IN THE FAMILY COURT OF NOVA SCOTIA
Citation: M.G.G. v. A.D.D., 2008 NSFC 18

Date: 20080611
Docket: 06Y050332
Registry: Yarmouth

Between:

M.G.G.

Applicant/Respondent

v.

A.D.D.

Respondent/Applicant

Publication restriction: **Publishers of this case please take note** that **Section 94(1)** of the **Children and Family Services Act** applies and may require editing of this judgment or its heading before publication. **Section 94** provides:

94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or a guardian, a foster parent or a relative of the child.

Judge: The Honourable Judge J.D. Comeau, C.J.F.C.

Heard: April 23, 2008, in Yarmouth, Nova Scotia

Written Decision: June 11, 2008

Counsel: Wayne S. Rideout, Esq., for the Applicant/Respondent
Marci Lin Melvin, Q.C., for the Respondent/Applicant

By the Court:

The Application:

[1] This is an application to vary an Order of this Court dated January 23, 2008, and the Respondent/Applicant., A.D.D, is requesting the following relief:

> The Respondent is requesting permission to move out of the Court's jurisdiction with C. born October *, 2006, as she has been accepted at a university in British Columbia. (**editorial note- removed to protect identity*)

[2] The Applicant/Respondent, M.G.G., is the father of the child and he is opposed to the move.

The Facts:

[3] The Order which is sought to be varied provided that the Respondent/Applicant mother have "sole primary care" of the child with unsupervised access to the Applicant/Respondent father every Sunday from 2 p.m. and until 5 p.m. It specified that access would be at the father's mother's house or his grandmother's house. There was provision for 24 hours notice in advance with

particulars of a phone number, address or an e-mail so the parties could communicate.

[4] A history of access orders started on January 24, 2007, with another three until the Order of January 23, 2008, a total of five in all. The general theme of these orders was that the father was to be supervised with respect to access until the Order of January 23, 2008. This Order deleted supervision but required him to exercise access at his relative's.

[5] Counsel for the father argues that the mother has gone out of her way to prevent access to his client and moving to British Columbia is another way of attempting to exclude him from the child's life. This is denied by the mother and her counsel points to the orders as proof that she has attempted to provide him with access.

The Mother's Plan:

[6] The mother has chosen to pursue a career as an executive chef and she has been accepted for that type of study at the College of Rockies in C., British

Columbia starting in September, 2008. The complete cost of the program is $3,800.00 and $400.00 for books. She plans to get student loans. A food safe certificate is required before the start of her course in September. The college is to provide her with dates for upcoming food safe courses.

[7] She advises the executive chef course is 48 weeks and a three year apprenticeship.

[8] In addition to her moving to British Columbia her mother plans to go as well. There are other extended family members; aunts, uncles, cousins already there in British Columbia. Her brother also lives there and she will be staying with him until she finds her own accommodations. She has reserved a placement in daycare for the child.

The Applicant/Respondent Father's Plan:

[9] The father's plan is to stop the mother and child from moving or he believes she should try out the chief's course in British Columbia on her own. He wants the

child left with him and he would have the help of his extended family caring for him.

[10] He does, however, realize that the bond with the child is with his mother and not him.

[11] There is a question in his mind as to whether the mother's plans are something she can complete. Through his counsel a description of a cooking program was submitted. It indicates, "This program is designed for the person who wants a career as a professional cook, eventually moving into kitchen management." It is offered in the Valley, South Shore, Pictou, Cape Breton, Strait area and Pictou campuses of the Nova Scotia Community College/Culinary Art. The mother says these are merely cooking courses while an executive chef does more than merely preparing food.

[12] The father lives with his parents but he has not provided any details of his living situation or what items he has to take care of a child. He has not parented the child and has just recently (January '08) had unsupervised access but at his

mother's home. This access has been successful. Access was originally supervised because the mother had concerns about his temper and use of drugs.

[13] No child support has ever been received from the father and none is being asked for. The mother indicates she will not be asking for child support so he can use it for access purposes if she is allowed to move to British Columbia.

Facilitating Access (Mother):

[14] The mother proposes that if she is allowed to move to British Columbia with the child she would bring him down for one month in the summer so he could see his father. His father could visit him in British Columbia at any time. She says when C. is ten years old they could arrange access for alternate Christmases and March breaks. There would also be liberal telephone and e-mail access.

The Issue:

[15] Application to vary adding a condition to custody; mobility whether in child's best interests to allow move to British Columbia.

The Law:

[16] Section 37 of the **Maintenance and Custody Act** provides for variation of court orders.

> S. 37(1) The Court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.

[17] The decision of the Supreme Court of Canada in **Gordon v. Goertz** (1996) 19 R.F.L. (4th)177, [1996] 2 S.C.R. 27, 137 D.L.R. (4th) 321 (S.C.C.) sets out a summary of the law with respect to mobility.

> The law can be summarized as follows:
>
> 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 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 parents;

(b) the existing access arrangement and the relationship between the child and the access parents;

© 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.

In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[18] In **Burns v. Burns** [2007] N.S. J. No. 2, the Nova Scotia Court of Appeal was dealing with a decision of a trial judge denying the mother's application for

sole custody and to relocate two children ages five and seven. In 2005 the parties had consented to a court order that provided for joint custody. The father subsequently always exercised his access and was a fully participating parent.

[19] The mother wanted to move to Ottawa from Cape Breton to take a Masters in Social Work at the University of Ottawa which would take two years to complete. Similar schooling in Nova Scotia was part-time and would take nine years to complete. She was the primary caregiver and primary bread winner and had been working part-time and temporary jobs and also collected social assistance.

