**FAMILY COURT OF NOVA SCOTIA**
**Citation:** A.J. v. K.M., 2015 NSFC 19

**Date:** 2015/12/03
**Docket:** FPICMCA-098586
**Registry:** Pictou

**Between:**

A.J.

Applicant

v.

K.M.

Respondent

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| Editorial Notice: | Identifying information has been removed from this electronic version of the judgment. |
| Judge: | The Honourable Judge Timothy G. Daley |
| Heard | December 3, 2015, in Pictou, Nova Scotia |
| Oral Decision | December 3, 2015 |
| Written Decision: | January 7, 2016 |
| Counsel | Ellen R. Burke for the Applicant |

**By the Court:**

[1] This case is about the child, A.E.A.J., who is three years old, born September […], 2012, and what is in her best interests. Specifically, can and should this court find that Nova Scotia is the appropriate jurisdiction and forum for determining matters concerning A.E.A.J., and, if so, should she be returned to Nova Scotia into her father's custody pending further determination of those issues by this court?

[2] This matter comes before me as an emergency application by A.E.A.J.'s father, A.J. He is seeking an order declaring that Nova Scotia is the jurisdiction for determination of matters concerning A.E.A.J. and her best interests; that A.E.A.J. be returned immediately to Nova Scotia; that he be granted sole custody and primary care of her; and that I grant supervised access for the mother, K.M., with A.E.A.J.

[3] His Notice of Application, supporting Affidavit, Parenting Statement, and Brief were served on K.M., on November 25th, 2015, in […], Ontario, and she, therefore, had notice of the proceedings. This was proven by an Affidavit of Service from Paul Haller, a Process Server, in the City of […], Province of Ontario, in which he indicated personal service on her of these documents. He

indicates in the Affidavit that the identity of K.M. was by means of verbal acknowledgment. Although not marked as an Exhibit, I am satisfied that this Affidavit is part of the court record, is evidence in this proceeding and is sufficient to prove service.

[4] K.M. did not appear at the hearing, she did not retain counsel to be present for her, nor did she have anyone attend on her behalf. The court did not receive any communication from K.M. or anyone representing her or purporting to speak for her, nor, as I understand from counsel, has A.J. received any such communication to indicate that someone would attend. The matter was called at 1:30 p.m., as scheduled. Neither K.M. nor anyone on her behalf appeared.

[5] The first of the issues to be determined by the court is whether I can find that Nova Scotia has jurisdiction in this matter. Under the *Maintenance and Custody Act* there is no specific direction on determination of jurisdiction in such circumstances, but the *Act* does indicate at Section 18(5):

> **(5)** In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall give paramount consideration to the best interests of the child.

and I therefore remind myself throughout this decision and throughout these proceedings that it is the best interests of A.E.A.J. and not the interests of her parents that must be given paramountcy at all times.

[6] To the question of whether I can find jurisdiction in Nova Scotia, one of the leading cases in the matter is that of *Yonis v. Garado,* 2011 NSSC 110, a decision of Justice Jollimore of the Nova Scotia Supreme Court Family Division, in which she discusses a circumstance somewhat analogous to this matter. In paragraph 6 of that decision she finds as follows:

> 6. In *Penny (Litigation Guardian of) v. Bouch*, 2009 NSCA 80 (N.S.C.A.), Justice Saunders, with whom Justices Rosco and Oland concurred, approved of the two-step analysis Justice Wright preformed in deciding the application at first instance. Justice Wright said, at paragraph 40 of his decision in *Penny(Litigation Guardian of) v. Bouch*, 2008 NSSC 378 (N.S.S.C.), that where there's a dispute over assumed jurisdiction, the *Court Jurisdiction and Proceedings Transfer Act* requires I must first determine whether I can assume jurisdiction given the relationship between the subject matter of the case, the parties and the forum. If that legal test is met and I can assume jurisdiction, I must then consider whether I ought to assume jurisdiction. He said this means considering the discretionary doctrine of *forum non conveineus*. There may be more than one forum capable of assuming jurisdiction and I may decline to exercise jurisdiction because there is another, more appropriate, forum.

[7] The *Act* referred to by Justice Jollimore is the *Court Jurisdiction and Proceedings Transfer Act*, 2003 (2d Sess.), c. 2, s. 1, which assists the court in its analysis of a matter such as this. Under Section 4 of the *Act*, it says*:*

> 4 A court has territorial competence in a proceeding that is brought against a person only if…

[8] The *Act* goes on to list the first four of the possibilities and subsections (a) through (d) are not applicable in this circumstance. Subparagraph (e) is, and it reads:

> (e) there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based.

