

IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA  
Citation: Sherman v. Rafuse 2011 NSFC 16

Date: 20110531  
Docket: FNGCFSA - 39746  
Registry: Pictou

BETWEEN:

LEONARD ANTHONY SHERMAN

Applicants

- and -

VERONICA LORI RAFUSE

Respondents

## **DECISION**

**Judge:** The Honourable Associate Chief Judge James C. Wilson

**Heard:** April 28<sup>th</sup>, 2011, Pictou, Nova Scotia

**Final Submissions:** May 18, 2011

**Decision Date:** May 31, 2011

**Counsel:** J. Nathalie Thibault Jones for Leonard Sherman

Angela Walker for Veronica Rafuse

[1] This is a mobility application. The applicant father is seeking to vary the custody order for his daughter Somer Rhain Majcan Sherman born June 11, 2005 so that he has primary care of the child here in Nova Scotia. The respondent mother, who has sole custody pursuant to previous court orders dated January 10<sup>th</sup>, 2007 and June 24<sup>th</sup>, 2009, has now obtained long term employment in Alberta and wishes to relocate Somer with her to that Province. Since the respondent obtained employment in Alberta in August of 2010, Somer has been residing with her maternal grandmother in Pictou County and having regular weekend access with the applicant and his family.

## BACKGROUND

[2] Somer was born as a result of a fairly brief relationship between the parties. They were before the court a number of times between July 2005 and June of 2009. During that period both parties were struggling with employment and relationship issues. Most of the court applications focused on access issues.

[3] Since Somer was born, Ms. Rafuse has completed her course at the Nova Scotia Community College and is now employed as a Corrections Officer. During Ms. Rafuse's time as a student Somer remained in her care and they resided in different locations. As part of her corrections program Ms. Rafuse accepted a five week work term placement at the Saint John Regional Corrections Centre. She accepted this placement in part because she believed it could lead to future employment. Indeed she was hired in June of 2009 for a six month term contract as a casual Corrections Officer in Saint John. During that time Somer was placed with other caregivers including the applicant who was then residing in Alberta. Somer resided with Mr. Sherman and his family between August and October of 2009. When Ms. Rafuse returned Somer to Nova Scotia in October, Somer resided with Ms. Rafuse's mother until Ms. Rafuse's work term in Saint John ended in December of 2009. Mr. Sherman and his family returned from Alberta to Nova Scotia in March 2010.

[4] Unable to obtain employment locally as a Correction Officer other than casual employment, Ms. Rafuse accepted a position as a full time correctional officer with the Alberta Government. The institution where she is

employed is located in Peace River, Alberta. Ms. Rafuse moved to Alberta in the early fall of 2010 for the purpose of establishing herself there. During this period Somer was again left with Ms. Rafuse's mother. It was Ms. Rafuse's plan to move Somer to Alberta with her when she returned home in December. At that time Mr. Sherman filed this application seeking to have primary care of Somer varied to himself so that she would continue to reside here in Nova Scotia. Following the initial appearances in December and January, it was agreed that Somer would remain living with her grandmother during the week so as to remain in the current school pending the outcome of this hearing. Mr. Sherman has had regular weekend access. During the March Break Ms. Rafuse came to Nova Scotia and took Somer to visit with her in Alberta for approximately 10 days.

#### ISSUES:

- [5] 1. Has there been a material change in circumstances?
2. If there has been a change in circumstances, is a change in custody in the child's best interest?

3. If a change in custody is not warranted, is it in the best interest of the child that the custodial parent be permitted to relocate?
4. What is the appropriate amount of child support?

THE LAW:

[6] The guiding principal in this and any other case involving custody is found in section 18(5) of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 as amended:

**18 (5)** In any proceeding under this Act concerning 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. R.S., c. 160, s. 18; 1990, c. 5, s. 107.

and section 37(l)

**37 (1)** The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.

The burden of proof in this case as in all civil cases is a balance of probabilities.

(See *F.H. v. McDougall*, 2008 S.C.C. 53). Evidence establishing a balance of probabilities must always be sufficiently clear, convincing and cogent. Evidence is not to be considered in isolation but rather examined based upon its totality.

[7] The acknowledged leading case on mobility is *Gordon v. Goertz*

[1996] 2 S.C.R. 27 wherein McLachlin C.J. summarized the law at paragraphs 49 and 50 as follows:

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

[8] The burden is upon Mr. Sherman to satisfy the court that there has been a material change in circumstance. The court is satisfied that a move by Ms. Rafuse to Alberta for the purposes of employment and her plan to relocate Somer with her to that Province is a material change in circumstance affecting the child. It is therefore appropriate for the court to "embark on a fresh inquiry as to what is in the best interests of the child having regard to all the relevant circumstances regarding the child's needs and the ability of the respective parents to satisfy them."

