FAMILY COURT OF NOVA SCOTIA

Citation: *C.L.J. v. R.A.M.*, 2010 NSFC 5

Date: 20100402
Docket: SFPAMCA-057732
Registry: Kentville

Between:

C.L.J.

Applicant

v.

R.A.M.

Respondent

Judge: The Honourable Judge M. Melvin, J.F.C.

Heard: March 15, 2010, in Kentville, Nova Scotia

Written Decision: April 12, 2010

Counsel: Bill Watts, Esq., for the Applicant
David Thomas, Q.C., for the Respondent

JURISPRUDENCE, LEGISLATION AND ARTICLES CONSIDERED BY THE COURT

LEGISLATION

The Maintenance and Custody Act, s. 18(5)

JURISPRUDENCE

1. *N.R.R. v. D.E.A.F.*, 2009 N.S.F.C. 4, Melvin, J.F.C.

2. *Jacques St-Gelais v. Lisa Kriisk*, 2001 NSSC 24 (CanLII), Hall, J.

3. *Sutton v. Sodhi* (1989), 94 N.S.R. (2d) 126, Sparks, J.F.C.

4. *Bedard v. Bedard*, 242 D.L.R. (4th) 625 (Sask. CA)

5. *Reid v. Reid*, SC Nfld & Labrador, UFC, 2007

ARTICLES AND TEXTS

1. The Annual Review of Family Law, 2008, page 29

2. Webster's II New Riverside Dictionary, Berkley Books, New York, page 276

By the Court:

Application before the Court

[1] This is an application made on December 16, 2009, by C.L.J., to vary an order, specifically as follows:

> 1. I am requesting a review in the custody, access and maintenance order noted above.
>
> 2. I am requesting joint custody of the following child with primary care and residence to remain with the applicant: C.J., (D.O.B. December 12, 2007), subject to access to the respondent on every weekend from Friday at 5 p.m. until Sunday at 5 p.m. with the access location to be determined by the court.
>
> 3. The respondent took the above noted child with her to Alberta on or about December 12, 2009 without the prior knowledge or consent of the applicant.
>
> 4. I am also requesting the court to order the respondent not to remove the above noted child from the Province of Nova Scotia without the prior written consent of the applicant.
>
> 5. I am requesting a review in the child support provisions and I am seeking a recision of the current child support order should the court determine a change in primary care will be effected as requested in number two above.

[2] The Order the Applicant seeks to vary was granted on June 23, 2008, in Port Hawkesbury, Nova Scotia.

[3] The order sets out as follows:

> AND UPON the Respondent, C.L.J., not appearing;
>
> AND UPON the Respondent, C.L.J., being served with notice of the hearing date on May 15, 2008;
>
> AND UPON the Respondent, C.L.J., acknowledging that he is the natural father of the child, C.J., born on December 12, 2007;
>
> AND UPON imputing income to the Respondent, C.L.J., in the amount of $62,352;
>
> NOW UPON MOTION:
>
> IT IS ORDERED:
>
> Paternity:
>
> 1. The Respondent, C.L.J., shall be, and is hereby declared to be, the natural father of the child, C.J., born December 12, 2007.
>
> Custody and access:
>
> 2. The Applicant, R.A.M., and the Respondent, C.L.J., shall have joint custody of the child, C.J., born on December 12, 2007, with the Applicant, R.A.M., having primary care and control of the said child.
>
> 3. The Respondent, C.L.J., shall have reasonable access with the said child at reasonable times upon reasonable notice to the Applicant, R.A.M.
>
> 8. The Respondent, C.L.J., can apply to this Court or a Court of competent jurisdiction to vary the term(s) of this Order. C.L.J.'s attendance within the Province of Nova Scotia for the purpose of making Application to Vary the term(s) of this Order shall constitute a material change in circumstance.

Background

[4] The parties met in Alberta and lived there until moving to New Brunswick. The child, C.J., was born in New Brunswick and lived there for the first three weeks of her life. Her parents separated at that time. R.A.M. has care and control of another child from a previous relationship.