It is the question of real and substantial connection with the Province that must be addressed in this analysis.

[9] Section 11 of the same *Act* provides some guidance with respect to substantial connection. It says, in part:

> 11 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Province and the facts on which a proceeding is based, a real and substantial connection between the Province and those facts is presumed to exist if the proceeding…

and goes on to list 12 circumstances under which it might be presumed that a matter has a real and substantial connection to the Province. None of those apply here. However, and to repeat, Section 11 begins with the phrase:

> Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Province and the facts on which a proceeding is based…

This quite clearly indicates that though there are 12 examples listed in the *Act*, those are not a closed class or group, and if the party can establish other circumstances of a real and substantial connection it may satisfy the court.

[10] This section has been interpreted and applied in the case of *Detcheverry v. Herritt*, 2013 NSSC 315, a decision of Associate Chief Justice O'Neil of the Nova Scotia Supreme Court Family Division.

[11] In paragraph 56 of that decision, Justice O'Neil was analyzing section 11 of the *Act*, aforesaid, and found as follows:

> 56 But for s. 11(a), it is noteworthy that none of these presumptions appear to be directly applicable to family proceedings. The statue does not give a comprehensive guide, encompassing all common law principles and presumptions including those that are long established in the area of family law. We must look to the common law for more guidance in defining a real and substantial connection.
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> 57 Justice Saunders summarized the considerations at common law that assist in determining whether "a real and substantial connection exists" as that phrase is used in section 4(e) of the "*CJPTA"*. He wrote the following in *Penny (Litigation Guardian of) v. Bouch*, 2009 NSCA 80 (N.S.C.A.):
>
> > [51] Accordingly, I reject the suggestion that considerations of fairness have no place in the inquiry into the existence of a real and substantial connection, and are only to be weighed during the application of the discretionary forum non conveniens doctrine. In my respectful view, such a prohibition would introduce an unnecessary and unrealistic rigidity to a test that is clearly designed to be flexible. To impose such a constraint would prevent a judge's assessment of the totality of the evidence when deciding whether the circumstances made it proper to accept jurisdiction over the action as framed by the plaintiff.
> >
> > [52] From the cases he reviewed, Justice Sharpe identified a list of emerging factors which would be relevant in assessing these jurisdictional questions. Sharpe, J.A. offered a list of eight factors:

1. The connection between the forum and the plaintiff's claim
2. The connection between the forum and the defendant
3. Unfairness to the defendant in assuming jurisdiction
4. Unfairness to the plaintiff in not assuming jurisdiction
5. The involvement of other parties to the suit
6. The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis
7. Whether the case is interprovincial or international in nature
8. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere

[12] Justice Saunders in *Penny,* supra, goes on to say in Paragraph 53 of that decision:

> [53] These were the same eight factors considered by Justice Wright in satisfying himself that Nova Scotia had acquired a real and substantial connection to the present litigation. I would endorse this list as a useful series of criteria with which to judge such matter, while at the same time observing that the list is by no means exhaustive. It offers a roadmap to guide judges hearing such applications. To borrow the language of s. 11 of the Act, the list of factors serves to complement "[w]ithout limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection…" I would conclude on this point by endorsing the observations of Justice Sharpe in introducing the factors he identified:
>
> > [75] It is apparent from Morgaurd, Hunt and subsequent case law that it is not possible to reduce the real and substantial connection test to a fixed formula. A considerable measure of judgment is required in assessing whether the real and substantial connection test has been met on the facts of a given case. Flexibility is therefore important.
> >
> > [76] But clarity and certainty are also important. As such, it is useful to identify the factors emerging from the case law that are relevant in assessing whether a court should assume jurisdiction against an out-of-province defendant on the basis of damage sustained in Ontario as a result of a tort committed elsewhere. No factor is determinative…

Although that decision related to a tort damage claim, it is clearly applicable in this circumstance.

[13] I also note that the issue of domicile is important. I note that *Yonis v. Garado*, supra, Justice Jollimore found at paragraph 11:

> Domicile refers to the children's permanent home, the place to which they'd return from an absence.

