FAMILY COURT OF NOVA SCOTIA
Citation: P.D.P. v. D.T.W., 2014 NSFC 22

Date: 2014-06-30
Docket: FKMCA-089177
Registry: Kentville

BETWEEN:

P.D.P.

Applicant

-and-

D.T.W.

Respondent

Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Judge Marci Lin Melvin

Heard: May 15, May 29 and June 9, 2014 at Kentville, Nova Scotia

Counsel: John MacMillan, counsel for the applicant

Daleen Van Dyk, counsel for the respondent

BY THE COURT:

Introduction

[1] The applicant P.D.P. has made application to vary an ***ex parte*** order of the Court dated December 16, 2013. The order has had several evolutions since that time. The ***ex parte*** was re-confirmed on February 17, 2014. It was made a "final" order by Dewolfe, J.F.C., on April 7, 2014. This Court varied it as an "interim without prejudice order" to ensure that P.D.P. would have parenting time with the child on her return to the jurisdiction.

[2] The applicant seeks sole custody of the child B.P. born May […], 2005, as well as an order vacating the ***ex parte*** order on the grounds that she did not have the opportunity to make representations and was never served with the application. Her application further sets out that the Affidavits filed by and on behalf of D.T.W. were inaccurate and untrue; that he is neither the biological father of the child nor the guardian and therefore required leave of the Court; and, further, seeks costs.

[3] D.T.W.'s **e*x parte*** application for interim custody and primary care of the child B.P. maintained the child's mother P.D.P. had moved to Alberta in September 2013, leaving the child B.P. in his care. His immediate concern was her impending return and removal of the child, citing she was bipolar but not on her medication, lived with a new boyfriend and a room-mate who went "nuts" every night, as well as other concerns.

[4] This Court granted an ***ex parte*** order on December 16, 2013, pursuant to ***Family Court Rule*** *19.02(e)*, ordering that P.D.P. be served a copy of the application, Affidavits and order, with a return date of February 10, 2014, or sooner if P.D.P. contacted the Court with that request. The Court also ordered that D.T.W. file an ***inter partes*** application with the Court that was to be served on P.D.P. at the same time as the ***ex parte*** application. The ***inter partes*** application was not filed with the Court, and by extension, not served on P.D.P.

[5] On February 10, 2014, counsel for D.T.W. advised the Court that the child's mother P.D.P. had not been served. The Court adjourned the matter until April 7, 2014, to ensure that be done.

[6] On April 7, 2014, counsel for D.T.W., told Dewolfe, J.F.C., he had not been able to determine P.D.P.'s whereabouts until the previous week. Dewolfe, J.F.C., made the order final and noted P.D.P. could make an application to vary without a change in circumstances but until then the child would remain in Nova Scotia.

[7] The parties appeared in Court on April 28, 2014, with counsel on the present application.

ISSUES

1. Can an ***ex parte*** order be vacated or set-aside?

2. Does a statutory Court have the jurisdiction to vacate a final order?

3. Does D.T.W. need standing to apply for custody and/or parenting time to B.P. or is he a "guardian" as defined by the ***Act***?

4. In whose custody, care and control is the child's best interest's met?

5. Is it in the child's best interests to relocate to Alberta with his mother, P.D.P.?

ANALYSIS OF THE EVIDENCE AND THE LAW

(1) Can an ex parte order be vacated or set-aside?

[8] It is P.D.P.'s submission that the ***ex parte*** order made by this Court on December 16, 2013, be set aside or vacated. Sharon Cochrane, counsel for P.D.P., argues:

> "… it is now clear that the evidence provided to support the application is incorrect, untrue and misleading. It is further submitted that the procedure ordered by this Honourable Court was not followed."

(a) Was the evidence provided to support the application "… incorrect, untrue and misleading," as argued by Ms. Cochrane?

[9] Ms. Cochrane argued: "… that the Court was not presented with a complete picture."

