Caleb in various forms of physical activity which is an important aspect of her own life. Lori McCullough is, in short, a fine and thoughtful parent.

12. Mr. Smith is less verbal. He is also committed to his son and his son's welfare. He is a pipefitter and had worked with Trenton Works in Stellarton. He has gone to Alberta briefly to find work but is now comfortable with finding what work he can in Nova Scotia. He hopes that the Goldborough LNG project in Guysborough County will provide work for him for a number of years to come. Construction on that plant has not yet started but both Ms. Smith and his brother Adam are confident that he will find work there.

13. Mr. Smith has a sense of connectedness to place and an appreciation of the bonds of family. He is close to his brother and his parents. He expressed in his own quiet way how he values the special sense of being rooted in a place. It is not at all surprising that Mr. Smith wants to remain in Nova Scotia.

14. It is not entirely surprising that Christian Smith and Lori McCullough have had difficulties in communication. He says that she talks too much. That is not intended to mean that she is someone who "chatters". She is analytical and logical and has no difficulty in articulating her considered views. Mr. Smith finds that exasperating. He wants what he sees as a "straight answer" and gets what he sees as just more talk. In some ways it is as if they speak different languages.

15. Mr. Smith was seeing Caleb every two weeks. They would play together, visit Mr. Smith's parents and his brother's family. Mr. Smith's brother Adam has a six year old son Jaden with whom Caleb is particularly close. Mr. Smith's brother Adam is married to Diane Murphy, who also happens to be Lori McCullough's very close friend. Caleb sees his cousin Jaden when spending time with his father and also when spending time with his mother.

16. Adam Smith has been placed in a very uncomfortable situation. Obviously, his brother Christian, wants to have his son close to him. His wife's close friend wants to move some thousands of miles away. Adam Smith was clearly affected by the competing emotional loyalties. He spoke ill of no one and like his brother appeared to be a man who has a strong appreciation of family and place.

17. Mr. Smith has been in a stable relationship with Amy Tattrie since 2004. They have a very young child, Brooklyn, who was born in March 2007. Ms. Tattrie was not called to give evidence.

18. Ms. McCullough had not had a serious relationship since she separated from Mr. Smith. In December 2006 Ms McCullough began a relationship with a long time friend Anthony Bennett. Mr. Bennet and Ms. McCullough grew up together. He introduced her to his friend, Christopher Smith. They shared confidences with each other about their relationships with others. They met again in December 2006 and Ms. McCullough visited with Mr. Bennett in Alberta for a week in March 2007.

19. Anthony Bennett's mother, Theresa Bennett has been Caleb's long time babysitter.

The only evidence about Mr. Bennett was that he is also a pipefitter with a steady job in Edmonton, Alberta. Mr. Smith made no negative comments about him or his potential influence on Caleb.

20. Ms. McCullough has decided that she wants to move to Alberta to be with Mr. Bennett.

She will not move if she cannot take Caleb.

Law:

21. The law in matters dealing with parental mobility is set out in the Supreme Court of Canada decision in *Gordon v. Goertz*, [1996] S.C.J. No. 522;

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.
7. More particularly the judge should consider, inter alia:
 - (a) the existing custody arrangement and relationship between the child and the custodial parent;
 - (b) the existing access arrangement and the relationship between the child and the access parent;
 - (c) the desirability of maximizing contact between the child and both parents;
 - (d) the views of the child;
 - (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
 - (f) disruption to the child of a change in custody;

(g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

22. Before entering into the merits of an application a court must be satisfied that there has been a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child, which materially affects the child and which was not foreseen or could not reasonably have been contemplated by the judge who made the initial order. Moves to nearby towns or moves away from parents who have had no positive relationship with the child might not be sufficient to qualify as such a change. Here, the proposed move is a fundamental change, that meets the threshold requirement. The issue is then, whether a move to Alberta will be in Caleb's best interests.

23. The Supreme Court of Canada has stressed the importance of a case and context specific inquiry in matters of this kind. Patterns that may be apparent in lists of reported cases are less significant than the general statement of law. It may well be, for example, that a majority of reported decisions in which a custodial parent has been permitted to move with a child, involve mothers who are moving to take advantage of clearly superior employment opportunities and who are able to take advantage of family support in the new location. That almost statistical analysis of case law may indeed indicate what has happened but does not reflect why it has happened. Furthermore it is neither the law nor a reflection of how the law is developed.

