IN THE FAMILY COURT OF NOVA SCOTIA
Citation: N.R.R. v. D.E.A.F., 2009 NSFC 4

Date: 20090123
Docket: 08D061168
Registry: Yarmouth

Between:

N.R.R.

- Applicant

v.

D.E.A.F.

- Respondent

Judge: The Honourable Judge Marci Lin Melvin, J.F.C.

Heard: January 20, 2009 at Digby, Nova Scotia

Written Decision: January 23, 2009

Counsel: Crystal Lawrence for N.R.R.
Alex Pink for D.E.A.F.

By the Court:

APPLICATIONS BEFORE THE COURTS:

(a) APPLICATION IN NOVA SCOTIA

[1] The original application before the Court is pursuant to Section 18 of the **Maintenance and Custody Act**, R.S.N.S. 1989, c. 160, for custody of S.E.R., born September 1, 2005 and J.M.G.R., born May 18, 2007. This application was issued at Yarmouth, Nova Scotia on October 21st, 2008.

(b) APPLICATION IN BRITISH COLUMBIA

[2] The Respondent, D.E.A.F., had filed an application for custody in the Provincial Court of British Columbia on July 14, 2008 and N.R.R., was served with said application on July 21, 2008.

(c) HEARING DATE SET IN BRITISH COLUMBIA

[3] There is a date set for a hearing in this matter in British Columbia on February 3, 2009.

ISSUES:

[4] Jurisdiction to hear the matter of custody of two children

FACTS:

HISTORY OF RELATIONSHIP

[5] The parties lived in a common-law relationship from June 2004 unitl March 8, 2008. They lived together for sixteen months before the birth of their first child, S.E.R..

(a) FIRST CHILD BORN IN BRITISH COLUMBIA

[6] S.E.R., was born in British Columbia on September 1, 2005. The parties and S.E.R., returned to Nova Scotia on November 26, 2006.

(b) SECOND CHILD BORN IN NOVA SCOTIA

[7] Their second child, J.M.G.R., was born in Nova Scotia on May 18, 2007. D.E.A.F., left Nova Scotia on March 8, 2008 with both children and returned to British Columbia.

(c) MOTHER AND CHILDREN LEAVE WITH FATHER'S CONSENT

[8] D.E.A.F., says she left with the consent of N.R.R., and that N.R.R., knew it was a permanent move, "... as he even drove her and the children to the airport."

[9] N.R.R., states in his affidavit of October 8, 2008:

> **At this time (the children) flew to British Columbia to be with the Applicant. It was my understanding this would only be for a couple of weeks to a month."**

However, he also states:

> **... due to the fact I gave the Applicant permission to leave the province .."**

[10] Therefore, D.E.A.F.'s contention that she left with N.R.R.'s consent is verified in N.R.R.'s affidavit.

(d) <u>RESIDENCE OF CHILDREN</u>

[11] The children presently reside in British Columbia with D.E.A.F.. They have been living in British Columbia for the past ten months. Previous to that, the children had lived in British Columbia with D.E.A.F., and N.R.R., for a total

of fifteen months. The oldest child lived approximately fourteen months in Nova Scotia, and the youngest for ten months.

THE LAW:

[12] The best interest of the child is paramount . (The **Maintenance and Custody Act**, *supra*., s. 18(5)), so no matter what other aspects of this case garner scrutiny and resolution, the children's best interests must be determined and honoured.

[13] 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 court's 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.

> **Powers of the court:**
> 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.

[14] In **<u>Jacques St - Gelais</u>** v. **<u>Lisa Kriisk</u>**, 2001 NSSC 24 (CanLII), an application from a decision of Family Court Judge Levy, 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 that under the Divorce Act. Its orders have the same force of law in this Province as orders of the Quebec Superior Court does in the Province of Quebec. If it were a question of deference, in my view, the Family Court of this Province is entitled to same deference as any other court exercising its proper jurisdiction.**

[15] However, 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.

[16] the factors and weight afforded to those factors that a Court must take into consideration when determining a jurisdictional issue, over and above the governing legislation are as follows:

> (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) is it the forum conveniens;
> (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) has a party to the proceedings consented to the child being in another jurisdiction;

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

(10) is there any evidence of abduction?

(11) how much time has passes with the child being in another jurisdiction;

(12) the age of the child as it pertains to the child's familiarity with the competing jurisdictions.