[10] In **M.E.G. v. M.J.K.**, 2003 ABQB 20, upon consideration of the ***ex parte*** application brought by one of the parties, Park, J., stated at para. 129:

> ***"Ex parte* orders have the potential to prejudice severely the other party. Lawyers and their clients have a heavy onus in *ex parte* applications to place all of the facts before the Court. There should be no lack of disclosure."**

[11] In **M.R.M. v. T.A.H.**, 2005 BCSC 1770, Brown, J, recounted the factual background that included an ***ex parte*** order. Brown, J., stated at para. 6:

> **"Madam Justice [Allan] set aside that order, finding that Mr. M.R.M. had failed to disclose a number of material considerations … [and]… found that Mr. M.R.M. gave false information to the Court of Queen's Bench judge; … and, advised the Court of Queen's Bench**

> **judge that he did not know Ms. T.A.H.'s address when he was aware that Ms. T.A.H. was represented and was, himself, represented in proceedings in British Columbia the day before the application in Alberta. Madam Justice Allen set aside the Alberta order, saying: "It is obvious that he, the plaintiff, did not make full and frank disclosure of numerous material facts."**

[12] As argued by Ms. Cochrane, it is not only the absent party that is at a severe disadvantage and at risk of suffering prejudice; the Court is also at a disadvantage. A Judge does not have the benefit of the evidence being tested through cross-examination or otherwise.

[13] In **Schulz v. Schulz**, 2007 NSSC 319 (CanLII), Lynch, J., stated:

> **"*Ex parte* orders are rare and for good reason. Only one side of the case is heard. The person who seeks an *ex parte* order has an added responsibility -- they must not only present their own case, they must inform the Court of all material facts whether those facts are adverse to their position or not. This duty is to allow the Judge to make an informed decision on the basis of all known facts. This duty is spelled out in *Rule 70.12(2)*:**
>
> > **(2) Where an application is made for an interim order without notice, the applicant shall inform the Court of all material facts known to the applicant, whether or not the facts are adverse, which will enable the Judge to make an informed decision and, where applicable, of the efforts made to inform the other parties of the application."**

[14] In **Derochie v. Derochie,** 2003 ABQB 345 (CanLII)**,** the Court held**:**

> **"It is well known that when applying for an *ex parte* injunction (or one on such short notice that the defendants have no time to respond) there is a solemn obligation on an applicant to see that full disclosure is made of all material facts. Failure to make full disclosure or misrepresenting material facts, when discovered will be dealt with severely and, as a punitive measure, most often results in the injunction being set aside on a motion to continue."**

[15] The Court quoted from **United States v. Friedland** [1996] O.J. No. 4399 (Ont. Gen. Div.):

> **"The judge hearing the *ex parte* motion and the absent party are literally at the mercy of the party seeking injunctive relief. The ordinary checks and balances of the adversary system are not operative. The opposite party is deprived of the opportunity to challenge the factual and legal contentions advanced by the moving party in support of the injunction. The situation is rife with danger**

> **that an injustice will be done to the absent party.**
>
> **... For that reason, the law imposes an exceptional duty on the party who seeks *ex parte* relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts and law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side. If the party seeking *ex parte* relief fails to abide by this duty to make full and frank disclosure by omitting or misrepresenting material facts, the opposite party is entitled to have the injunction set aside. That is the price the plaintiff must pay for failure to live up to the duty imposed by the law. Were it otherwise, the duty would be empty and the law would be powerless to protect the absent party… Given the flagrant nature of the misrepresentation, non-disclosure and lying under oath, I will not excuse this conduct and the injunctive relief provisions in paragraph 2 of the Injunction is vacated."**

[16] The ***ex parte*** order was granted based on the Affidavits of the applicant, D.T.W. and B.R.P. These brief Affidavits did not place all of the facts before the Court. The Court finds there were portions that were misrepresented and misleading. The most glaring examples are as follows:

(a) That P.D.P. moved to Calgary and left the child in D.T.W.'s care. The Court finds, based on subsequent evidence, that this is patently untrue. It is now clear that P.D.P. left the child in her mother's care.

(b) That P.D.P. was mentally unstable, bipolar, and refusing to take her medication, with an inference that the child may be at risk because of this. P.D.P.'s family doctor has been treating her since 2005. His evidence was he has never been concerned with her mental health; she saw a psychiatrist in 2008; there are three mental health reports in his file and all of them are normal. P.D.P.'s (M.B.P.) father, a witness for D.T.W. testified that he had done a lot of reading and it was his opinion that his daughter P.D.P. was bipolar. M.B.P. was not an expert witness, not a doctor, and not in a position to undermine his daughter with his inexpert opining on her mental health.