[5] R.A.M. then moved to Port Hawkesbury with her mother and from that time until July 2008 (approximately seven months) she spent time with her mother in Port Hawkesbury and her father in New Brunswick.

[6] In July 2008, the parties reconciled and returned to Alberta. The Order was not rescinded.

[7] The parties were having relationship difficulties in March 2009, and at that time, the Respondent, R.A.M., and the child of the parties and another child of the Respondent, left Alberta to go to Port Hawkesbury for a two-week visit. The Applicant, C.L.J., remained in Alberta.

[8] The parties filed affidavits and were subject to cross-examination.

Evidence of Applicant

[9] The Applicant, C.L.J.'s evidence by way of affidavit is as follows:

> That for a while everything was good between R.A.M and I while we were living in Alberta. In October/ November 2008 we moved to Tofield, which is a town outside of Edmonton, Alberta. We stayed there for four to five months. While there, R.A.M. and I started to have more arguments. I stopped working up north so that I could be at home more with the family in Tofield, Alberta. I got a job in Fort Saskatchewan.
>
> That on May 8, 2009 we split up. I went to stay at a friend's place and bought a flight home for R.A.M. and both kids on May 10, 2009. At that time I stayed another two and a half weeks at our home in Tofield, Alberta before moving in with a friend around the corner from where we lived. I lost my job in June of 2009. I came home to Nova Scotia two days later.
>
> That from that time in June 2009 until October 2009, R.A.M. and I resumed the two week rotation parenting schedule for C.J.
>
> That in October, 2009, R.A.M. and I agreed that we would move together out west to secure employment. The two of us were not getting back together but we were going to live together at least temporarily while we got set up out west. In the third week of October, 2009, we left for Alberta. We left C.J. with my mother with the intention of coming to get C.J. within a month. I set up an apartment which would ultimately be lived in by R.A.M. After the children were to arrive, I was to get a place of my own. R.A.M. is trained as a Welder although she does not have her papers for doing so. Her pay reflects this.
>
> That after being out west for approximately three weeks, I was looking for "day homes" for the kids. Day homes are similar to daycare arrangements but less expensive. They would cost between $600.00 and $700.00 a month. To set up the apartment, I put beds together, went through the children's clothes, and generally prepared for their arrival.
>
> That R.A.M. stalled in bring the children out west with us. She said she wanted to delay their return until Christmas. It became apparent to me that she had no intention of doing this the way that we discussed at that stage. Communication between us had broken down. On November 25 or 26 of 2009, I went to work and told my boss that I wanted to get laid off so that I could return to Nova Scotia to be with C.J. I came to the conclusion that C.J. needed a stable home, and that R.A.M. and I would not be able to provide it in Alberta. I felt the best place for us

> was in Nova Scotia. I was back in Nova Scotia by November 27, 2009. I spent time with C.J. here in the Valley at that stage. I was concerned about R.A.M. taking the children without me out west and I also wanted to change the existing Family Court order which had been prepared in my absence previously.
>
> That R.A.M. also returned to Nova Scotia. On December 5th, 2009 I was contacted by the RCMP. R.A.M. contacted the RCMP apparently concerned that I would not let her see C.J. I explained to R.A.M. and the officer that I had no intention of keeping C.J. from her mother, but I was concerned that R.A.M. would take C.J. to Alberta without my consent. I had a discussion with the officer wherein he described the possibility of child abduction charges if that were to occur. I was satisfied that R.A.M. would be taking C.J. to Cape Breton to be with her family, and that after making arrangements for Christmas, we would resume our two week rotation.
>
> That on December 6, 2009 R.A.M. was picking C.J. from me. We were discussing arrangements for me to pick C.J. up for the Christmas holidays. R.A.M. and I argued a bit but we ultimately agreed on an arrangement. Based on our discussions, I believed that R.A.M. also agreed that the children would be better off in Nova Scotia.