24. The court must consider the principles as set out by the Supreme Court of Canada and

apply those very basic principles to the specific circumstances of the family involved. Seeking patterns in decided cases is an attempt to impose a logic that is not and is not intended to be present.

Analysis:

25. It is important to note at the outset, that this case is not framed as a choice between remaining with Ms. McCullough in Alberta or staying in Nova Scotia with Mr. Smith. There is no suggestion that custodial arrangements would change. Ms. McCullough simply will not move without Caleb. That affects the manner in which the law is applied as well.

26. The principles set out in *Gordon v. Goertz*, supra. involve weighing the importance of the child remaining in the custody of the parent in whose custody he has been, in a new location, against the importance of continued full contact with the access parent. That same weighing cannot take place here. Ms. McCullough, by her decision, has framed the case as simply being whether she can or cannot move to Alberta.

27. If Caleb moves to Alberta with his mother, his access to his father will be seriously and adversely affected. He will have a long distance relationship with a father who has maintained contact with him. That change should not be “spun’ as a positive.

28. It is clearly in Caleb's best interest that he have a relationship with both of his parents and

that is best achieved by having them both living in the same general area. Despite whatever disagreements the parents have had about Mr. Smith's commitment to Caleb, it is certainly desirable to maximize contact between Caleb and both of his parents. That will not happen in Alberta.

29. A move to Alberta will be a disruption. Caleb would not see his relatives in Pictou Country with anything like the frequency he now does.

30. Caleb is young. A move to Alberta would mean changes to his life but changes to which he could adapt. Taking on the challenge of a new school and new friends can be a difficult one. Children are resilient with regard to those kinds of changes, but they are changes that cannot be ignored.

31. The reasons for the proposed move are not relevant except to the extent that they are relevant to a parents ability to meet the needs of the child. Ms. McCullough is able to support Caleb in Nova Scotia. She does not need to move to Alberta to find work. While she has expressed concerns about her future working in Nova Scotia, her decision to pursue professional and educational advancements are not what motivate her desire to move. They may complement that desire but the timing of her decision suggests that its real motivation lies not with the professional or educational but with the romantic.

32. Lori McCullough has begun a romantic relationship with her long time friend Anthony Bennett, who lives in Alberta. That is why she wants to move there. Why she wants to move is not as relevant as the simple fact that she wants to move.

33. It would be cruelly ironic however if Ms. McCullough personal choices were limited by her decision to forego a move it meant losing custody of her son. She wants very much to move to Alberta to begin a relationship with Antony Bennett. There are those who would suggest that the brief term of the romantic involvement casts doubt on the wisdom of such a move. She has not been involved romantically with Mr. Bennett for very long, has no place to live and no job to go to.

34. Ms. McCullough is capable of making adult choices and by her decision to remain in Nova Scotia, if need be, to retain custody of Caleb, speaks to the fact that she sees her son's welfare as being more important than her own. Parenthood is, in her case, no mere biological fact. She will not abandon Caleb to follow her own emotional needs.

35. If she were to announce her intention to go to Alberta, and wanted to take Caleb with her, she would have in her favour the current long term custodial arrangement. Changing that would be more disruptive than a move to Alberta. Her case would in that sense, be made technically

more strong. by proposing a course of action that puts herself and her wants before her son's welfare. Instead, she has essentially asked permission to go, with Caleb to Alberta.

36. It has been said, perhaps flippantly at times, that it is easier to ask forgiveness than to ask for permission. In other words, it might be better to act and deal with the consequences than to delay. Ms. McCullough, by taking the measured approach she has to this matter, has chosen to wait for "permission". That has meant that she could not line up a job or a permanent home, simply because she did not know whether she would be able to go. Requiring a custodial parent to make definitive plans in order to buttress the case for mobility puts that parent to an almost cruel choice. Her or she can commit to leaving the jurisdiction, and improve the chances of being able to leave, but faces the risk that they will be able to go but not with the child. If the custodial parent seeks permission before making those commitments in the other jurisdiction he or she faces the difficulty of having to answer for rather vague and incomplete planning.