(c) That P.D.P. was not the child's primary caregiver. The Court finds that although she may have had assistance from D.T.W. and her mother, she was – up until the time she moved to Alberta - the child's primary caregiver.

(b) ***Was the procedure as ordered by the Family Court complied with?***

[17] The Court finds it was not. This was concerning to the Court on a number of levels. The order was clear: P.D.P. was to be served with a copy of the order that clearly noted the return date in February. The order was not to be mailed and neither was it to be ignored; it was to be ***served*** on P.D.P.

[18] Counsel for D.T.W. advised the Court at the February 10, 2014 appearance that "in fairness" he would like to get another date. A letter from respondent counsel filed with the Court showed the order was mailed to P.D.P.; however, the address was incorrect.

[19] The matter was adjourned to April 7th and counsel for D.T.W. was directed to prepare another order. This order was not issued and P.D.P. was not provided with any notice of the April 7th Court appearance.

[20] There was evidence that P.D.P.'s mother had sent P.D.P. other things in the mail; they had telephone or cell phone communication; and, her family had her email address. There was no personal service. There was no application for substitute service. Why was P.D.P. never advised of this significant event in her child's life: that D.W.P. had an ***ex parte*** order giving him care of her child?

[21] ***Family Court Rule*** *7.01(1)* provides:

> **"Except where these Rules or an enactment otherwise provides, the following documents shall be personally served on each respondent:**
>
> **(a) An application;**
>
> **(b) Such other documents as the Court may be required to be personally served."**

[22] At the April 7th Court appearance, counsel for D.T.W. advised that he did not draft a new order and was only able to confirm P.D.P.'s new address a week prior. Counsel for D.T.W. also advised that P.D.P. had notice of the February 10th Court appearance but did not attend Court. Dewolfe, J.F.C., suggested that the ***ex parte*** order be made a final order and this suggestion was accepted.

[23] It is imperative that ***ex parte*** applications disclose all of the facts, even if some are not favorable to the applicant. It is the best interests of the child with which the Court is concerned. The Court finds that D.T.W. did not make full and forthright disclosure on numerous material facts. Further, the rules of the Family Court, and the orders made by this Court, were violated when P.D.P. was not made aware of these proceedings as ordered.

[24] The Court finds it has the jurisdiction to vacate an ***ex parte*** order.

(2) Does a statutory Court have the jurisdiction to vacate a final order?

[25] P.D.P. seeks in her application before the Court to vacate the ***ex parte*** order of

December 16, 2013. However, the order was made a final order by Dewolfe, J.F.C., on April 7, 2014. This was not appealed, but rather, made subject to a variation application.

(a) Can a statutory Court vacate an order that was made a final order?

[26] Counsel did not argue this; P.D.P.'s application was to vacate the **ex parte** order, and counsel made submissions on that particular issue. However, as noted earlier, the original order has evolved to a final order with an interim without prejudice variation. It is therefore an issue that must be considered by this Court.

[27] The case of ***Beaulieu v. Swinimer***, 1998 CanLII 1196 (NS SC), does not deal with the same **Act**, but it does deal with the setting aside of a final order. The legislation governing the case provides that registration of an order may be set aside if the Court "… determines that the order was obtained by fraud or error or was not a final order." This deals not with the order itself, but rather the registration of said order.

[28] While it is apparent the Supreme Court has the inherent jurisdiction to set aside a final order, this is not the same with a statutory Court.

[29] In **Goodwin v. Rodgerson**, 2002 NSCA 137 (CanLII), the Court held:

> **"In our view the order of the deputy prothonotary should be set aside pursuant to the exercise of the Supreme Court's inherent jurisdiction to control its own process and to prevent an injustice."**

[30] On the issue of inherent jurisdiction, the Court in **Goodwin v. Rodgerson** states:

> **"The inherent jurisdiction of the Court has been described as a vague concept and one difficult to pin down. It is a doctrine which has received little by way of analysis, but there is no question it is a power which a superior trial Court enjoys to be used where it is just and equitable to do so. It is a procedural concept and Courts must be cautious in exercising the power which should not to be used to effect changes in substantive law."**

[31] In **Gates Estate v. Pirate's Lure Beverage Room**, 2004 NSCA 36 (CanLII), Hamilton, J., held that a chambers Judge had the inherent jurisdiction to set aside an order even though it was a consent order.

