IN THE FAMILY COURT OF NOVA SCOTIA

Citation: T. H. v. C. M. 2005 NSFC 15

Date: OCTOBER 28, 2005
Docket: FKMCA-039179
Registry: KENTVILLE

Between: **T. H.**

Applicant

and

C. M.

Respondent

DECISION

Judge: **The Honourable Judge Bob Levy**

Heard: **October 25, 2005**

Counsel: **Linda Rankin for the Applicant, Ms. H.**
Joseph MacDonell for the Respondent, Mr. M.

Issue: **Mobility**

By the Court:

1. The Applicant is the mother of two little girls, aged two and one. She seeks an order for joint custody of these girls, with them being in her primary care, and with permission for her to move with them to Ontario. She is amenable to reasonable parenting times for the Respondent. She also seeks child support. The Respondent father opposes the request of the Applicant to move with the children to Ontario and in fact seeks day to day care of the children himself.

OUTLINE OF FACTS

2. The parties resided in a common law relationship for approximately ten years, separating in late April of this year. He is in his early thirties, she in her mid twenties. They have two children, girls, born August of 2003 and October of 2004 respectively. The parties are originally from Newfoundland, where they still have family, then lived for a time in Ontario before moving to Nova Scotia in the summer of 2002 where they have resided since. Except for a sister of the Applicant neither has any relatives in this province. Ms. H. has some relatives in Ontario, although Mr. M. wonders how salutary the relationships are. Mr. M. is employed in the aerospace industry, doing specialized drafting or design. Since they have resided in Nova Scotia Ms. H. has neither worked outside the home nor sought such employment. He has a College education, she has a grade twelve education. She worked outside the home while he was attending College and to an extent while they resided in Ontario.

3. The decision to move to Nova Scotia came after Mr. M. was laid off by Bombardier. He had a number of job options but they chose the one in Nova Scotia because Ms. H.'s sister resides here. Ms. H. indicated that she also favoured the move to Nova Scotia as she wanted to get away from Ontario so as to maximize her efforts to salvage her relationship with Mr. M..

4. Ms. testified that it is her plan, should the court permit, to move to a small city in Ontario to reside with Mr. J. who is a detective constable with that city's police force. The city, I'm told, might be about an hour and a half from Toronto. The Applicant and Mr. J. had been conducting an extra-marital sexual relationship from late 2001 through to the summer of 2002. After she and the Respondent moved to Nova Scotia she kept up extensive and surreptitious telephone contact with Mr. J. with many, often dozens or more, telephone conversations monthly.

5. In February of this year, Ms. H. testified, she was still trying to salvage her relationship with the Respondent. She revealed that she had repeatedly implored Mr. J. to stop calling her, to the point of threatening to get a "restraining order" against him. Her threats being unsuccessful, she testified that she eventually made a complaint to someone at his police force, which I gather worked. Notwithstanding that, it wasn't long before they were back on the phone together, (Mr. M.'s affidavit of September 6th appended detailed telephone records from September of 2003 until the separation showing this extensive telephone contact), and the numerous calls back and forth continued.

6. Since the separation Mr. J came down to Nova Scotia for two weeks in June, 15 days in September, and two weeks so far in October. Ms. H. spent ten days with him and his three children in Ontario in August. Since the separation Ms. H. has been living with her sister here in Kings County and Mr. J. stayed with them while he was here.

7. Mr. J. separated from his wife approximately six months or so ago and he and she have apparently have a shared custody arrangement with him having extensive care of their three children, aged 8, 5, and 4. He testified that he is in the process of buying a four bedroom house of which he can take occupancy in mid-December. He said he would build onto the house to accommodate all the children. He also indicates that he has checked out daycare options for the girls "should (Ms. H.) choose to go back into the work force", that he would establish education funds for the two children, that they would have access to his "extensive health benefits package" through his employment and he said that he would equally cost share Mr. M.'s access costs. Mr. J.'s evidence is that his income is $79,000 per year. This sum, though respectable, may not be equal to the ambitious agenda he has in mind for it especially if he is paying child support for his three children and if Ms. H. does not secure well-paying employment.

8. Ms. H. indicated (para. 41 of her affidavit) that she would seek part-time employment in Ontario in, as I took it, retail, (as she had done before when they lived in Ontario), or cleaning. She also mentioned that she knew someone hiring for a new automobile assembly plant nearby. She allowed that "it is only through moving that I see myself able to provide for my children" and that she wants to begin saving for her children's education. (She has not sought employment in Nova Scotia, nor has she pursued any educational options here perhaps because, as she says, the Respondent "was never accommodating to this idea.".) She indicated that if it "doesn't work" with Mr. J. she has family in Ontario.

9. It isn't clear exactly what Ms. H. would do if the court were not to permit her to move with the children to Ontario. Mr. J. said that if the Applicant could not move to Ontario that he would, "look into (the) possibility" of moving to Nova Scotia.