[14] The evidence in this application is only from one of the two parties, and I am mindful that I only have one side of the story at this point. That evidence is brought with notice to K.M. This is not an *Ex Parte* Application. There was every opportunity for K.M. to provide her side of the story by way of evidence if she chose to, or at least to contact the court to seek to schedule the hearing at a different time to afford her that opportunity. She has chosen not to participate for reasons of her own.

[15] The evidence before the court is that the child was born in Calgary, Alberta. As I understand it, the families of both of the parents are from Nova Scotia and Ontario and the parents were in Calgary due to the work of A.J.

[16] The parents moved to Nova Scotia in July of 2014 and the child lived in this province until she was taken to Ontario by her mother in early September of 2015, a period of just over a year. I note that this child is three years old, born September […], 2015. Therefore for approximately one third of her life she has lived as a

resident of Nova Scotia. I find that to be a significant factor in assessing the evidence.

[17] I note from the evidence that A.E.A.J. has known Trenton and New Glasgow, which are both towns located in the County of Pictou, Province of Nova Scotia, as her home. I note that her father has worked a rotation of ten days out West and four days off, and that the mother had been unemployed when they were together in Nova Scotia.

[18] The father tells the court that he has a very close relationship with A.E.A.J. In his *viva voce* evidence he testified that there was a period of some months when he was off work and, by his own admission, not particularly anxious to go back to work so that he could spend that time with his daughter here in Nova Scotia.

[19] I find it relevant and material that he and K.M. moved to Nova Scotia and lived for an extended period of time with his parents, the child's paternal grandparents. This afforded the child an opportunity to get to know and to spend a great deal of time with her paternal grandparents in a very intimate way, living in their home and no doubt interacting with them on a daily basis, as he maintains in his evidence.

[20] I also take into account the circumstances under which the child was taken from the province. Those circumstances also enter into the analysis of whether I should determine jurisdiction to be in this province, but as the cases I have cited note, consideration of the circumstances of the child's leaving Nova Scotia is not limited to the *forum non conveniens* analysis.

[21] Attached to the affidavit of the father is an e-mail that the father says is from the mother to him. He indicates that, unbeknownst to him, the mother took the child on what she described as a vacation to Ontario. His evidence is that the mother told him she was taking the child for an activity at the YMCA to take benefit of a new membership that was available to them. I find it material and relevant that the e-mail is dated September 8th, 2015 and indicates in part:

> I've decided to go on very much needed vacation with A.E.A.J. to spend some time with my parents in […], Ontario.
>
> I will be gone with A.E.A.J. for one month. And will return back on the 8th of October…

[22] This e-mail is significant for a number of reasons. First, according to the father, he did not know that this vacation or this travel was planned. He says it was a complete surprise to him when he received this e-mail after she left to go to the YMCA with the child on that day. His evidence was he wanted to give K.M. the benefit of the doubt that she meant what she said and would return in October. I

find that to be a reasonable assumption, notwithstanding some other comments family members made to him about being concerned about this e-mail and the trip.

[23] Second, it is significant that the mother in no uncertain terms indicates that she will be gone with A.E.A.J. for one month and will return on the 8th of October. I find the e-mail indicates the 8th of October 2015, and return to the Province of Nova Scotia, and specifically the County of Pictou.

[24] Third, there is no indication in this e-mail that this was intended to be anything other than a vacation or a temporary removal and not a change in domicile or primary residence of the child. While the mother may have had different intentions at the time, we don't know what they were because we don't have her evidence. We do have the father's evidence that the mother's intent was simply to go to the YMCA locally and there was no indication that a vacation or trip was planned. Yet, on the same day she sent him this e-mail.

[25] Fourth, I find it relevant that this e-mail is lengthy and appears to be carefully written, which indicates that it took K.M. some time to draft. I also find it relevant that she copied this to an R.C.M.P. Constable, a Clinical Therapist, and a T,M., who I presume is a family member. There is no explanation as to why she

copied the e-mail to those people, but it does raise a concern in my mind that this was well-planned in advance.

[26] It is also relevant and of concern to the court that during the time K.M. was in Ontario from September to October 8th, it is the evidence of the father that he had difficulties in reaching her, difficulties in speaking to their daughter, and difficulty in communication overall. It is particularly concerning that after October 8th there was no direct indication by K.M. that she would not be returning to Nova Scotia until A.J. was served with the application from the Ontario Court seeking primary care and residence and jurisdiction in Ontario.