[32] The Family Court of Nova Scotia is a statutory Court pursuant to the ***Family Court Act,*** RSNS, ch. 159. Section 6 sets out:

> **"The Family Court has jurisdiction over matters conferred on it pursuant to this Act or any enactment."**

[33] The ***Family Court Rules*** do not provide for the setting aside or vacating of orders. *Section 1.04* of the rules, however, does provide that the ***Civil Procedure Rules*** apply at the discretion of the Court where there is no provision under the ***Family Court Rules***.

However, the Family Court has no inherent jurisdiction.

[34] Dewolfe, J.F.C., indicated when she made the order final in April 2014 that P.D.P. could apply to vary without showing there had been a material change in circumstances, so that burden need not be met by P.D.P.

[35] The Court would have been prepared given all of the above to vacate its own ex parte order, but finds there is no jurisdiction to vacate a final order. To do so would be akin to acting as a Court of Appeal for one's own Court.

[36] The remedies in this instance would have been an appeal to the Court of Appeal or a variation application. P.D.P. has made the latter. It is properly before the Court. She need not show any change in circumstance as ordered by Dewolfe, J.F.C.

3. Does D.T.W. need standing to apply for custody and/or parenting time to B.P. or is he a "guardian" as defined by the Act?

(a) Leave to apply for standing

[37] Counsel for P.D.P. argued D.T.W. requires leave to apply for parenting time with the child. Don Fraser, counsel for D.T.W., maintains his client "… did not 'step' into an already existing established custodial parent role. There was none established when he came into [the child's] life. My client's relationship with [the child] has always been that of a parent than of a traditional step-parent."

[38] Ms. Cochrane argued contrary and sets out the test the Court still refers to when determining factors on a leave application as noted by Legere, J.F.C. (as she then was) in **G. (C.) v. G. (M.)** (1995), 137 N.S.R. (2d) 161 (F.C.), and upheld by Justice Goodfellow at (1995), 147 N.S.R. (2d) 369 (S.C.). It is as follows:

> **"Taking from the cases then, the guidelines outlined include an application overall of the best interests test having regard to the nature of the application; is it frivolous or vexatious; is there a sufficient interest and/or connection and should the custodial parents be called to respond to this application; are there other more appropriate means of resolving this problem or having the Court hear the issue; is there a justiciable issue; are there risk factors associated with this case that calls for Court intervention, again in the best interests of the child? Will the leave application, if granted, place the child in more risk of litigation and uncertainty? Are there extenuating circumstances, such as a change in the natural order of access or denial of access? … Is the involvement of the third party destructive or divisive in nature?... Any one of these factors in and of itself is not the test. It is a weighing of a combination of these factors in light of the facts presented on the application that leads one to the appropriate conclusion in allowing or denying an application of this sort with such serious repercussions."**

[39] D.T.W.'s evidence is that he has seen the child almost every day of the child's life, he loves the child, they have a close bond, and the child calls him "Dad".

[40] He states:

> **"[The child] … is very intelligent and a great kid and I love him very much. It saddens me that [his mother]… has for a long time sporadically tried to convince [the child] … that I am not his "Dad" and that he need not listen to me despite my being in a paternal role with [the child] since the day that he was born."**

[41] His evidence and the evidence of P.D.P.'s mother is that D.T.W. was "… present in the operating room when [the child] … was born." B.D.P. also states in her affidavit:

> **"[D.T.W.] … has been a father to [the child] … since the day he was born. He has been the only father [the child] … has ever known and has always been actively involved in a daily basis with [the child's] … day-to-day care. He is certainly a stable individual and provides excellent care for [the child] …"**

[42] P.D.P.'s evidence is that she and D.T.W. were not together when the child was born. She moved in with D.T.W. "as a friend" when the child was a year old, tried a romantic relationship which was off-again/on-again for over ten years, living sometimes with him, sometimes with her mother, and sometimes on her own with the child. Her evidence is that when she was on her own, D.T.W. only saw the child a few times a month.

