FAMILY COURT OF NOVA SCOTIA
Citation: B.T. v. J.M., 2015 NSFC 18

Date: 2015-09-02
Docket: Kentville, No. FKMCA-092374
Registry: Kentville, N.S.

Between:

B.T.

Applicant

v.

J.M.

Respondent

Editorial Notice:	Identifying information has been removed from this electronic version of the judgment.
Judge:	The Honourable Judge Marci Lin Melvin
Heard:	September 2, 2015, in Kentville, Nova Scotia
Written Release:	January 11, 2016
Submissions:	September 2, 2015
Counsel:	Claire Levasseur and Cheri Killam, for the Applicant, B. T. Donald Fraser, for the Respondent, J. M.

By the Court:

[1] This matter has been before the Court for almost a year and it has an unusual history.

[2] It first came before the Court by way of an application for the determination of custody and access pursuant to Section 18 of the ***Maintenance and Custody Act***, filed by the Applicant father, B.T. The Applicant father had advised the Court that the Applicant mother was refusing him access to the baby. He did not know the baby's name or sex and was refused information about or contact with the child. The running file noted the Court clerk advised the Respondent mother, J.M. that Court was scheduled for September 2nd, 2014.

[3] On September 2nd, 2014, counsel for B.T. – then Ms. Claire Levasseur – informed the Court that B.T. knew he had a son but did not know the date of birth or the name of the child and had not seen him. He was still being refused access and information. J.M. was not in Court. The Court was informed the J.M. was due to be in provincial court on a peace bond application at that time.

[4] The Court ordered that J.M. attend Court on September 3rd, 2014, and further, that failure to do so may result in her being cited for contempt and further,

that pursuant to Section 20 of the ***Maintenance and Custody Act*** she was to bring the child to Court at that time.

[5] On September 3rd, 2014, Ms. Levasseur advised they had attempted to serve J.M. at Provincial Court the day before, as she was due to be there on a Peace Bond application, but she did not show up and the Peace Bond application was dismissed. A process server had attempted to serve her at her own home but was not successful. Ms. Levasseur indicated that her client was concerned, given that J.M.'s parents' house was for sale and once it was sold, they would move to British Columbia.

[6] An Order for Substituted Service was granted by the Court. On September 11th, 2014, once again, the Applicant and his counsel were present but the Respondent was not. The Order for Substituted Service was not able to be served.

[7] The Court issued a Warrant for the Respondent's arrest and indicated it would be held. There were numerous issues with respect to this matter and the Court did not feel it appropriate to endorse the Warrant at that time. The matter was adjourned until September 17th, 2014, for the Court to hear argument by the Applicant on the issues that he had set forward.

[8] Applicant counsel argued that this Court had jurisdiction, under the ***Maintenance and Custody Act***. The parties had an intimate relationship and when the Applicant saw the Respondent in June of 2014, she was pregnant. His position was that he was clearly a possible father and as such this would provide the Court with jurisdiction. The Court found, that he was a possible father, and had the right to proceed under the ***Act***. The Court found it would be a simple matter for the Respondent to agree to DNA testing, knowing that B.T. was not the father, if this were indeed the case. The Court found it in the best interest of this child to know his genetic heritage and granted Orders for Production, as requested by counsel for the Applicant, from Valley Regional Hospital and Vital Statistics, with respect to the birth of the child. The Court ordered the Warrant be issued for the Respondent.

[9] The matter returned to Court on September 22nd, 2014, and the Respondent's mother, A.M.M. appeared. She advised the Court that her daughter, J.M., had left Nova Scotia several weeks ago "... with the baby's father." She indicated that the Applicant father, B.T., had been obsessive about her daughter. The parties had not seen each other for over eight months and she had no idea where her daughter was. She said B.T. had been stalking her daughter and appearing out of nowhere. A.M.M. testified the child was A.M., born August […[, 2014. The Court accepted her evidence and another Warrant was issued and endorsed.

[10] The matter returned to Court once again in October and subsequently on June 4, 2015.

[11] Mr. Urquhart was now representing the Respondent father, B.T. As well, J.M. indicated she would be obtaining counsel. J.M. had been arrested in Winnipeg and the child was removed from her care and was with Children Services for some time before being placed in the care of B.T. Mr. Urquhart indicated that J.M. had appeared in Provincial Court the day before, where she was released but charged with abduction.

[12] The child was returned from Manitoba by Family & Children Services and placed with B.T., as I previously indicated.

[13] On June 11th, 2015, the parties were once again in Court, with Mr. Fraser representing J.M. Paternity tests were requested and as long as the paternity tests fit within the confines of the ***Vital Statistics Act*** – because they didn't within the confines of the ***Maintenance & Custody Act*** – the Court ordered that these could take place. The matter was again in Court and the Court was advised that B.T. was seeking to have the matter moved to Sydney and J.M. was contesting jurisdiction but no longer contesting paternity. That is the brief history of the Court process.