[10] On cross-examination by counsel for R.A.M., C.L.J. admitted that he had not given R.A.M. any notice that he had changed his mind about remaining with her in Alberta, or that he was leaving to return to Nova Scotia. He confirmed that he left her a note that said: "Good luck, have fun with your new boyfriend."

Evidence of Respondent

[11] R.A.M.'s affidavit sets out as follows:

> During the two weeks in March 2009, that I was visiting my parents, I continued to have telephone contact with C.L.J. During one such call he informed me that he had given up our apartment in Edmonton and had put the furniture in storage. He did this without consulting me. I then found myself with no place to live and with only limited financial resources. C.J. was 15 months old at the time. I was

without a source of income beginning in December 2008 when my maternity benefits expired.

On or about August 20, 2009, C.L.J.'s mother moved from Moncton, New Brunswick to Kentville, Nova Scotia. He went with her. He stayed with her until October 20, 2009.

In October 2009, C.L.J. and I agreed that we would return to Alberta to live. We further agreed that we would obtain separate apartments. The children would remain in Nova Scotia until we both got jobs and became settled. In order to allow my son to complete his fall school term in Port Hawkesbury, C.L.J. and I agreed that the children would come to Edmonton on December 14, 2009 when my niece would fly out with them. This way, neither C.L.J. nor I would lose time from work. My son stayed with my parents in Port Hawkesbury. C.J. was left with C.L.J.'s mother who by this time was living in Kentville and who had offered to look after her.

On October 20, 2009, C.L.J. and I flew out to Edmonton together. On October 25, 2009 I rented an apartment in Edmonton. On November 3, 2009 I was rehired as a welder full time at Preismeca.

Although C.L.J. obtained employment soon after arriving in Edmonton on October 20, 2009, he neglected to get his own apartment. I agreed that he could stay at my place for two weeks while he was looking for a place of his own. We had discussed him finding a place located within a reasonable distance from my own in order to make it easier for him to exercise access to C.J.

By late November 2009, when it became obvious to me that C.L.J. was not making any attempt to get his own apartment, I asked him to leave. Then, on December 2, 2009, without any prior consultation or notice to me, C.L.J. returned to Nova Scotia. When I tracked him down on December 6, 2009, he was then staying at his mother's in Kentville, having left his job in Edmonton.

Up to December 2, 2009, I had been working up to 50 and 60 hours weekly in order to save up enough money to pay for the children's tickets for when they came out to Edmonton on December 14th. When I spoke to C.L.J. by telephone on December 6th, I reminded him of our prior agreement that we would reside in Edmonton. He made it clear to me that he had no intention of returning to Alberta. He further told me that he would be applying for custody of C.J. He told me that he would not let C.J. come to Alberta as planned nor would he allow me to have the child in my care even though I had a court order.

> As soon as I could obtain an affordable flight to Nova Scotia, I came to Kentville where on December 9, 2009, I met C.L.J. at his mother's home in Kentville. I had to get the police involved in order to get C.L.J. to give C.J. to me.
>
> Upon returning with C.J. to my parent's home in Port Hawkesbury, I then sought legal advice regarding my right to leave with the children and return to Alberta. I spoke with, ..., a barrister practicing in Port Hawkesbury. As a result of my discussion with the lawyer, I booked tickets for myself and the children to fly to Edmonton on December 12, 2009.
>
> Although I still had my apartment in Edmonton, I had to leave my job when C.L.J. abruptly left Alberta and refused to allow C.J. to come to Alberta as planned. I do not have enough stamps for employment insurance. Accordingly, I am temporarily in receipt of social assistance. I am optimistic, however, that I will soon obtain a welding job. The welfare authorities are helping me look for work through a placement agency.