[43] His is that he saw the child daily and that any spare time he spent with the child. The Court finds that D.T.W. has been a constant factor in the child's life since the child was very young.

(b) Definition of Guardian

[44] The definition of "guardian" under the ***Maintenance and Custody Act***, R.S.N.S., c. 160, s. 2 (e) includes: **"… a head of a family or any other person who has in law or in fact the custody or care of a child."**

[45] As the Court has found there is no jurisdiction to vacate a final order, D.T.W. does in law have care of the child, and therefore is a guardian under the ***Act*.**

[46] Having considered all of the evidence the Court finds that even if D.T.W. had not been found to be a guardian, having carefully weighed all of the factors in light of the facts presented, he would have met the criteria of the test to at least grant him leave to apply for parenting time with the child.

4. In whose custody, care and control is the child's best interest's met?

[47] The Court has already found that the Affidavit evidence of D.T.W. at the **e*x parte***

stage was at best misleading. When a Court makes such a finding credibility takes a front row seat. The Court observed D.T.W. on the stand. Whatever else the Court may say with respect to his credibility, the Court finds he is deeply attached to the child.

[48] However, is the child "deeply attached" to D.T.W.?

[49] In the Children's Wish Assessment, prepared by Debra Reimer and marked as Exhibit 6, when the child was asked if anyone had talked to the child about what to do, he said: "[D.T.W.] says I should stay and … [the maternal grandparents and his uncle] … want me to stay too."

[50] The child said he wanted to go to Alberta with his mother and would be really "… sad and mad …" if he could not move with her, saying: "I want to go too." When asked if this was a difficult decision for him to make, he said: "It has not been a hard decision to go to Alberta because I want to be with my mom no matter where it is."

[51] P.D.P. maintains she has been the child's primary care giver all of his life, that she was a working mother and had her mother care for him while she was working, and this only changed in September 2013, when she moved to Alberta.

[52] Exhibit 18, dated September 17, 2013 notes: "In my absence my mother, [B.D.P.] will have the authority to give permission(s) for school activity, sports, medical, etc. for [B.P.] …"

[53] She testified that she and D.T.W. had an "off-again on-again relationship" for over ten years and that they were not together when the child was born, but moved in together when the child was a year old. She and the child have lived at various times with her mother, with D.T.W., and on her own.

[54] D.T.W. maintains this was not true. His evidence is that P.D.P. has never lived "completely on her own" with the child. Even when she was in an apartment with the child on […], D.T.W. had daily contact with the child, and stayed there on numerous occasions. His evidence is the longest time he has been away from the child has been the three days a week parenting time ordered for P.D.P. as a result of this Court proceeding.

[55] She testified her father physically abused her and her mother for many years. She testified she smokes marijuana at the end of her day for anxiety, when her child is in bed. P.D.P.'s evidence is that she is not bipolar.

[56] Dr. Mark Pennell, testified on her behalf. He has been her doctor since 2008. He is not a psychiatrist, but as a general practitioner; he has referred P.D.P. at her own request to a psychiatrist. He testified he has seen no indicia that would cause him to be concerned P.D.P. has a difficulty with mental health. He testified he has three psychiatric assessments since 2000 on P.D.P. and they are all normal. He said she suffers from situational anxiety, which he did not qualify as a mental illness, and takes a minor tranquilizer to help her sleep.

[57] Whatever weight the Court may apply to Dr. Pennell's evidence, it was patently

clear that D.T.W. did not have any medical evidence that P.D.P. was bipolar.

[58] P.D.P. maintains that her father is "driving this application" due to his obsessive desire for the child to have a hockey career in Nova Scotia. P.D.P. was a medal-winning figure skater and testified if she did not do well at skating her father would abuse her. Her evidence was that he abused both her and her mother and was charged for assaulting her mother.

[59] The Court accepts P.D.P.'s evidence about her father, having had the opportunity to observe him on the stand. He testified on behalf of D.T.W., saying he had done a lot of reading and he thought that his daughter was bipolar. The Court found him to be evasive on cross-examination and discounts much if not all of his testimony and finds M.B.P. was completely disingenuous with the Court and his evidence self-serving. It was simply not credible.