[14] The issue is where is this matter best heard?

[15] **In C.L.J. v. R.A.M., 2010 NSFC 5**, Melvin, JFC, this Court set out the factors a Court must consider when jurisdiction is in dispute.

[16] Mr. Fraser is correct, in some regard, that jurisdiction and venue do not necessarily mean the same thing but I think that the Court can consider the factors that have to be pondered, with respect to a jurisdiction issue, when considering change of venue as well.

[17] The ***Family Court Rules*** do discuss a transfer of proceeding, pursuant to 16.01, which says that the Court may at any time order that a proceeding be transferred to another office of the Family Court and when transferred the proceedings shall be entitled and continued in the later office. I don't think that precludes being transferred to the Supreme Court Family division because if it did it would clearly prejudice rural Nova Scotians if they chose to move. It is one more argument why there should be a unified Family Court in Nova Scotia. I have never failed to bring that point up but the Court is going to find that, for these purposes, transferring to another office of the Family Court, in rural Nova Scotia, has the same effect as transferring to HRM or CBRM, Supreme Court Family Division. Otherwise, it is tremendous bias to rural Nova Scotians and seriously impedes access to justice.

[18] ***Is the child ordinarily or habitually resident in the jurisdiction and one could certainly add to that, in this venue?*** Is the child ordinarily or habitually resident in Kentville? The Court has no evidence before it, to know that this child has actually ever resided in Kentville. The child may have been born in Kentville but where one is born does not have anything to do with where one is resident.

[19] ***Is the child present in the form?*** The child is not present in the form and has not been present in the form, perhaps since birth, as indicated earlier. Does the child have a real and substantial connection with the form? No, not that the Court has found, based on the evidence before it.

[20] ***Is it the form conveniens***? The Court would find that it is not, there is no clear evidence that there are any witnesses here, with the exception perhaps of the R.C.M.P., as noted by Mr. Fraser, that may be able to testify on behalf of either of the parties. J.M. and her parents are in British Columbia. The one best friend that B.T. indicates J.M. had, is no longer her best friend and B.T. spent the night with her last night, his evidence would seem to indicate. So there doesn't appear to be anybody here that could give the Court information or evidence, with respect to this child, without having to travel a great distance.

[21] ***Would the child be at risk if jurisdiction were not assumed?*** I find that the child would not be at risk if Kentville did not assume jurisdiction or place of venue.

[22] ***Where is the best evidence available?*** Likely not Kentville. Which venue allows for a full and sufficient inquiry of the issue? I would think it would be CBRM. If not full and complete inquiry, then certainly half of the inquiry and that half would be B.T.'s. Unless the matter were to be heard in Kelowna, British Columbia, which is where the other half of the inquiry could probably be met, there is no place where there could be a full and complete inquiry.

[23] ***Has the party to the proceedings consented to the child being in another jurisdiction?*** As a result of J.M. being charged with abduction and the Children's Aid taking the child from her care and placing her with B.T., she has not commented on whether or not she consents to the child being in another jurisdiction, however clearly, she wants the matter held here in Kentville.

[24] ***Has the party to the proceeding acquiesced in the child remaining in another jurisdiction?*** J.M. really hasn't any choice at this time. Her choices are fairly limited, given the criminal charges before the Court, of which the Court has become apprised. The Court does find it interesting and perhaps troublesome that

the evidence before this Court is that J.M. has not attempted to see the child or make arrangements to see the child, before moving to British Columbia.

[25] ***Is there any evidence of abduction?*** Yes.

[26] ***How much time has passed with the child being in another jurisdiction?*** From the evidence before this Court, the child has been with his father since May or June of 2015.

[27] ***The age of the child*** is irrelevant at this point.

[28] There are no ***applications filed in concurrent jurisdictions***.

[29] As far as the Court is aware, ***there are no multiplicities of proceedings.***

[30] ***The wishes of the child*** are not applicable because the child is too young.

[31] Finally, ***what is in the best interest of the child, taking into account, all aspects of the case before the Court?***

[32] This was an avoidable position for everybody to be in, especially the child. It is sad that J.M.'s evidence is that the child was with her, practically glued to her hip at all times, for the first nine months of his life and then the child was taken from her and placed with his biological father, whom he didn't even have the

chance to know. There was no phasing in. There were no happy incidents where the child could be introduced to his dad. Nothing. Just take from mom, give to dad. That is tragic for this little child. The child has the right to know both parents as equally as is possible under all given circumstances.

[33] So as far as jurisdiction or venue is concerned, the child is with his father, his mother isn't even in the province. From the Affidavit evidence - and I have nothing to dispute it - the child is well cared for by his father and as such the Court finds it is in the best interest of the child that this matter be held in Sydney Supreme Court Family Division. Pursuant to Rule 16.01, the Court orders that the venue and jurisdiction be changed.

_____

Marci Lin Melvin, JFC