[12] C.L.J.'s evidence is that when he and R.A.M. were separated, they shared custody of C.J., "two weeks on, two weeks off." R.A.M refutes that and in her affidavit states:

> ... C.L.J. and I separated in mid-January 2008, not in February/March 2008 as alleged. At the time, C.L.J. moved in with his former girlfriend. Further, and contrary to what C.L.J. alleges, we had no set parenting schedule. C.J. resided most of the time with me at my parent's home in Port Hawkesbury. Approximately every two weeks C.L.J. would exercise his access. There was a problem in that C.L.J. would never commit as to when he would be bringing C.J. back. Sometimes he kept her for eight days, sometimes for 10 or 12 days. This access arrangement ended in July 2008, when we returned to Alberta.

[13] At the time of the hearing, C.J. had lived for 13 months of her life in Alberta, seven months in New Brunswick, and six and a half months in Nova Scotia, sometimes in Port Hawkesbury and sometimes in Kentville. She presently resides in Alberta.

The Issue:

[14] Which province has jurisdiction to hear the matter of a custody variation: Nova Scotia or Alberta?

The Law:

[15] As this Court has noted in the case of **N.R.R. v. D.E.A.F.**, *supra*.:

> The best interest of the child is paramount.
>
> > "In any proceeding under this Act concerning the care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration." Maintenance and Custody Act, *supra*., s. 18(5)).
>
> No matter what other aspects of this case garner scrutiny and resolution, the children's best interests must be determined and honoured.
>
> Historically, a court had jurisdiction to hear custody and access matters provided the child was a resident or present in the jurisdiction at the commencement of the proceedings. Present day legislation dictates the courts jurisdiction and Section 18(2) of the Maintenance and Custody Act, *supra*., affords the Family Court of Nova Scotia jurisdiction to hear matter pertaining to the custody and access of children.
>
> > 18(2) The court may, on the application of a parent or guardian or other person with leave of the court, make an order
> >
> > (a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or
> >
> > (b) respecting access and visiting privileges or a parent or guardian or authorized person.

[16] In **Jacques St-Gelais v. Lisa Kriisk**, *supra.*, Justice Hall states at paragraph 16:

> In Nova Scotia, by virtue of legislation, it is the Family Court that has exclusive original jurisdiction in custody matters other than under the Divorce Act.

[17] Although the legislation gives the Court the jurisdiction to hear matters involving the care of children, there are other factors which come into play when there are two or more competing jurisdictions.

[18] Upon careful consideration of much of the case law concerning jurisdictional disputes in custody matters, the Court has determined a list of factors that can be taken take into consideration when determining a jurisdictional issue, over and above the governing legislation.

(1) is the child ordinarily or habitually resident in the jurisdiction?

(2) is the child present in the forum?

(3) does the child have a real and substantial connection with the forum?

(4) which province or jurisdiction is the most convenient forum?

(5) would the child be at risk if jurisdiction not assumed?

(6) where is the best evidence available?

(7) which venue allows for a full and sufficient Inquiry of the issue?

(8) what is the status of the relationship between the parties?

(9) has a party to the proceedings consented to the child being in another jurisdiction?

(10) has a party to the proceedings acquiesced in the child's remaining in another jurisdiction?

(11) is there any evidence of abduction?

(12) how much time has passed with the child being in another jurisdiction?

(13) what is the age of the child as it pertains to the child's familiarity with the competing jurisdictions?

(14) if applications have been filed in

concurrent jurisdictions, taking into account any administrative difficulties, whose application was first in time; and

(15) avoidance of multiplicity of proceedings;

(16) what are the wishes of the child, when applicable and appropriate, taking into account the maturity of the child to appreciate to gravity of her or his wishes;

Mr. Thomas argued on behalf of the Respondent, R.A.M., the "intent" of the parties may also be considered in a case on jurisdiction, and this court has determined this to be another factor which may be taken into consideration.

(17) what was the intent of the parties, if any, with respect to where the child would live and how does that impact upon the best interests of the child?

(18) considering all of the foregoing, as applicable, what is in the best interests of the child taking into account all aspects of the case before the Court?