(13) if applications have been filed in concurrent jurisdictions, taking into account any administrative difficulties, whose application was first in time.

(14) avoidance of multiplicity of proceedings;

(15) 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; and most importantly;

(16) what is in the best interests of the child taking into account all aspects of the case before the Court.

(1) Are the children ordinarily or habitually residents of Nova Scotia?

[17] 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 matter of custody and that an equitable order acts ‘in personam’.”**

[18] In **Sutton** v. **Sodhi** (1989), 94 N.S.R. (2d) 126 (Fam. Ct. Per Sparks F.C.J.)

Judge Sparks states at paragraph 12 of her decision:

> **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.**

[19] The Annual Review of Family Law, 2008, supra, p. 29 states:

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

[20] In **Bedard** v. **Bedard**, 242 DLR (4th) 625 (Sask CA), The Court found that one parent cannot unilaterally change a child’s ordinary or habitual residence by moving a child’s residence with the other parents’ consent or a Court Order. Consent to a temporary removal is insufficient.”

[21] This is tempered in the case before the Court by the almost equal time the parties have spent with their children in both Nova Scotia and British Columbia and their apparent comfort level in each location. Their first child was born in British Columbia on September 1, 2005 and the parties returned to Nova Scotia on November 26, 2006 when the child was almost fifteen months old. They resided in Nova Scotia until March 8, 2008. The oldest

child was then thirty months old and the baby was seven months old. D.E.A.F. and children have now been in British Columbia for ten months. The oldest child has, therefore, spent twenty-five months out of her four month life in British Columbia.

[22] In **Sutton** v. **Sodhi**, *supra*, Judge Sparks 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 I 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 ...**

Judge Sparks 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.**

[23] It is argued by British Columbia counsel for D.E.A.F. that the ordinary residence may now be located in either jurisdiction but given the best interests

of the children and to cause them the least disruption that it is in their interest to remain in British Columbia while this matter is heard.

[24] In **Hjorleifson** v. **Gooch**, a decision of the Nova Scotia Court of Appeal, the Court quoted from *Power on Divorce* at page 3 as follows:

> ***Power on Divorce and Other Matrimonial Causes*, 3rd Ed. Vol 2 at pp. 259 - 260 states the matter thusly:**
>
> > **The place where the child is ordinarily resident is, in most cases, the most convenient forum to hear the case. Yet, the place where the child presently is also has jurisdiction. In determining whether to exercise its jurisdiction the court where the child is physically present will bear in mind two considerations: the administration of justice and the welfare of the child. Clearly, abduction of children should be discouraged from the point of view of proper administration of justice and it is in the best interests of the child that the case be heard by the forum conveniens which, as is stated above, is generally the place of ordinary residence.**

(2) Are the children present in the forum?

[25] The children have resided in British Columbia for ten months and, therefore, are not present in the forum.

(3) Do the children have a real and substantial connection in the forum?

[26] A "real and substantial connection" is defined as:

(4) Is the Family court of Nova Scotia the "forum conveniens"?

[27] The forum conveniens is defined as:

> **In order for the Court to determine whether the Family Court in Nova Scotia is the most convenient forum for the hearing, several aspects require**

> **consideration. Given that D.E.A.F. has had defacto care and control for ten months and is settled with the very young children in another province, is it sensible to ask her to either find care for the children and come to Nova Scotia for a hearing, or to bring them with her? D.E.A.F. in her affidavit signed July 10, 2008, states that she is presently in receipt of social assistance. How would she afford travel? I sit convenient for her to travel? What about N.R.R. and his ability to travel?**

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

[28] The affidavit evidence of both N.R.R. and D.E.A.F. certainly point to a turbulent relationship.

[29] In D.E.A.F.'s affidavit, aforementioned, she states:

> **I separated from the Respondent as he was becoming physically and verbally abusive to me. In his anger he would punch holes in the walls in our home and on some occasions he would push me around and hit me although I was never physically injured as a result. The Respondent was also constantly verbally abusive to me yelling and swearing at me.**
> **When I separated from the Respondent, I and the children came to live in British Columbia with my parents who reside there.**
> **Since separating from the Respondent he has had telephone access to the children almost every 2nd day. He as well came to British Columbia on May 8, 2008 to see the children and to see if we could reconcile. As this did not work out he returned to Nova Scotia.**
> **Recently his telephone calls to me have become more aggressive towards me an not to talk to the children. One June 10 or 11, 2008 he called me and he was angry and yelling at me and threatened to kill me. I could hear that he was smashing the telephone and kicking the table around at his residence. I reported this incident to the police.**
> **On June 20, 2008 the Respondent called me again. He was upset and angry at me. He threatened to kill himself and if he did it was my fault. I again reported this to the police in British Columbia and they informed the police in Nova Scotia. I am advised by the police an officer went and talked to the Respondent and told him not to make any further calls to me of that nature.**
> **Although I do not believe the Respondent to have a serious drinking problem he would drink to excess almost every weekend and when he drinks he usually becomes more abusive.**