10. Mr. M. testified that if he were to get custody his mother would come over and help him out initially, but that he had already contemplated a child care arrangement with a woman, the wife of a co-worker, who lives nearby and who has been looking after children for a number of years. He lives in a mobile home, the only home the children had known since birth until the separation. It is agreed that he earns about $48,586 per year. He has been paying child support in the amount of $620 since the separation, although Ms. H. notes that he has been late at times. It is agreed that if the Applicant were to have the children that child support per the Nova Scotia tables would be $660 per month.

11. Apart from his job the Respondent would seem to have little to keep him in Nova Scotia, except perhaps the greater proximity to his family in Newfoundland. He said that he "may" be able to return to Ontario and he said that if Ms. H. moved there with the children that he "would seriously consider it because I would still want to be included in my children's lives". He mentioned that he wasn't "licensed" to do certain types of work that may be available there in the aerospace industry, but he did not seem particularly unwilling to pick up and move to Ontario or daunted by the prospect of finding suitable employment. His affidavit, exhibit #5, paragraph 3, recites a rather impressive number of job offers he had after he was laid off by Bombardier. He did note though that most of the work in Ontario in his field is likely in the Toronto area which is some distance from where Ms. H. proposes to live.

12. There is very little evidence about the girls themselves, none at all from the Respondent. What little there is is to be found in paragraphs 25 and 27 of the Applicant's affidavit. It is essentially that they are "happy, wonderful little girls" who are "thriving". I accept this to be the case.

13. It is clear that because Mr. M was employed since the time that the children were born that Ms. H. has been the primary care giver. This is not to say that Mr. M. has been uninvolved. On the contrary it appears that when he was not at work, he did his share of child care, and was attentive to them and their needs. Equally, he looked after the children at least once for an extended period without Ms. H., the ten days in August that she spent in Ontario.

14. Ms. H. expressed a number of concerns about the Respondent as a parent. She indicated that he was upset about her housekeeping, sometimes "screaming" his anger, yet he would never help with housework. He denies both allegations. She said that on occasion he drank to excess on occasion to the point of being incontinent of urine and being unable to be awakened. She indicates that he has given the children Tylenol, not because they needed it, but to put them to sleep. Her sister agreed. He denied it. The Applicant complained that he didn't follow the bedtime routine she had established and that he didn't have suitable beds for them at his place. She says that he didn't and doesn't "have time" for the children and has not actively planned for their visits. She alleged that he holds racist views, a factor of some particular consequence in this situation because Mr. J. is not Caucasian. He denies this and counters that he has close friends who are members of a racial or ethnic minority. The evidence does not permit me to draw any conclusions on this point.

15. Notwithstanding all of this Ms. H. allowed that he is "a good dad" to the children and her counsel in her summation also described him as a good parent. I accept that he is a good parent, flawed no doubt as we all are in some way or another, quite capable of looking after the children and that he is well bonded to them.

16. The Respondent, in turn, expressed particular concern about the Applicant drinking to excess. He spoke of her drinking during the daytime when he was at work and she was looking after the children. He said when he came home from work she smelled of alcohol and the house was a mess. He said he found beer bottles under the bed. He noted that several of her siblings were or are alcoholics. He said the matter of her drinking was a big factor in the relationship troubles they were having. Ms. H. acknowledged having "a beer" while the children were napping or she was watching some daytime TV. This is a "he-says-she says" dispute. Without more evidence I am reluctant to draw too firm a conclusion about her drinking. His presentation is credible but so too is hers. Ultimately I will discount it somewhat on the strength of the information that the children are doing and have done well in her care. I will treat it as something of an unknown factor.

17. He gave evidence that she had been suffering from depression and that she had been taking or should still be taking the anti-depressant drug Paxil. He gave uncontradicted evidence of three suicide attempts or gestures by her, the last within the past year. Obviously one pays attention to evidence such as this, but her doctor, in a note appended to her affidavit and not

objected to by counsel for the Respondent, says she's "fine" and no longer in need of Paxil. (Respondent's counsel notes that could leave room to conclude that she may still need some medicine other than Paxil, but that is not the way I read the doctor's note.) Possibly her depression was situational, perhaps being in part post partum depression and depression about her circumstances. It may suggest a disposition towards or a susceptibility to significant depression, perhaps situationally induced, that could manifest itself again. I can't quantify or qualify the risk but I am conscious of it. In general, and with some sense of disquiet I find her to be a competent, committed and loving parent.

THE LAW

18. The leading case in Canada on what has come to be known as 'mobility rights' is that of **Gordon v. Goertz,** [1996] 2 S.C.R. 27. It has been extensively cited and followed in courts across Canada including our own Court of Appeal, for example in **Mahoney v. Doiron** (2000), 182 N.S.R. (2d) 34. **Gordon v. Goertz** dealt with an application to vary an existing order but its core reasoning applies equally well to orders in the first instance. There is a summary of the law set forth by Justice McLachlin of The Supreme Court of Canada set forth in paragraphs 49 and 50, and of particular importance in this case are points 5, 6 and 7:

> **"C. Summary**
>
> 49 The law can be summarized as follows:

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.