Court's consideration of Factors

(1) Is the child ordinarily or habitually resident of Nova Scotia?

[19] As referred to in Sutton v. Sodhi supra., in Studies in Canadian Law, by D. Mendes da Costa, volume 2, at page 558, it is stated

> When a custody dispute has contacts with two or more provinces or states, the jurisdictional question takes on another dimension. Two questions arise: first, does the Court have jurisdiction and secondly, if the Court has jurisdiction, should the Court exercise its jurisdiction. With respect to the first question, it may be stated initially that a Court has jurisdiction if the infant is physically present within the boundaries of the province, even though the child may have been clandestinely brought into the province to avoid proceedings in another jurisdiction. Indeed, mere presence of the child within the province is enough to ground the jurisdiction of the Court notwithstanding that the child is neither resident nor domiciled within the province. If the child is outside the province, a Court may still exercise jurisdiction if the parent or person exercising actual control over the child is within the province. The exercise of jurisdiction in the latter instance is based upon the concept that rules of equity apply to matters of custody and that an equitable order acts 'in personam'.

[20] In **Sutton v. Sodhi**, *supra*, Sparks, J. states at paragraph 12:

> Jurisdiction to deal with custody matters flows from the physical presence of the child or the child's ordinary domicile or residence. Before a Court can assume jurisdiction, one or both of these must be present. These two jurisdictional requisites often clash, with two different courts having rightful jurisdiction over the same custody matters.

[21] The Annual Review of Family Law, supra., p. 29 states:

> A child is habitually/ordinarily resident in the place where he or she last lived with both parents.

[22] In **Bedard v. Bedard**, *supra.*, the Court found that one parent cannot unilaterally change a child's ordinary or habitual residence by moving a child's

residence without the other parents' consent or a Court Order. Consent to a temporary removal is insufficient.

[23] In the case before the Court the question of ordinary residence is certainly tempered by the almost equal time the parties have spent with the child in the Maritime provinces of Nova Scotia and New Brunswick, and Alberta. However, as counsel for R.A.M. argues, the two Maritime provinces cannot be "lumped together," and certainly, with the child having spent 13 months in Alberta, the majority of the child's life has been lived there.

[24] In **Sutton v. Sodhi**, *supra.*, Sparks, J. references the case of **Burgess v. Burgess** (1977), 19 N.S.R. (2d) 689; 24 A.P.R. 689 (N.S.C.A.), and states:

> [T]he Burgess case held that generally the place where the child is ordinary resident is the most convenient forum and in determining whether to exercise jurisdiction, the Court of presence should look to the welfare of the child and the administration of justice unless there is fear of harm to the child. The oft-quoted works of Lord Denning in Re P. (G.E.) (An Infant), *supra*, are helpful:
>
> "A child's 'ordinary residence' is the last place in which the child resided with his parents ... So long as the father and mother are living together in the matrimonial home, the child's ordinary residence is a home - and it is still his ordinary residence, even while he is away at boarding school. It is his base, from whence he goes out and to which he returns. When father and mother are at variance and living separate and apart and by arrangement the child resides in the house of one of them - then that home is his ordinary residence, even though the other parent has access and the child goes to see him from time to time ... Quite generally, I do not think a child's ordinary residence can be changed by one parent without the consent of the other ..."

[25] Sparks, J. further comments at paragraph 23:

> I accept that a child's ordinary residence is where it last resided with its parents and a child's ordinary residence cannot be changed without the consent or acquiescence of the other parent.

(2) Is the child present in the forum?

[26] "Forum" is defined by Webster's II New Riverside Dictionary, *supra.*, as "... a public meeting place or medium for open discussion, ... a court of law." It is clear that the word "forum" refers to an area - whether it is a meeting place or a court of law - that is accessible to the people in a particular area where that meeting place or court of law is located. The forum, in this case, is Kentville, Nova Scotia.

[27] The child in this matter is not present in the forum.