[9] Since January of 2007, Ms. Rafuse has had sole custody of Somer except for a two or three month period in 2009 when the parties agreed to a joint custody order that had the child in the primary care of Mr. Sherman in Alberta. Ms. Rafuse terminated this joint custody arrangement after a few months when she returned Somer to Nova Scotia before the end of her work term in New

Brunswick. It is acknowledged that during the periods Ms. Rafuse had sole custody, the child was in her care except for approximately eight months in 2009 while Ms. Rafuse was working in New Brunswick. It is also acknowledged that since Ms. Rafuse commenced employment in Alberta in September 2010, the child has been in the defacto care of the child's grandmother, Michelle Rafuse. The initial period when Somer was in the care of others, related to a short term work contract. The most recent period when Somer was left in the care of her grandmother relate to the period Ms. Rafuse required to establish a residence in Alberta and most recently, to deal with this application.

[10] Mr. Sherman acknowledges there is a strong bond between Somer and her mother and that Veronica has been a good mother. He alleges that she has been guilty of making some poor decisions that have caused Somer to be placed in the care of others. Mr. Sherman argues that this instability in residence and caregivers is not in Somer's best interests. Ms. Rafuse acknowledges that she made a number of moves while she struggled to complete her education but she always left Somer in the care of people Somer knew and she made a special effort to maintain frequent contact with Somer.



[11] These parents experienced some initial problems in establishing a regular and consistent schedule of access. For the most part, and with some more recent minor problems, access has been exercised on a consistent basis since Mr. Sherman returned to Nova Scotia over a year ago. Indeed, since Somer resided with him for a period of a few months in the fall of '09, there appear to have been no access problems until this matter was brought back to court due to the pending move. Since December Mr. Sherman has been exercising access virtually every weekend while Somer remains with her grandmother during the week to attend school. Her grandmother, Michelle Rafuse, has been facilitating transportation for access.

[12] Mr. Sherman and his family reside in a home about a half hour from the grandmother's home. Somer has been spending her weekends with her dad and the two younger children he has with his current partner. Mr. Sherman also has two older children from a previous relationship who spend most weekends with him. The court is satisfied Somer has had an opportunity to develop a good relationship with her father and his family. Mr. Sherman argues his is a home that

Somer has become very familiar with and it would be easy for her to transition there on a permanent basis.

[13] This is a case where it is necessary to consider the parent's reasons for moving. Ms. Rafuse trained as a correctional officer but could not find full time employment in this Province. Rather than put her career on hold and endure the financial instability associated with casual employment, Ms. Rafuse sought a full time position. Her offer of permanent employment was in Peace River, Alberta. In order to establish herself in that community before moving Somer, Ms. Rafuse decided to leave Somer in the care of her mother until she was able to establish a residence and settle into her new job and community. She enjoys her job, has made friends, and established an apartment within that community that is close to schools, services and recreational activities for Somer. She has arranged a child care provider who is able to meet the needs of her employment. She has had opportunity to introduce Somer to the community and some of her friends. While she has no family living in the community she does have family members within the Province.

[14] Mr. Sherman is employed as a meat manager. Given that he manages the department, he has some control over scheduling his hours. He anticipates that when his partner returns to full time employment she will be able to arrange her hours so that no outside child care is required.

[15] Parenting is a challenging undertaking that is not made any easier by financial stress. In addition to being physically and emotionally available to your children, a prerequisite to good parenting is the ability to provide adequately. Not only does good steady employment provide the necessary resources, it provides the role modeling necessary for children to aspire to greater things for themselves.

[16] Many families face difficult options when deciding whether to stay put or move on. In this case Ms. Rafuse was quite clear that she will forego her employment and career opportunities to stay in Nova Scotia if that is the price of retaining custody. She simply argues that the prospect of long term financially rewarding employment will make her a better parent and provide better opportunity for her daughter.

[17] Faced with a similar decision, Judge Campbell of this court in

*MacCulloch v. Smith*, [2007] N.S.J. 225 stated as follows:

42 If her life and mobility are limited in this way, she is deprived of making a choice that might lead to her greater long term happiness and as a result in Caleb's long term welfare. Caleb's best interests are served by his being in the custody of a mother who feels that her aspirations have not been extinguished by the fact of her having custody of him. The limitation of her right to mobility is not a cost that she should be required to pay, despite and in some ways because of her willingness to pay it.

- "Most men lead lives of quiet desperation and go to the grave with the song still in them."

Thoreau said that. If Lori McCullough, were required to remain in Nova Scotia in order retain custody of her son, she would get by, living perhaps the kind of life that Thoreau imagined. She imagines something more for herself. That is a good thing for her and a good thing for her son.