> 50 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?"

ANALYSIS

19. The Applicant has been the primary care giver throughout the children's lives and has had them with her since the separation. The children are doing well in her care. The Respondent too is an excellent parent, but his ability to single-handedly look after the children for the long haul is an unknown. I wouldn't be surprised if he could raise the children very well; its just that he hasn't had to be the primary care giver before. The children at ages two and one are very young and have not been integrated into a community or developed connections or friendships.

20. Neither parent has, apart from Mr. M.'s job, a strong connection to or roots in this province. They simply washed up on the shores here three years ago on the impetus of Ms. H. with the only connection then being her sister. Newfoundland may be the strongest nexus for this couple, perhaps, but neither indicated any plans to go there. Ms. H.. has family in Ontario, the Toronto or Scarborough area, although the Respondent would cast doubt on how solid or potentially beneficial those relationships may be. Ms. H. says that her employment prospects may be better in Ontario, or at least the rate of pay in the service industries may be higher, but for that matter the cost of living may be higher, Halifax has about as good an employment rate as just about anywhere in Canada and there are certainly plenty of educational opportunities here.

Mr. M. has a work history in the Toronto area and he testified that there is some aerospace industry. He did not seem to react adversely or regard as improbable the idea of his seeking employment in that area should it come to that.

21. In general I was not unimpressed by Mr. J. with whom Ms. H. proposes to reside. He would appear to be a solid citizen employed for a number of years in a position of considerable trust. His affection for Ms. H. is genuine, as is hers for him. They have visited one another somewhat extensively since June. As counsel pointed out their knowledge of one another is at least better than that of the new phenomenon of couples meeting through the internet and wanting to commence cohabitation right away.

22. I have to say two things, though. He and Ms. H. have still not had a great deal of time to get to know one another as potential long term domestic partners. Until very recently their relationship has been furtive and long distance. It may or not work out between them. Ms. H. says that if it doesn't work out she has family in Ontario. I am unable to make any findings as to the suitability of those family members to assist her and the children should it come to the crunch.

23. I am uneasy about the evidence that Ms. H. felt compelled only a relatively few months ago to threaten Mr. J. with a 'restraining order' to get him to leave her alone and that she had to call his employer to get the employer to get him to stop calling her. That latter information had to be coaxed out of Ms. H. while Mr. J. himself was somewhat parsimonious with the details. This event raises a question as to whether one might necessarily expect totally smooth sailing for this couple. Should there be problems, of course, they might trigger a return of Ms. H.'s depression, and, whether that happens or not, they may impact negatively on the children. To the extent that a propensity to excessive alcohol consumption may be a factor that can only heighten one's apprehensiveness.

24. In all of these circumstances the usual concerns of sustaining the relationship between father and children are present to some degree although at Mr. M.'s income he should still be able to afford to exercise parenting times. What particularly concerns me is not just that he would be far away, but that in being far away he cannot neither keep himself appraised as to how the Applicant (and the very young children) are faring but he would be unable to respond quickly.

25. Given the Applicant's history of being the primary care giver and having cared so well for the children my inclination is that she still would be best situated to be able to meet the children's needs in the short and long term. But being so far from the Respondent, given the history here, worries me as there are risk factors associated with her relocation that aren't present in many cases. These risk factors make one somewhat uneasy for the sake of the children. I certainly do not believe that problems for Ms. H. and therefore the children are inevitable, simply that they are something of which it is prudent to be conscious.

26. In my opinion the course of action best calculated to meet the needs of the children in this instance is to put any proposed move on hold and allow Mr. M. the opportunity to explore the job market in Ontario. As I said he seemed open to this idea should Ms. M. and the children move there and appeared hopeful of being able to secure suitable employment there. Allowing a little more time to go by will also serve to let the relationship between the Applicant and Mr. J. develop further.

DECISION

27. I will award joint custody of the children to both parties as there are no substantial contraindications and it would be in the best interests of the children. Primary care of the children will be with the Applicant on the condition, at least in the interim, that she maintain her residence in Nova Scotia with the children. The Respondent will have generous parenting times, including, but not limited to, parenting times three out of every four weekends from Fridays at six p.m. to Sundays at six p.m. and such other times as may be agreed to. In the event that Ms. H. should travel to Ontario to visit Mr. J. or otherwise, the children will be with Mr. M..

28. The matter stands adjourned for a brief docket appearance Monday, March 6, 2006 at 1:30 p.m.. Even if Mr. M. has not by then secured employment in Ontario I may then be inclined, subject to the opportunity to present further evidence and submissions, to sanction the move by Ms. H. and the children, but all options will remain on the table. In the event that the parties make arrangements prior to that date to both relocate to Ontario I am quite prepared to deal with this matter earlier.

29. I would respectfully ask counsel for the Respondent to prepare the Order including the agreed-upon provision with respect to child support payable by the Respondent.

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Bob Levy, J.F.C.