> **I have been the parent primarily caring for the children and had stayed home to care for the children after the birth of S.E.R.. The Respondent I admit had assisted with the care of the children when he was not working.**
> **The Respondent is not presently employed having quit his job prior to Christmas of 2007 and I do not believe he is making any real effort to find work.**
> **I am presently on social assistance but hope to make application to join the Canadian Armed Forces.**
> **I have concerns regarding the Respondent having unsupervised access to the children at this time given his level of anger and rage. I believe he should take anger management courses.**
> **The Respondent is presently living with his parents and his sister, her boyfriend and their child. The Respondent's father has a lengthy criminal record for drugs, sexual assault among other things. He is suspected by the police of being a local drug dealer and the police have executed search warrants on their property for that purpose. The Respondent's parents also have a pit bull and 5 pit bull puppies and a husky on the property. I consider these animals dangerous as they have killed cats and have bitten people. I do not consider the Respondent's parents home a safe place to have any children. The Respondent has advised me that he has a new girlfriend who I have known previously to have a serious crack cocaine problem.**
> **I am not opposes to the Respondent having access to the children but at the present time I believe the access should be supervised and exercised in British Columbia.**

[30] N.R.R. responded in his affidavit sworn to October 8, 2008:

> **That during the winter of 2007, the Applicant started visiting Club 98 and drinking. She admitted to me that she would have men buy her drinks. After the bar closed at 2:00 a.m. the Applicant would not return home. On one occasion while at a New Year's Eve party, she was caught in a bedroom with another man. It was after this that I decided to take the children and move to my parents' residence. This was in February 2008;**

[31] He denied paragraph 4, 5, 7, 9, 10, 11, 13, and 14. N.R.R. also states that he had been the sole care giver of the children.

[32] In response, D.E.A.F. and D.E.A.F.'s mother filed an affidavit on October 20, 2008. D.E.A.F's mother B.F. states:

1. I am the mother of D.E.A.F.
2. My daughter and N.R.R. were living with us June of 2005 until November of 2006 when they moved to Nova Scotia.
3. During the time they were living with I was able to observe them and their relationship.
4. After S.E.R. was born on September 1, 2005, D.E.A.F. stayed at home to be a full time mother to her. Although N.R.R. would assist with her care it was D.E.A.F. that provided most of the care. D.E.A.F. was a good parent to S.E.R. and would assist in feeding her and changing diapers but most of this was done by D.E.A.F.. N.R.R. was working at time. I never noticed that D.E.A.F. would sleep in other than the odd occasion.
5. While they were living with us I did notice N.R.R. had a bad anger management problem. I would hear him at night when he was in their room and he was yelling and arguing with D.E.A.F.. In his fits of anger he would punch holes in the walls. Afterward he would say he was sorry and would repair the walls but he never did. he admitted to me that when he gets mad he "loses it".
6. D.E.A.F. would often complain to me when they were living together in our home and after they moved to Nova Scotia that N.R.R. was abusive and controlling.
7. I visited D.E.A.F. and N.R.R. in May of 2007 to assist D.E.A.F. as she was having complications with her pregnancy with Jenae. I arrived 1 week before Jenae's birth and S.E.R. came to stay with us at my daughter. Jennifer's home. I then stayed with D.E.A.F. and N.R.R. for 2 weeks after J.R.'s birth to assist D.E.A.F..
8. When I was staying with them at this time I notice several holes in the wall about arm hieght which looked similar to the whole N.R.R. had punched in our walls in our home in British Columbia.
9. I and my husband lived in Nova Scotia from 1993 to 2001 near where N.R.R.'s family lives. It was well known in the community that N.R.R.'s father was a drug dealer. I recall on one occasion when N.R.R.'s parents came to visit them in British Columbia in March of 2006 that his mother confided to me that they were able to pay for the trip to visit from the profits from N.R.R.'s father's drug trafficking. While we were here N.R.R's father's cell phone was constantly ringing with calls from people back home.