[60] The Court accepts P.D.P.'s evidence that her father is "driving" this application. That is not to say that D.T.W. does not sincerely love the child or is not attached to the child. But having observed D.T.W. on the stand, the Court finds him to be gentle in his unwavering commitment to this child, believing the child is best situated with him. D.T.W.'s evidence on the **e*x parte*** application was alarmist and inaccurate, however, the Court noted in his demeanor at this hearing that he was sincere in his concern and love for the child.

[61] The Court finds that D.T.W. thinks of himself as the child's "Dad". Having heard the applicant's father on the stand; it is clear, for example, that the concerns D.T.W. had that the applicant was bipolar may have been fueled by M.B.P.'s "reading" on the subject and applying it to his daughter's behavior.

[62] D.T.W.'s plan is to maintain the ***status quo*** and parent the child with the child's maternal grandmother. The child would attend the same school, have all the same friends and support of both families.

[63] Mr. Fraser, on behalf of D.T.W., argued that P.D.P.'s choices and plans for the child call into question her ability to provide a safe and stable environment for him. He argued that P.D.P.'s new boyfriend is unknown to the Court, his client and the child; has recently been convicted of a violent crime; is on probation and ordered to take anger management. There was an altercation between P.D.P. and her new boyfriend at Christmas that had her fleeing their home and calling her father for money to return to Nova Scotia.

[64] P.D.P.'s plan is to take the child with her to Alberta and parent him with her new boyfriend, in a house less than one kilometer from the school the child will be attending. In testimony, the Court finds, she downplayed the new boyfriend's need to take anger management.

[65] The Court has some concerns with respect to P.D.P. and finds she has a temper and was cantankerous and confrontational on the stand, unable to maintain her composure during cross-examination. Her counsel argued: "Of course these

circumstances would make anyone feel upset, stressed out, and defensive."

[66] The Court notes that the hearing process is often stressful for litigants but most do not behave in such a manner. However, the Court does accept that the circumstances in this matter are more strained than usual. It is not often that one's parents testify for the opposing party.

[67] P.D.P. admitted in evidence that when she and D.T.W. were arguing she assaulted him twice, one time cracking his tooth.

[68] The Court is still unclear as to why, when she requested and expected the child to be with her for Christmas and this did not happen, that she did not get herself back to Nova Scotia to see her child, or to at least see what was going on. Even with financial restrictions, the evidence does not add up, that she would go away in September and not come back until April, not seeing her child in person for seven months.

[69] The Court also has concerns about her new boyfriend. She maintains she knew him previously, but there is also evidence she met him on the Internet. The Court does not find either way, but notes it seemed a rash decision to suddenly plan to move to Alberta to be with someone she did not necessarily know very well, leaving her child behind. The boyfriend did not attend Court or file any type of documentation in support of P.D.P.'s plan to parent the child in Alberta together. He is an unknown entity to the Court. There is some evidence before the Court that he has a recent criminal conviction for a violent offense.

[70] All of that being said, the Court does believe she loves her child and her evidence is that she went to Alberta in the hopes of creating a better life for the child: "My heart was in the right place." But what struck the Court the most was when the Court asked her to clarify her responses on cross-examination, which were: "[My child]… is my first priority. I don't care where it is." And further when asked what she would do if the child stayed with D.T.W.: "I would not leave my son. I would have to have contact." Her response to the Court was: "He's my son, he's my life. I would never want him to think it was remotely possible [that I would leave him.]"

[71] She taught him how to skate and has travelled a lot with the child for hockey games; has raised him for the most part with her mother's help and the help of D.T.W., as she was "a working mom," and needed support. By all accounts, P.D.P. has not had an easy life. The ***status quo*** would no doubt have continued had she not moved to Alberta without the child.

[72] The Court has also considered the Child's Wish Assessment, and it is crystal clear that no matter how much pressure D.T.W. or the child's grandparents have placed on him to stay here with them, he wants to be with his mother. It does not particularly matter that his mother has painted a "rosey" picture of a wonderful life in Alberta with his own four-wheeler, it is clear it is the relationship with his mother this child wants. P.D.P. said on the stand that she would not go to Alberta if the Court did not allow her to return with the child. It is her child, not the move that is important to her.