37. The case is not about the relative merits of Alberta and Nova Scotia. Many have made that trip. Some have found happiness and success. Some have found no joy and remain uprooted, living away from family and friends, chasing an illusive dream in a place that will never really be home for them. Some have returned.

38. The case is not about the wisdom of following a particular person to Alberta. Whether that relationship will or will not flourish is impossible to tell. Like anyone going into a new relationship Lori McCullough is taking a risk. It is not one that she a calculated without

reference to the potential impact on her son. The only way she will ever know whether that relationship will work is either to go to Alberta or to have Mr. Bennett leave his job and come home to Nova Scotia.

39. The simplest response would be to maintain the status quo and to deny Ms. McCullough permission to leave. Caleb would have both mother and father nearby. Ms. McCullough would almost certainly find a way to make do. Potentially she and Mr. Bennett could work on a long distance relationship. She is resourceful and hardworking enough to be able to find work here. Her decision to stay rather than give up custody of her son would have made that a more or less easy decision.

40. She would then have been forced to pay a steep price for parenthood. Parenthood comes with joy and challenge but also comes at a cost that is not calculated in dollars but in independence. Parents cannot always have what they want or do what they want. Acting as a parent is one of those few experiences or relationships where it can be said that the ego is naturally subsumed by something greater and infinitely more important.

41. The question here is whether it would be in Caleb's best interest, in these particular circumstances, to extract that price from Lori McCullough.

42. If her life and mobility are limited in this way, she is deprived of making a choice that

might lead to her greater long term happiness and as a result in Caleb's long term welfare. Caleb's best interests are served by his being in the custody of a mother who feels that her aspirations have not been extinguished by the fact of her having custody of him. The limitation of her right to mobility is not a cost that she should be required to pay, despite and in some ways because of her willingness to pay it.

“Most men lead lives of quiet desperation and go to the grave with the song still in them.”

Thoreau said that. If Lori McCullough, were required to remain in Nova Scotia in order retain custody of her son, she would get by, living perhaps the kind of life that Thoreau imagined. She imagines something more for herself. That is a good thing for her and a good thing for her son.

43. In that sense, the matter does deal with her rights and her aspirations except insofar as denying those will affect her ability to be the best parent she can be. Were she required to remain in Nova Scotia, I have no concern that she would be resentful or anything other than a loving and attentive parent. By denying her the right to follow a professional and personal course that she hopes for, she would be denied the opportunity to be the most fulfilled person she can be and as a result the best parent she can be. Remaining in Nova Scotia, with day to day care and control of her son, she would be a good parent, but perhaps not the best parent that she can be.

44. I am satisfied that Ms. McCullough has and will have Caleb's best interests at heart. If

her relationship with Mr. Bennett does not work out as hoped, she will be resourceful enough to make her way either in Alberta or in Nova Scotia. She is hopeful that any breakup of that relationship would be handled with maturity. I share her hope but do not rely upon it. I do rely on her intelligence and concern for Caleb to provide the assurance that he would be protected to the extent possible from any consequences of such a breakup.

45. She should be permitted to move to Alberta after July 31, 2007.

46. I am satisfied that she will encourage a relationship between Mr. Smith and Caleb. Her proposal for access involves it a reasonable one. Obviously, Mr. Smith would be entitled to exercise reasonable extended access periods in Alberta should he be able to visit there. Caleb and Mr. Smith would share a month together each summer, one week at alternating school March break or Easter and one week over the Christmas school break. Ms. McCullough would pay the cost of airfare for Caleb for one trip and will share one half of the airfare for two other trips each year.

47. Rather than making an order for access at this point, I will leave it to the parties to work out the details of access, setting out specific travel dates, the manner in which air travel is to be accomplished given Caleb's age and the details of the financial aspects of the travel costs. If those details can be agreed upon, without prejudice to Mr. Smith's right of appeal, I will review and sign a consent order. If the parties cannot agree on those details the matter will be docketed to return to court in two weeks, on June 5 at 10:00am for resolution.

48. There will be no order for costs in this matter.

Judge Jamie S. Campbell