[33] There are numerous other affidavits supporting and repudiating the affidavit evidence of the opposing parties

[34] Although the accumulated affidavit evidence does raise a number of red flags, I can find no evidence that the children at this time would be at risk if Nova Scotia did not assume jurisdiction.

(6) Where is the best evidence available.

[35] Judge Sparks also states in paragraph 14 **Sutton** v. **Sodhi**, supra: 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: Whether 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)

[36]

N.R.R. argues that the best evidence is in Nova Scotia, as his family is here, as is some of D.E.A.F's family. D.E.A.F. argues that the best evidence is in British Columbia, as she is there with the children, her parents and presumably any friends she has there given not only her most recent residence of then months, but the time she has spent previous to that.

[37] It is the determination of the Court that indeed there would be valuable evidence in Nova Scotia and certainly - based on the affidavits filed on behalf of N.R.R. - there would be considerable evidence that N.R.R. and his family members love the children.

[38] However, the "best interest" available has to be the most recent in time, that is, how are the children doing now, what is their level of development, what activities are they involved in, what is their bond with D.E.A.F., her parents extended family and friends. both children are quite young and unfortunately may not even recall their time in Nova Scotia and the people - family and friends - they knew here.

[39] Therefore, the best evidence at this time has to be British Columbia.

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

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

(8) Has a party to the proceedings consented to the children being in another jurisdiction?

[41] Based on the Affidavit evidence before the Court, the short answer is yes. N.R.R. did consent to the children moving to another jurisdiction.

[42] N.R.R. states in his affidavit at paragraph 4, signed October 8, 2008:

> **It was after this that I decided to take the children and move to my parents' residence. This was in February 2008.**

[43] N.R.R. stated he did this because he had caught D.E.A.F. in a bedroom with another man at a New Years Eve party. He says that during the winter of 2007, D.E.A.F. went to a club, was drinking and admitted that men bought her drinks.

[44] In a further affidavit by N.R.R's parents J.R. and R.R., sworn to on October 17, 2008, they state at paragraph 12:

> **that when the Applicant [D.E.A.F.] and the Respondent [N.R.R.] had split up, the Respondent [N.R.R.] and the children had moved down here to live with us ... They stayed down here from the end of February 2008 until March 22, 2008, the day they left for British Columbia. The Applicant promised us she was going to return in several weeks with the children and that she would never take the children from us or the Respondent.**

[45] D.E.A.F. denies the above in her affidavit, however, notwithstanding this and combined with the other evidence in D.E.A.F's affidavits, the relationship was clearly in trouble and I find that by N.R.R.'s sworn statement that he took the children, it is clear evidence that he believed he and D.E.A.F. had separated.

[46] In D.E.A.F's mother's affidavit sworn to on October 20, 2008, she states:

10. D.E.A.F. and the children having been living with us since she separated from N.R.R. in March of 2008. She had never indicated to me when she came she was only here temporarily and intended to return. I have never indicated to my daughter of N.R.R. that I and my husband intended to move back to Nova Scotia. We own a summer home there which we visit on holidays.
11. N.R.R. did visit with D.E.A.F. in May of 2008 as I understand from D.E.A.F. to try to reconcile with N.R.R. to live here if it worked out. N.R.R. told me he would only be able to reconcile if he stayed in British Columbia as his family was too interfering. However, a reconciliation never took place and he returned 8 days later.
12. After N.R.R. visits in May, 2008 he would often telephone D.E.A.F. at all hours of the night and day. He was often abusive and threatening to D.E.A.F during these telephone calls as I would often over hear them as D.E.A.F. had the telephone on speaker. I recall one telephone call I overheard in June of 2008 when he threatened, "I will kill you and take the kids" and "I will kill your family." D.E.A.F. reported this to the police.
13. Recently in September, N.R.R. had again been making threatening and harassing calls at all hours of the days and night. I overheard one telephone call on September 24, 2008 on which he made the same threats that he did in the June telephone call.
14. I believe my daughter to be a capable and caring mother for her children and we are prepared to assist her as long as she wishes us to do so.

(9) Has a party to the proceedings acquiesced in the children remaining in British Columbia.

[47] Based on N.R.R.'s affidavits and that of his parents it is clear that he believed the parties were separated. N.R.R.'s parents stated that D.E.A.F. promised to return to Nova Scotia in several weeks and would never keep the children from them. If this is true, D.E.A.F. and the children should have returned by the end of March 2008. They did not.

