2001 **F. K. 00-0094**

IN THE FAMILY COURT OF NOVA SCOTIA

(Cite as J.S.G. v. L.K., 2001 NSFC 3)

BETWEEN:

J. St. G.
-APPLICANT

AND

L. K.
-RESPONDENT

DECISION

BEFORE THE HONOURABLE JUDGE BOB LEVY

COUNSEL:

DONALD URQUHART FOR THE APPLICANT

RONALD RICHTER AND CHRIS PARKER FOR THE RESPONDENT

HEARING DATE:
FEBRUARY 1, 2001

DATE OF ORAL DECISION:
FEBRUARY 1, 2001

DATE OF WRITTEN DECISION:
FEBRUARY 2, 2001

SUBJECT MATTER:
Custody-jurisdiction-most substantial connection

Levy, J.F.C.

This written decision is supplementary to an oral decision I gave February 1, 2001 on the matter of whether this Court should accept jurisdiction in the matter of a contested custody application. I concluded that Nova Scotia was and is the proper jurisdiction for this litigation and that therefore this court should accept and exercise jurisdiction.

Because this decision is auxiliary to my oral decision I will give only a brief outline of the factual situation in this written decision.

BACKGROUND

The parties resided in a "common law" relationship for some fifteen years. They have two children. a daughter aged 9 and a son aged 7. The father was in the armed forces, stationed at Base Greenwood, Nova Scotia, and, before leaving the armed forces he had obtained the rank of Captain. The uncontroverted evidence is that some six years ago he was diagnosed as having a brain tumour. Surgery was performed, but not all of the tumour could be removed. Though slow-growing, the tumour will be fatal. There is evidence on, but not unanimity, whether tests and X-rays done in the spring of 2000 showed the tumour much more developed than the parties had hoped; there is conflicting evidence on the degree of disability, if any, that the father currently has, and whether the tumour may be adversely affecting his personality and coping and parenting capacity; and there is or may be a question as to whether the father voluntarily retired from, or was declared medically unfit for. continuing service in the military.

In June of last year, the parties, each represented by counsel, their current counsel in fact, appeared before myself and entered into a Consent Order providing: that the parties would share joint custody of the children, that the children were to primarily reside with the mother, that the father would have access every weekend and other "daytime" access as agreed, and that the father was to provide a medical report as to his "current" medical condition. (There was a dispute at this hearing as to whether that latter condition had been met.)

In July there was a further Consent Order to cover a visit the father wanted to make to Quebec with the children. One of the terms was that, "...(the father) shall reside with family members such that a family member is available to assist (the father), if necessary, with his care of the children." The access visit, apparently, went without incident or problem. Again, there was a different perspective offered by each counsel as to why this term was in the order. At the very least one would have to assume that both parties committed themselves to the recognition that the father's health was an issue, although it is possible that the father's consent was motivated more by getting on with the access than by any real belief that his capacity was impaired.

In any event when the father and children returned to Nova Scotia the parents had discussions that led, over a period os some weeks, to them wanting to re-establish the family unit. They moved as a family to Quebec, obtained rental accommodations, enrolled the children in an English school and lived there until a separation on January 9 of this year. Whatever may be the exact details of the departure of the mother and children for Nova Scotia, it is clear that it was completely without notice to the father. The mother cited problematic behaviours by the father towards herself and the children such that continued cohabitation was intolerable and such that she felt she had to leave, for her sake and that of the children. The father, while not exactly denying these allegations, made some allegations of his own against the mother, in how she conducted

herself with the children. As I said in the oral decision I make no findings of fact on the issue of which parent may have done what, or whether, by reason of disease or otherwise, that the parenting of the father is currently worrisome. I simply note that there are a lot of allegations made, but that there was no opportunity at our hearing for either party to be cross-examined.

There is some dispute, perhaps, as to how each party viewed their re-uniting and setting up residence in Quebec. The mother says it was an "attempt" at reconciliation, driven in part by her feelings of "guilt", and her wish to re-unite the family "in the best interests of the children". The father's position may be more to the effect that the past was entirely put behind them and that they did in fact reconcile and commit themselves to irrevocably building their lives in his home province of Quebec.

It may be impossible to know exactly what was in the minds of the parties as they moved to Quebec, and ultimately it may not even be that helpful to try to do so. Suffice it to say that it very much looks to me like they tried to pick up the pieces of their relationship, for the sake of the children or otherwise, and that the mother returned to Nova Scotia within months when the failure of the relationship could no longer be denied. It remains to be established, after a full hearing, whether the mother was acting out of a reasonable fear for herself or the children, or whether it was simply a recognition that the attempt at reconciliation had failed utterly. In saying this I recognize too that the reason may not prove to be all that relevant.

DISCUSSION

In my oral decision I took the position that a proper analysis, as I understand the law in Nova Scotia, starts with a recognition of the over-arching obligation on the courts in a custody case, which is for the court to determine and serve "the best interests of the children". Courts have approached the matter of deciding which jurisdiction, or which forum, to hear the case by deciding where the best evidence would be that would assist the court with the answer to that ultimate question. Thus the doctrine of "the most substantial connection" is expressed in the **Divorce Act**, and has been adopted, using different words perhaps, on a consistent basis for years. I see nothing in the facts to suggest any reason why that should not be the litmus test for the exercise of jurisdiction in this case.