[27] It is also relevant that A.J. had limited contact with their daughter, notwithstanding his efforts. I do acknowledge that his work schedule, including night shifts, would present a challenge to any family. But I find it relevant that the only offer of access has been a telephone call once per week and some Skype access. As well, I find it particularly troubling that the only physical access had to be worked out through negotiation of counsel in Ontario and consisted of one visit since the child left the province on September 8th, 2015.

[28] With respect to the other evidence before the court, it is clear that the affidavit of A.J. demonstrates that this child has a real and substantial connection

with the Province of Nova Scotia, and specifically with the County of Pictou; that A.E.A.J. had spent approximately a third of her life here as a resident; and that her parents were settled here, and this was the plan of A.J. I find there was no consent by A.J. to the removal of the child from the province. As for the so-called vacation, there was no consent but at least acquiescence. The acquiescence was limited, I find, to the period of the absence from September 8th to October 8th only, and any absence thereafter was not with the acquiescence or consent of A.J.

[29] I am satisfied with A.J.'s explanation as to why he delayed between September and October in taking any action. He indicates at least twice that he wanted to give K.M. the benefit of the doubt respecting her intent to return to the province. I am satisfied that was a reasonable position for him to take as he wished to maintain his relationship with both K.M. and A.E.A.J. As well, I find that when he was served with the documents from Ontario he took steps reasonably promptly afterwards to retain counsel and bring this application before the court.

[30] I find that the burden of proof to establish that the father acquiesced or consented to the permanent removal of the child from Nova Scotia to Ontario rests squarely on the mother. I find authority for that in the *Yonis v. Garado*, supra., decision, at paragraph 16, and find that there is no evidence before me that the mother has discharged that burden of proof.

[31] Therefore, I am satisfied that this child has a real and substantial connection to the Province of Nova Scotia and that I could find jurisdiction.

[32] To the second part of the test of whether I should find that Nova Scotia has jurisdiction in the matter, the *Act* requires me to consider under s. 12(1) the following:

> 12 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside the Province is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
>
> (b) the law to be applied to issues in the proceeding;
>
> (c) the desirability of avoiding multiplicity of legal proceedings;
>
> (d) the desirability of avoiding conflicting decisions in different courts;
>
> (e) the enforcement of an eventual judgment; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole. *2003 (2nd Sess.), c. 2, s. 12.*

With respect to certain of these requirements, they can be dealt with quickly. Respecting enforcement of an eventual judgment in Canada, there are various reciprocating statues that permit the registering and enforcement of judgments for

custody, access and maintenance, and certainly Ontario and Nova Scotia are reciprocating jurisdictions and have legislation to permit this. As a result, whichever jurisdiction determines the matter, the law will permit the enforcement of judgments in either jurisdiction.

[33] I am satisfied that the law to be applied to issues in the proceeding is substantially similar between Nova Scotia and Ontario in that the paramount consideration is always the best interest of the child. I am not concerned that there would be such a substantial difference in law that it should come into the consideration of this court in deciding whether to accept or decline jurisdiction.

[34] However, other factors do come into account, including comparative convenience and expense for the parties to the proceeding and for their witnesses. I find that the most relevant evidence will likely be provided by witnesses located in Nova Scotia. The child has spent over a year of her three years of life in Nova Scotia, in the care of her parents, in the home of her paternal grandparents, and surrounded by her extended family. As counsel properly notes, even in the e-mail that was sent to the father the mother copies it to three other people who may well be relevant, material witnesses, including an R.C.M.P. constable, a clinical therapist in Nova Scotia, and T.M.. I don't know if Mr. M. resides in Nova Scotia or Ontario, but certainly the first two might well be material witnesses.

[35] I contrast that with the brief time the child has spent in Ontario of approximately three months. While there may be something that K.M.'s parents, extended family or service providers for the child have to say, I find there is a more substantial connection and more substantial evidence likely to come from the witnesses in Nova Scotia.

[36] There is no question that we should seek to avoid a multiplicity of legal proceedings, but in this circumstance there has already been a proceeding commenced in Ontario. It certainly can be that the child is present in one jurisdiction and domiciled in a different jurisdiction. This child is currently in Ontario and the Ontario court could find that it has jurisdiction to rule on issues concerning the child. Likewise, I have made a determination that the child's normal domicile is in Nova Scotia and could make the same finding. That would be unfortunate but is possible, and must be addressed if required.