[48] Counsel for N.R.R. sets out in her brief that N.R.R. visited D.E.A.F. and the children in British Columbia in mid April 2008, advising of an attempted

reconciliation and a subsequent return to Nova Scotia. In D.E.A.F.'s affidavit of November 17, 2008, paragraph 33, she states:

> **... I moved their [there] because N.R.R. and I separated permanently.**

In N.R.R.'s affidavit of October 8, 2008, he states:

> **At this time (the children) flew to British Columbia to be with the Applicant. It was my understanding this would only be for a couple of weeks to a month.**

[49] Although perhaps reconciliation was attempted when N.R.R. went to British Columbia in April or May 2008, it is clear on the evidence before the Courts that the separation was permanent in the minds of the parties when D.E.A.F. and the children left Nova Scotia.

[50] It is also evident that N.R.R. not only consented to D.E.A.F and the children leaving, but did indeed acquiesce to them staying in British Columbia while he stayed in Nova Scotia.

[51] This is especially evident if he originally thought D.E.A.F and the children were only to be away for a few weeks. The few weeks passed, he went to British Columbia to reconcile which didn't happen and returned in either April or May, 2008, obviously to remain separated. If he thought or wanted to resolution regarding the children's custody, it should have been embarked upon at that time.

[52] Given his familiarity with the area in British Columbia where D.E.A.F. and the children had gone, he might have considered relocation again to be with the children. He also had the option of commencing a court application in Nova Scotia, it is clear the parties were separated (mention is made in both N.R.R.'s and D.E.A.F.'s affidavits of N.R.R.'s new girlfriend) and custody, access and child support arrangements would have to be made for the children. N.R.R. did not make an application to the Court in Nova Scotia until October 2008, seven months after D.E.A.F. and the children had left and three months after D.E.A.F. made her application. It is the finding of the Court that N.R.R. acquiesced in allowing the children to remain in British Columbia.

(10) Is there any evidence the children were abducted?

[53] There is no evidence of any sort to suggest the children were abducted.

(10) How much time has passed with the children being in British Columbia?

[54] The children, as previously stated, are very young and have both spent over half of their lifetimes in British Columbia. This is recent time.

(11) The ages of the children as it pertains to their familiarity with the competing jurisdictions.

[55] As previously stated, the children's life in Nova Scotia is ancient history to their young live and their familiarity would be, at this time, in British Columbia.

(12) First in time

[56] Although the parties were separated, neither made applications immediately to the Court, D.E.A.F. in July 2008 and N.R.R. in October 2008.

(13) Avoidance of multiplicity of proceedings

[57] Justice D.E. Fry, in **Reid** v. **Reid**, SC Nfld and Labrador, UFC, 2007, 10, 04, states:

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

Madame Justice Fry 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**.

[58] Nova Scotia does not have such a provision in the **M.C.A.**, supra, and indeed the above provision codifies the law in an eminently sensible manner.

[59] Therefore, multiple proceedings, unless there are exceptional circumstances, must be avoided and a determination of where the child has the closer connection, as well as the aforementioned sixteen points to determine jurisdiction, have to be considered.

(14) The wishes of the children

[60] The wishes of the children are not before the court and given their young ages are unlikely to be determined.

(15) The best interests of the children taking into account the foregoing

[61] 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 children have left the jurisdiction with the consent of the other parent and the other parent has acquiesced in the children remaining in that jurisdiction with the other parent, the balance shifts and the child's ordinary place of residence becomes the new locale.

[62] This is also tempered by the amount of time the children have been in BC; more than one-half of their young lives, at times with both parents and more recently with one.

[63] The proper forum therefore is BC and the children have the most "real and substantial connection" at this point in their lives, in BC. Also, although there appears to be substantial evidence that N.R.R. and his family love and care for the children, the best evidence has got to be the most recent evidence provided it is not insubstantial (from a time perspective) in nature. Ten months is a substantial enough period of time to accumulate recent evidence (?) The best evidence can be gleamed from BC, and as such allows for a full and sufficient inquiry into the evidence.

[64] Therefore, it is the finding of the court that it is in the best interests of the children that the jurisdiction for the custody hearing be BC.

____

Judge Marci Lin Melvin
a Judge of the Family Court
for the Province of Nova Scotia