Nova Scotia is the jurisdiction with which these children have the most substantial connection. They were born here and lived here until August of 2000 when that consistent residency was interrupted by a hiatus of some four and a half to five months in Quebec while their parents attempted reconciliation. Almost all of their schooling was in Nova Scotia and thus their teachers, or the majority of them, would be here. Most of their friends would be here, as would neighbours, family doctor, and others who have known them, and the family, over the years. Their mother's family with whom the children would have had almost daily contact, is in the immediate vicinity. Importantly too, the bulk of the evidence as to the father's health is here in Nova Scotia, and that looks to be, by the sounds of things, a major issue in the proceedings if they go ahead.

I want to address one issue a little more fully, and that is the matter and manner of the mother's return to Nova Scotia without notice to the father. I am of course aware of the law, much of which was cited before me, to the effect that courts have an obligation to discourage kidnaping, or child abduction, or "child-snatching". There is no question that the mother, I would say probably with some measure at least of forethought and planning, unilaterally decided to remove the children from the family residence and from Quebec and return them to Nova Scotia. I recognize that

something of this nature happened and that such knowledge has often inclined courts to order the return of children to the jurisdiction from which they were removed. I have in the past, and suspect I will again, ordered the return of children when this has occurred. I recognize that children should not be subjected to unilateral disruptions to their lives, (especially in the middle of a school year), and I recognize as well the unfairness to the other parent.

I would nonetheless urge a word of caution in response to what might strike anyone as a regrettable course of action. Firstly, a court should be careful in it's understandable desire not to reward this kind of conduct, not to lose sight of the entirely legitimate principles of having the adjudication take place in the jurisdiction with which the children have the most substantial connection. Thus, if the children are unilaterally removed to the appropriate jurisdiction a court should not impair the prospects of making the best decision for the children simply to punish the parent who made the unilateral move. There may be other and better ways to express the court's disapproval than to deliberately hamstring the enquiry into the children's welfare.

Secondly, there has to be a realization, that a spouse and parent may be so economically disadvantaged and dependent, so far from home and with so few supports, maybe even in an environment when she is not fluent in the prevailing language, that the option of not leaving the jurisdiction is simply not open to her. A wage earner, on the other hand, is much more easily able to fend for himself or herself while the matter grinds it's way through the courts. More often than not it can be close to impossible for a parent to wait the months involved and a court should take her or his plight into consideration when reacting to a removal of this kind. I am not arguing for anarchy, just for a realistic understanding of how the burden of complying with the courts' expectations can fall very unevenly depending on one's circumstances and role during the "marriage".

In this instance it is fair to remember that only a few months before the parties had separated and agreed to a Nova Scotia Court Order whereby the children would reside with their mother...in Nova Scotia. It was surely within the parties' contemplation that the reconciliation effort might not work and that the mother would be returning to Nova Scotia, no doubt with the children. She had no job in Quebec, no family, no resources, and no real ability even to speak the language. Insisting or even expecting that she should remain so situated extracts too high a price from a party whose only reason for being in this situation was to try one more time to make the relationship work.

By entering into the Orders in June and July of 2000 the parties had acknowledged the reality that Nova Scotia courts had a legitimate role in settling their affairs. Little has changed apart from a brief, and failed, reconciliation attempt. There is no compelling reason in these particular circumstances to allow the admitted unilateral action of the mother dominate the need for an adjudication in the *forum conveniens***,** nor to disturb the express consent of the parties which at best had been 'put on the shelf' while they made one more effort to save their relationship.

Counsel for the father urged strongly in his brief, (but not so strongly in oral argument), that this court, being a provincially appointed court, should defer to the Order from the *Cour Superior* of Quebec. To this I would simply note that the Family Court of Nova Scotia is vested with exclusive original jurisdiction in this province with respect to these children in that their parents aren't married. At least it is so vested outside of the Halifax Regional Municipality and Cape Breton. I trust he would not be saying that had the family home happened to have been in Halifax rather than Wilmot, Annapolis County, that that would be one more reason that the matter should be heard in Nova Scotia. I don't see this as a matter of "superior" versus "inferior" courts. I have every respect for the Court and Justice in Quebec, but I am nonetheless obliged to respond to the evidence that is

before this court.

DECISION

On the basis of that evidence and on the law as I understand it to be I conclude that Nova Scotia should be the forum in which this matter is adjudicated as it is the jurisdiction with which the children have the most substantial connection. I am cognizant of the issue of the temporary residence in Quebec and of the manner by which the mother removed the children from that province, but I do not find those issues to be determinative. I confirm the decision I gave from the bench as to interim custody, residency and access or parenting times by the father.

Counsel for the mother will prepare the Order. The matter stands adjourned to a pre-trial conference to the date and time set.

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Bob Levy, J.F.C.