(3) Does the child have a real and substantial connection in the forum?

[28] A "real and substantial connection" is an actual, and a solid connection having substance. If a child has lived in another province all of his life, comes to Nova Scotia for a one week holiday, with no other connection to Nova Scotia except a stay at a camp grounds, there is clearly no real and substantial connection. Conversely, for a child who has lived in a province for 13 months of her life, it could certainly be said the child has a real and substantial connection in that forum.

[29] In this matter, the child does have some connection with Kentville, Nova Scotia, but not as much as she would have with, for instance, Port Hawkesbury, Nova Scotia, or Alberta. Therefore, the child does not have a real and substantial connection in the forum.

(4) Is the Family Court of Nova Scotia the most convenient forum?

[30] Is it most convenient for the matter to be heard in Nova Scotia, or is it most convenient for it to be heard in Alberta? The Court has to consider not only the witnesses that would need to travel from one jurisdiction to another, but also, which jurisdiction would have access to the most recent and substantial evidence which can be conveniently and most easily accessed with respect to the children. While convenience to the parties, and to the Court, is a factor, the evidence born of that convenience should be the most recent, the most pertinent available to the Court. While it is clear there are family members in Nova Scotia that support C.L.J. in his application, the Court finds there are potential witnesses to support R.A.M. in Alberta, given the time she has been there. Furthermore, the child is already well- travelled in her short life, and has not spent a great deal of time in any particular or specific place, with the sole exception of Alberta.

(5) Would the child be at risk if the Family Court in Nova Scotia does not assume jurisdiction?

[31] There is no evidence to suggest that the child would be at risk if the Family Court in Nova Scotia does not assume jurisdiction.

(6) Where is the best evidence available?

[32] In **Sutton v. Sodhi**, *supra*., Sparks, J. states:

> Several factors must be taken into account by the Court in deciding whether to exercise its discretion on a dual or concurrent jurisdictional matter. In Caudle v. Caudle (1983), 60 N.S.R. (2d) 11; 128 A.P.R. 11 (F.D.), Daley, J., at p. 16, says:
>
> > "Whether or not a Court will hear the application is at its discretion. The question to be asked is: Where is the best evidence available so that the welfare of the child rule may best be served? To answer this question, the Court must consider the circumstances of the parties and those surrounding the move from one jurisdiction to another as well as the availability of witnesses and other evidence, the circumstances under which the child currently resides, and if the child requires action by the Court to protect him or her." (emphasis added)

[33] R.A.M. has lived in Alberta, both with C.L.J. and presently without him, since early in 2006, when she obtained a job in Edmonton as a welder. She lived there from that time until August 2007.

[34] Her evidence confirms her intention to live and work in western Canada:

> I obtained my first job as a welder in April 2006. This was in Lafleche, Saskatchewan. I worked there until the company went out of business. I then

obtained a job as a welder in the greater Edmonton area and more specifically, at Precismeca.

I worked at Precismeca until the autumn of 2006 when I was involved in a car accident.

On January 1, 2007, following a period of recovery from my said accident, I obtained another welding job at Auburn Rentals in Edmonton. I remained in this job until I found out I was pregnant. Due to the fumes involved in this type of employment, my doctor put me off work on sick benefits until the birth of my daughter, C.J., born December 12, 2007.

Following C.J.'s birth, I went on maternity leave for 12 months.

C.J.'s father is C.L.J. I met C.L.J. when we were both residing in Edmonton. At the time, C.L.J. was working for Suncor out of Fort McMurray, Alberta. He and one of his cousins maintained an apartment in Edmonton where C.L.J. stayed eight days per month when he was not working in Fort McMurray.

C.L.J. and I became a couple when we rented a house together in January 2007. I became pregnant in March 2007, and had to give up my job due to the fumes, aforesaid.

When our six-month house lease expired in June 2007, C.L.J. wanted to leave his job and return to the Maritimes. I resisted the move. Since moving to Alberta in 2006 I have never wanted to return east to live. I know that I would have difficulty finding work in the Maritimes.