43 In that sense, the matter does deal with her rights and her aspirations except insofar as denying those will affect her ability to be the best parent she can be. Were she required to remain in Nova Scotia, I have no concern that she would be resentful or anything other than a loving and attentive parent. By denying her the right to follow a professional and personal course that she hopes for, she would be denied the opportunity to be the most fulfilled person she can be and as a result the best parent she can be. Remaining in Nova Scotia, with day to day care and control of her son, she would be a good parent, but perhaps not the best parent that she can be.

[18] Recognizing the compromises associated with moving, Ms. Rafuse has given serious consideration to access. Should Ms. Rafuse move to Alberta, Somer's relationship with her father will be varied in a material way. Rather than spending every weekend with him and his family, her face to face contact will be severely limited. In the normal course it is likely Ms. Rafuse will visit the county

once or twice a year. Ms. Rafuse accepts that she will bear the cost of transporting Somer with her during these visits. To offset Mr. Sherman's loss of contact, Ms. Rafuse is prepared to share in the cost of any additional visits Mr. Sherman may want to exercise with Somer. She would support block access during the summer of up to six weeks as well as any other reasonable access the parties can arrange. She would support access by way of telephone, Skype or any other appropriate electronic means. She recognizes her obligation to encourage access between Somer and Mr. Sherman.

[19] Somer is completing her first year in school. She has been involved in some activities through the local Y. As noted she has been spending her weekends with her father and half siblings. The effect of removing her from the community with which she has become familiar cannot be underestimated. No access regime, however generous, can replace primary care. However, it is to be noted that there has been an opportunity to develop a strong attachment and Somer is growing into an age where she is able to utilize today's electronic resources to maintain contact.

[20] Somer will experience some change with whatever decision the court makes. If Somer remains in the primary care of Ms. Rafuse and she moves to Alberta, Somer will be faced with both a change in residence and a change in schools. If Mr. Sherman's application is granted, Somer will again face a change in schools and will become a resident in a household of three to five children where she was previously a weekend visitor. If the court were to leave primary care with Ms. Rafuse and not allow her to move out of Province, Somer may still experience a change in residence and school.

## CONCLUSIONS

[21] The decision of Ms. Rafuse to accept employment in Alberta is a material change in circumstance that permits the court to reassess the custodial arrangement for Somer. Based on all of the evidence the court has concluded that it would not be in Somer's best interest to vary the current custody order. Somer has a well established relationship with her mother. Except for the months related to her work placement, establishing an alternative residence or getting this matter resolved, Somer has been in the primary care of Ms. Rafuse. It is Ms. Rafuse who has either attended to or facilitated medical appointments and other

primary care responsibilities. She has maintained regular contact with Somer while she has been in the care of others. Mr. Sherman has been the primary care parent for less than three months of Somer's life.

[22] The court is satisfied that it would not be in the long term best interests of Somer for her mother to give up the opportunity of a stable and rewarding career to retain day to day care of Somer. While a move by Somer with her mother to Alberta will present some access challenges, such a move is in Somer's best interest. Except for brief periods associated with securing employment, Veronica Rafuse has been the child's primary caregiver and attachment figure. Mr. Sherman admits mother and daughter have a strong bond and Ms. Rafuse is a good mother.

[23] That he wishes to maintain his close relationship with Somer is understandable. In order for that to happen Ms. Rafuse must forego financial independence and the opportunity to be the best parent she can be for Somer. In the court's opinion the move proposed by Ms. Rafuse and the resources she is prepared to commit to access represent the best overall plan for Somer. Ms.

Rafuse's connections to Nova Scotia remain strong with her family located here. There should be reasonable opportunities to maintain meaningful contact.

[24] The order will continue as a sole custody order given the legal issues frequently associated with exercising joint custody over a great distance. In addition to reasonable access including extended and overnight access in either Somer's province of residence or Nova Scotia, Mr. Sherman will be granted the specific authority to obtain all information from schools, doctors or other professionals dealing with Somer and to authorize emergency medical care on the same basis as if he was a joint custodial parent. Ms. Rafuse shall keep Mr. Sherman advised of all relevant medical, educational or other information with respect to Somer.

[25] In addition Mr. Sherman will be entitled to up to six weeks of access during the summer school break. Dates for summer access should be requested before May 15<sup>th</sup> each year. For this summer, 2011, Somer will remain in Nova Scotia, residing primarily with her father from the end of the school year until August 15<sup>th</sup>. During the period from the end of school until she moves to Alberta,



Michelle Rafuse and/or Veronica Rafuse shall be entitled to reasonable access including, but not limited to alternating weekends. The intention is that Somer will be transitioned to Alberta during the last two weeks of August. In addition to the above access Mr. Sherman will be entitled to reasonable telephone access including computer access to occur before 7:00 pm Alberta time.

[26] The current maintenance provisions will be maintained.