[73] The Court must always look to what is in the best interests of the child, often not having any idea what the child wants. It only makes sense to hear the voice of the child. It is not the final answer, obviously, but it is a piece of the puzzle a Court needs to consider. In this instance, the Court finds it was beneficial to know what the child wanted.

5. Is it in the child's best interests to relocate to Alberta with his mother, P.D.P.?

[74] P.D.P. wants to move to be with a new boyfriend, in the hopes of creating a better life for herself and her son. She moved to Alberta in September 2013, leaving her child in the care of her mother. Her evidence was that her mother and child would move together to Alberta to be with her when she got established.

[75] P.D.P.'s evidence was that it took a long time to find appropriate housing and it was not until April 15th that she and her new boyfriend found something suitable. She secured employment for herself once she got there at a Deli making $17.00 an hour. Her evidence is that her residence is close to a school and the child has his own room.

[76] What is the reason P.D.P. wanted to move? Her counsel argues that P.D.P. "… wanted to remove herself from the negativity she was experiencing and create a better life for her and her son."

[77] The most recognized case on mobility is **Gordon v. Goertz** [1996] 2 S.C.R. 27, and summarizes the law at para. 49:

> 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.
>
> 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?

[78] The threshold requirement is that the Court finds a change in circumstances. Dewolfe, J.F.C. noted however when making the order final, that P.D.P. need not show a change in circumstances to vary the order, and that was the basis on which this matter proceeded. It was not argued by either party that a change in circumstances was a requirement.

[79] The Court reviewed the evidence as a fresh inquiry into what is in the best interests of the child and considered the aspects of custody as set out in **Foley v. Foley,** 1993 CanLII 3400 (NS SC), Goodfellow, J., as well as s. 18(6) of the ***Maintenance and Custody Act***, which directs the Court to consider all relevant circumstances when considering the best interests of the child. These are:

> (a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;
>
> (b) each parent's or guardian's willingness to support the maintenance of the child's relationship with the other parent or guardian;

(c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;

(d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;

(e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;

(f) the child's views and preferences, if the Court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;

(g) the nature, strength and stability of the relationship between the child and each parent or guardian;

(h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;

(i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and

(j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on

(i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and

(ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

[80] The Court does not propose to go through all of the above affixing findings to each provision. Suffice to say the Court has given serious attention to each provision in light of the evidence before the Court and made findings in the child's best interests on the provisions applicable to this matter.

Findings and Conclusions of the Court

[81] The Court can vacate an **e*x parte*** order if the Court finds the applicant seeking ***ex parte*** relief fails to make full and frank disclosure by omitting or misrepresenting material facts. D.T.W. misrepresented material facts in his ***ex parte*** application before the Court. Further, proper procedure as ordered by the Court was not followed in that P.D.P. was not served or given notice of the application and ***ex parte*** order until four months later.

[82] The ***ex parte*** order was made a final order on April 7, 2014, by Dewolfe, J.F.C. A statutory Court has no inherent jurisdiction and cannot vacate a final order. The proper

process is an appeal or an application to vary. The applicant's variation application is therefore properly before the Court.

[83] D.T.W. is a guardian as defined by the ***Act***, but, even if he were not, he meets the test as presently required to apply for standing. D.T.W. has established to the Court's satisfaction that he has a role to play in the child's life. It is in the child's best interests that contact with D.T.W. be maintained, on a regular weekly basis.

[84] Counsel for P.D.P. argued her client: "… respectfully requests that this Honourable Court … return [the child] to her primary care." The Court finds, having carefully considered all of the evidence, the best interests of the child are that he be in P.D.P.'s primary care.

[85] As set out in **Gordon v. Goertz, *supra***, the ultimate question in every case is what is in the best interests of the child in all the circumstances, old as well as new?

[86] Considering the relationships the child has with the parties, the existing arrangements, the desirability of maximizing contacts in the child's best interest, the views of the child, the reason P.D.P. wants to move, the lack of evidence before the Court regarding her boyfriend and whether he supports this plan or not, and the disruptions to the child the move could or would cause, the Court finds it is not in the child's best interests to be relocated from Nova Scotia at this time. The child is not to be removed from the jurisdiction except for vacation purposes.

_____

M. Melvin, J.F.C.