Although C.L.J. grew up in Kentville, Nova Scotia, his mother, S.J., had been living in Moncton, New Brunswick, for several years prior to C.J.'s birth. When C.L.J. gave up the house in June 2007, he went to visit his mother in Moncton for approximately two weeks. He returned to his job in Alberta which he then quit in August 2007. During the period June to August 2007, and without a home to live in, I went and stayed with my parents in Port Hawkesbury.

In August 2007, C.L.J. relocated from Alberta to Moncton where he got a job in construction and rented a house. I then joined him in Moncton, bringing B., my son from a prior relationship, with me. B. was born on August 25, 2003 and is currently 6 years old.

C.L.J. and I resided together in Moncton from August 2007 until mid January 2008 when we separated. C.J., who was born in Moncton, was just three weeks

old at the time of separation.

[35] It is clear from the Respondent, R.A.M.'s evidence, both by way of affidavit and her testimony, that as a welder, she had tried valiantly to make Alberta her home and that was always her intent. Had she not formed a relationship with the Applicant, C.L.J., she may never have returned for any long term basis to Nova Scotia, as the evidence is that the parties only ever returned to the Maritimes at the whim or decision or because of the actions of, the Applicant, C.L.J.

[36] Therefore, the best evidence for a custody hearing would be in Alberta, not only because of the mother and child, but also given that the Applicant, C.L.J., is very familiar with Alberta as well.

(7) Which venue allows for a full and sufficient inquiry of the issues?

[37] This aspect goes hand-in-hand with the previous provision on best evidence. Given the Court's determination with respect to Alberta having access to the best evidence, it follows, therefore, that Alberta would also be the best venue for a full and sufficient inquiry of the issues.

(8) What is the status of the relationship between the parties?

[38] The evidence was that the parties have had a turbulent, off-again, on-again,

relationship, and at present are not together. There is some evidence to suggest that both parties have new partners.

(9) Has a party to the proceeding consented to the child being in another jurisdiction?

[39] Although counsel for C.L.J. argues that he did not consent to the child being in Alberta, he states in his affidavit:

> That in October, 2009, R.A.M. and I agreed we would move together out west to secure employment ... we left C.J. with my mother with the intention of coming to get C.J. within a month.

[40] While C.L.J. may have changed his mind, once he got there, it is clear from his evidence that he consented to C.J. being in Alberta.

(10) Have the parties to the proceedings acquiesced in the child remaining in Alberta?

[41] Mr. Watts, on behalf of the Applicant, C.L.J., argues that his client has not acquiesced in the child remaining in Alberta. Counsel for the Respondent, R.A.M. argues in the alternative, citing the cost to relocate, find a job, get established in the job, find accommodations, etc. Mr. Thomas argued: "For whatever reason, Mr. [J.] did a u-turn, and went back to Nova Scotia."

[42] This is unrefuted; however, the Applicant, C.L.J. has not acquiesced in C.J.

remaining in Alberta, having commenced action in Nova Scotia almost immediately upon returning to Nova Scotia.

(11) Is there any evidence the child was abducted?

[43] C.L.J.'s counsel argues there was no abduction, but the child was taken out of Nova Scotia without consent.

[44] The Court finds that this is not true. The Respondent, R.A.M., was simply following through with the plans made by the parties pre-October 2009.

(12) How much time has passed with the child being in Alberta?

[45] The Court has touched on this earlier in this decision. The child has been in Alberta since December 2009, having been subjected to the peripatetic lifestyle of her parents, but perhaps more so, her father, the Applicant, C.L.J., whom the evidence has shown seems to have no compunction of moving whenever it strikes his fancy.

[46] Prior to that, the child had lived in Nova Scotia since May 2009 and prior to that, in Alberta since July 2008.