[37] The main concern I have with respect to this matter is contained in clause (f), which requires that I consider the fair and efficient working of the Canadian legal system as a whole. Counsel for A.J. has noted that although this is not a classic case of abduction, it is certainly a case where a child has been taken out of the province under misleading pretences. According to the father, the intent was to go to the YMCA, yet an e-mail arrived shortly after on the same day indicating that

the mother is off to Ontario with the child. That is concerning. She says in her e-mail that she will be back in a month, and she does not return. The father's evidence is that she did not provide an explanation until he was served with the application out of Ontario, and in the meantime and since, he has had difficulty in speaking to the child and to K.M. about the child.

[38] All of this gives rise to serious concerns that the mother has used the opportunity of leaving Nova Scotia to her advantage, and is attempting to establish jurisdiction in Ontario. Had she provided notice in advance, had she discussed the matter with the father, had she given him a full indication of where she would be and when, and had she provided full and meaningful contact and access with both her and the child since relocating, the decision might well be different. She could also have applied to this court for an order permitting her to relocate the child with her to Ontario. The father would have had an opportunity to respond and a mobility hearing would have resolved the matter.

[39] I note the decision of Justice Campbell in S. v. D., 2004 NSSF 18, at paragraph 7, where he wrote:

> There is jurisdiction in the province where the child was taken because of the presence and existence of the child. There is also jurisdiction in the departing province by virtue of the fact that that province had been the child's habitual residence. She had lived there from the time of her birth until her removal by the mother on January 16th or 17th, 2004. In light of that dual jurisdiction, it is the policy of most Courts as a matter of

> general rule that the receiving province would decline to use its jurisdiction in favour of the jurisdiction of the province of habitual residence with which the child has the most substantial connection. The main reason for this policy is to discourage the clandestine removal, whether it amounts to kidnapping or not, of children from one province to the other.

I find that is the appropriate principle which must be applied in this circumstance.

[40] Therefore I find that Nova Scotia is the appropriate jurisdiction for the determination of all matters concerning A.E.A.J.

[41] As to relief, A.J. requests an order of sole custody to him, with supervised access to the mother, a return of the child to the Province of Nova Scotia into his care, and a declaration that the jurisdiction remains with Nova Scotia.

[42] In determining the appropriate relief in this case I take into account the fact that the child is in the care of K.M., there is no indication that the child is at physical risk in her care, nor is there any indication that the child is under any harm or risk of harm at the moment in the care or in the company of anyone else around the mother. It is always a difficult determination in such a circumstance to order that a child be taken from one parent and brought back to another province and placed in the care of another parent. On the other hand, the evidence is that the father has had a long and close relationship with this child, has had an extended period of time off work to spend with this child, that this child has had a

meaningful relationship with the father's parents and his extended family here in Nova Scotia.

[43] I am prepared to grant an interim order that Nova Scotia is the appropriate jurisdiction for determination of all matters concerning the child, A.E.A.J., born September […], 2012. I also order that A.E.A.J. be immediately returned to the Province of Nova Scotia, that she be placed in the primary care of her father, and that her father have sole custody and primary care of her on an interim basis. If the mother is able to exercise physical access with the child, she will be entitled to do so on a reasonable basis, at reasonable times, upon reasonable notice. On an interim basis I order that this access be supervised by someone chosen by and in the absolute discretion of the father. If the mother is unable to exercise physical access in Nova Scotia, she may have daily telephone contact and/or Skype or Facetime or other video conferencing contact with the child, at times to be agreed between the parties. The father is to keep the mother informed at all times about any major issues concerning the child and her best interests and well-being. The father is to meaningfully consult with the mother with respect to any decisions concerning major issues for the child, but he will have final decision-making authority respecting those decisions. Once returned to Nova Scotia, the child is to remain within the Province of Nova Scotia and is not to be removed from the

Province by either parent without express written consent of the other parent or an order of a court of competent jurisdiction, until this matter is further reviewed. This order may be registered in the Province of Ontario, and if it is so registered, it will include a provision that it is enforceable in Ontario by any Peace Officer, if required.

[44] There will be a return date set on the matter. We will set a date two months from now, but at the request of either party, an earlier date may be requested. This will be a Review Docket date. We will set a half hour. The matter is adjourned to February 5, 2016, at 10:00 a.m. for Review.

Daley, J.