[20] The trial judge denied the move indicating it would be too traumatic for the children, financially difficult and their best interests required them to maintain their current relationship with their father.

[21] The Nova Scotia Court of Appeal awarded sole custody to the mother and allowed her to move to Ottawa. In arriving at this decision, the court reviewed **Gordon v. Goertz**, *supra,* and looked at some of the decisions where it was applied, for example; in **Woodhouse v. Woodhouse** (1996), 290 R. (3d) 417, the

court “weighed those factors which favoured the move against the drawbacks of the move.”

[22] In coming to a conclusion in **Burns**, *supra*, the Nova Scotia Court of Appeal reviewed these four grounds:

1. Economic Circumstances;

2. The views of the mother;

3. Traumatic effect of the move, and;

4. Overemphasizing reductions in access.

[23] They found the trial judge failed to properly consider the economic impact on the children if the move was not permitted and thereby committed an error in principle. The trial judge also erred in failing to accord the views of the mother (the primary caregiver) “great respect and the most serious consideration” (see **Gordon v. Goertz**, *supra*).

[24] There is also an indication that the trial judge had no evidence to speculate that this move would be overly traumatic on the children. He also failed to consider the mother's plan of access, overemphasizing reduction in access.

Change in Circumstances

[25] The decision of **Cameron v. Cameron** (2006) 27 R.F.L. (6th) 1, 245 N.S.R. (2d) 85 is helpful with respect to a change in circumstances and to corollary relief under the **Divorce Act**, applicable here to Section 37 of the **Maintenance and Custody Act.**

[26] In this case the Court of Appeal upheld the trial judge's decision not to allow a move by the mother with two small children as follows at p. 4:

> The Judge here found that the mother had not established a change which altered the children's needs or the ability of the parents to meet those needs. The fact that the children were experiencing some stress from the alternating week care arrangements did not warrant a variation of the joint custody order so as to permit the mother to move.

[27] In **Gordon v. Goertz,** [1996] 2 S.C.R. 27 (S.C.C.), the Supreme Court of Canada addressed the meaning of a "material change in circumstances" in the context of a parent's request to move away with the children.

[28] McLachlin, J., as she then was, for the majority, described the necessary change as follows:

> 12. What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: **Watson v. Watson** (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: **MacCallum v. MacCallum** (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J.G. McLeod, **Child Custody Law and Practice** (1992) at p. 11-5.
>
> 13. It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) 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; (2) which materially affect the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[29] This case turned on what was dealt with in the previous order:

> As is clear from the judgment, although a planned change in a child's residence may be a material change in circumstances, the intended move must generally be

one that was not addressed directly or implicitly in the former order. Not every planned move is a material change. The following excerpt from the judgment is helpful:

In these circumstances, the judge's finding that the proposed move did not constitute a material change was consistent with the direction in **Gordon v. Goertz**, *supra* (see ¶15 reproduced at para. 11, above). Judge White's order had not been appealed. The mother's request had been fully addressed at that hearing. The mother's renewed proposal to move to Yarmouth was not materially different from that proposed before Judge White. The only significant change put forward by the mother in support of the move was the fact that the week-about joint parenting was not working. Justice Murphy was not satisfied that the difficulties the parties were experiencing under the existing shared parenting arrangement went to the root of the joint custody. The premise of Judge White's order was that it was in the interests of the children to have regular and frequent contact with each parent. The benefit to the children from the contact, in the opinion of Justice Murphy, had not changed.

Conclusion/Decision:

[30] The previous orders in the case before the Court did not take into consideration a possible move of the mother with the child out of the jurisdiction. It is a material change in circumstances (her plan to move) that requires a fresh inquiry into what is in the best interests of the chid.

[31] In arriving at a decision the Court has considered **Gordon v. Goertz**, *supra*, and **Burns v. Burns**, *supra*. There is no legal presumption in favour of the mother who has been the primary caregiver since the birth of the child. Her views are entitled to "great respect." She has a career plan for herself after finishing Grade 12 this June. The purpose of her choice to go to further educate and become an executive chef is for the economic benefit of her and the party's child. She has been accepted in a school of culinary arts in British Columbia, and there is proof it is a course not available in Nova Scotia. Extended family will be there to assist her in the move.

[32] The father indicates there is no proof that she can actually complete this course, that she is underestimating the cost of it. That her desire of one day having her own restaurant is too high. He believes she should leave the child with him and go herself and try the school to see if it is an achievable goal for her. The

problem is he does not have a detailed parenting plan, and there is evidence that he may not have the financial means to care for the child.

[33] The mother has always been the primary caregiver and the bond of the child is with her. If the child were to remain with the father his parents could end up being the primary caregivers.

[34] The Court having applied the facts of this case to the criteria set out in the decisions referred to earlier is of the opinion that it would be in the best interests of the child to move with her mother to British Columbia to pursue her career choice.

[35] In order to achieve this it is in the best interests of the child to grant custody to the mother with access as follows to the father:

1. The mother is to arrange for the father to see the child during a period of one month in the summer in Nova Scotia.

2. The father may visit with the child at anytime in British Columbia.

3. Unlimited telephone and e-mail access.

4. When the child is ten years of age the mother shall arrange for alternating access at Christmas, also access during March break.

5. Such other access as the parties may agree upon.

[36] Counsel for the Respondent/Applicant mother shall prepare the order.

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John D. Comeau, Chief

Judge of the Family Court