(13) The age of the child as it pertains to her familiarity with the competing jurisdictions

[47] The evidence before the Court allows the Court to conclude that the child is only twenty-seven months old, so it is doubtful that her familiarity extends very much beyond the people with whom she spends her time, not where she lives.

(14) First in time

[48] There is no evidence before the Court that would suggest there is any court application in process in Alberta.

(15) Avoidance of multiplicity of proceedings

[49] In **Reid v. Reid**, *supra.*, Fry, J., states:

> The legal framework in which custody and access applications operate is designed to prevent multiple proceedings occurring in various Courts.

[50] Fry, J. goes on to quote Section 25 of **The Children's Law Act**, R.S.N.C. 1990 C-13 which states:

> **(**b) "... to recognize, that the concurrent exercise of jurisdiction by judicial tribunals of more than one province ... in respect of the custody of the same child ought to be avoided, and to make provision so that the courts of the province will, unless there are exceptional circumstances, refrain from exercising or declining jurisdiction in cases where it is more appropriate for the matter to be determined by a tribunal having jurisdiction in another place which the child has a closer connection."

[51] Nova Scotia does not have such a provision in the **Maintenance and Custody**

Act, *supra.*, however such a provision makes inherent sense. Therefore, multiple proceedings, unless there are exceptional circumstances, must be avoided.

[52] In any event, it is not relevant in this case.

(16) What are the wishes of the child?

[53] The wishes of the child are not before the Court and given her young age, are unlikely to be determined. However, when children are of a mature age, have an above average understanding of what their options are, can form an opinion independent of pressure by either of the parties, and understand what is involved, their wishes should be considered by the Court.

(17) What was the intent of the parties with respect to where the child would reside?

[54] It is clear, based on the evidence of both parties, that the intent was for everyone to live in Alberta, if not together, then certainly in separate apartments. The parties both intended to find jobs and R.A.M. did, working long hours, her evidence shows, to make extra money to buy tickets for both of her children to fly to Alberta and join them.

[55] For whatever reason, the Applicant, C.L.J., changed his mind, and returned, unannounced and without notice to R.A.M., forcing her to leave her job in order to return to Nova Scotia to get her child. As a result, the evidence is she is now without a job and in receipt of assistance.

[56] The Court has paid careful attention to the demeanour of the parties while giving testimony, and was left with the distinct impression that C.L.J. tends to have knee-jerk reactions, and once he makes up his mind to do something, for example, leave Alberta without notice of a change of plans, there is no stopping him.

[57] However, putting that aside, the clear intent agreed upon by the parties, was that Alberta would be the child's home.

(18) What are the best interests of the children taking into account all of the foregoing?

[58] Although it is accepted law that a child's ordinary place of residence is where that child last resided with his or her parents, in the case where the parties are knowingly separated, there is no abduction, the child was to have left the jurisdiction with the consent of the other parent, and the intent of both parents was for the child to live in the new jurisdiction with one or both parents, the balance shifts and the child's

ordinary place of residence becomes the new locale.

[59] In the case before the Court, this is also tempered by the amount of time the child has been in Alberta, more than one-half of her young life, at times with both parents and more recently with one.

[60] The proper forum therefore is Alberta and the child has the most "real and substantial connection" at this point in her life, to and in Alberta. Also, although there appears to be substantial evidence that C.L.J. and his mother love and care for the child, the best evidence has got to be the most recent evidence.

[61] Where there have been discrepancies in the evidence, the Court accepts the evidence of R.A.M.

[62] The evidence of R.A.M. is that she has always been the primary care giver, the parties did not share custody when they were separated, and her intent has been, since 2006, to live and work in Alberta.

[63] This is not to say that the Court does not believe C.L.J. loves and misses his

child, and it is not to say that he will not have the chance to raise her. But having considered everything before the Court, it is clear that Alberta has the jurisdiction to hear the matter of custody of this child.

[64] The Court thanks counsel for their excellent submissions on behalf of their clients.

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M. Melvin
A Judge of the Family Court
for the Province of Nova Scotia