FAMILY COURT OF NOVA SCOTIA
Citation: S.E.O. v. J.W., 2013 NSFC 15

Date: 20130801
Docket: FKMCA-034427
Registry: Yarmouth

Between:

S.E.O.

- Applicant

v.

J.W.

- Respondent

Judge: The Honourable Judge John D. Comeau, JFC

Heard: July 15, 2013 at Annapolis Royal, Nova Scotia

Counsel: Anita Hudak, counsel for the Applicant
J.W., self-represented

Introduction / The Application:

[1] The Applicant is the father of the child Rhianna, born October 25, 2000 and he is applying to vary an order dated October 18, 2004 requesting shared custody citing the fact that the child has resided with him Mondays until Thursdays within the last three to five years (the facts will refer to more specific dates).

[2] This application was made on January 22, 2013 and further asks for a condition to custody that neither party remove the child from the Province of Nova Scotia without the written consent of the other party or the Court. An additional remedy sought is a review of Guideline child support. A request is also made for holiday times to be shared, one year with the Applicant and one year with the Respondent. He also wants to share the child tax credit.

[3] The Respondent is the mother of the child and is requesting custody and to be allowed to move with the child to Alberta. She is also requesting child support. This reply was made orally on the record due to the Respondent's unrepresented status.

[4] This request informally changes the remedy the Applicant is seeking to one of opposing the Respondent's move to Alberta with the child. Therefore, he is requesting custody and child support and the issues before the Court are custody, access, and child support. This all revolves around the issue of mobility and the child's best interests.

[5] The order of October 18, 2004 which is the subject of this variation hearing, was made by Judge Bob Levy and recognized the child, at that time, was primarily resident with the Respondent mother and the Applicant father was to enjoy reasonable parenting times. Child support was ordered to be paid by the Applicant father, based on an annual income of $9,800 from December 1 to April 1 each year. It was determined the amount would be $133 per month from April 1 to November 1 of each year and $95 a month from December 1 to March 1 of each year.

Issues: custody / access / child support and mobility

The Facts:

[6] The parties agree there is a change in circumstances which provides the Court under section 37 of the *Maintenance and Custody Act* with jurisdiction to conduct a fresh review of custody (see *Gordon v. Goertz*, infra.)

[7] The child resides with her father the Applicant. The parties began cohabitation in 1999 in Nova Scotia. They relocated to Alberta in January 2000 and lived in various cities in that province. Eventually they both relocated to Nova Scotia when Rhianna was two years old. Although, it appears they did not cohabit. Between 2002 and 2006 the Applicant had access once a week on Sundays. From 2006 to 2013 the Applicant's parenting time was every Monday after school to Thursday morning. The Respondent mother also left the child in his care so she could attend an aesthetics course at NSCC. Since March 2013 the child has been living with the Applicant father as the mother moved to Alberta.

[8] The Respondent mother says she moved to Alberta to better herself and her family. She felt it was in the child's best interest to stay with her father until she had a job and set up a home before she brought her daughter with her. She now

has a good job and a home and she says her partner D.T. is supportive of her and her children, although he did not testify.

[9] The status quo that was established (child primarily with the Applicant father) was, in addition to extended access, for the purpose of her pursuing her education and then gainful employment (move to Alberta).

[10] A description of the status quo involves the Applicant's partner F.M.V. She has no children and has what she describes as a strong bond with Rhianna. They spend much time together baking cupcakes, watching movies or being outside. She says she knows very well she is not the child's mother but has bonded with her and is described by the child in what appears to be a card, "You are like a mother". F.M.V. refers to the Applicant as being a loving and sensitive father who participates extensively in the parenting of Rhianna.

[11] The child Rhianna is a high achiever in school. She received an honours with distinction certificate from school for exceptional academic achievement in grade VI. She is artistic (having won first pace ribbons for her painting and drawings) and make friends easily. She has many school friends because of her

participation in the community. She also is involved in music, playing the guitar, drums and singing.

[12] The Respondent indicates she would continue with these pursuits in Alberta. She would also be able to enter french emersion in Alberta which is planned for Nova Scotia in the fall.

[13] In Nova Scotia extended family consists of the paternal grandparents who are described as important (participate extensively) in Rhianna's life. The Respondent describes them as the best grandparents I ever met. She also has first cousins ages 11 and 15 who she interacts with. She sometimes babysits F.M.V.'s niece and nephew who are 9 and 8 respectively. At home with the Applicant and F.M.V., Rhianna has pet rabbits, her musical instruments and her own room.

[14] The Respondent mother has a home in Airdrie Alberta and resides with D.T. and her two other children Gavyn and Khalil. She describes Gavyn as a very difficult child although she says Rhianna needs to be around her brothers (half brothers whose father agreed to them moving to Alberta).

[15] With respect to her partner D.T. there is evidence that as a result of a domestic assault by him on her, he was arrested at a Tim Horton's in Nova Scotia. The parties have now reconciled. As a result of this and a second fight referred to by the Applicant, there is concern over the Respondent's relationship with D.T. He appears to have a good relationship with the mother of his children and they have some arrangement for access. The Respondent's extended family is in Alberta. She has a mother and father, brother and cousin within hours away. She has seen her mother five times since she has been in Alberta. There is no relationship with her father but her brother is close by.

[16] She believes she is better capable financially to care for the child and there are more opportunities there for the future of Rhianna.

[17] She wants Rhianna to try it in Alberta and if after the first school semester she wants to move back to Nova Scotia she would agree to that.

Professional Report - Child's Wishes Assessment

[18] Neil Kennedy, MSW, M.Ed., RSW prepared a report to assist the Court with respect to how the child felt about where she wanted to live.

> "In conclusion, Rhianna was very clear in her viewpoint that she wishes to continue to live in Nova Scotia with her father and visit her mother in Alberta. She presented in a relaxed manner and was articulate in her responses. I asked her about any attempts by her father to influence her and she believed that he would support any decision that she made and he never inferred that if she moved she would not see him.
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> From my review of her report card, contacts with both parents as well as direct observation it is obvious that Rhianna is well adjusted, bright and fully capable of formulating her wishes and expressing them."

The Law:

[19] The *Maintenance and Custody Act provides for varying orders:*

> "**Powers of court**
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> **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."

[20] Recent amendments to the *Act* confirm items the Court should consider in a fresh inquiry into the custody of a child as set out in *Foley v. Foley*, 1993 CANL II 3400 (S.C.):

> " 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 give paramount consideration to the best interests of the child.
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> (6) In determining the best interests of the child, the court shall consider all relevant circumstances, including
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> (a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;
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> (b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;
>
> (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;
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> (d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
>
> (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;

(f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;

(g) the nature, strength and stability of the relationship between the child and each parent or guardian;

(h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;

(i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and

(j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on

(i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and

(ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

(7) When determining the impact of any family violence, abuse or intimidation, the court shall consider

(a) the nature of the family violence, abuse or intimidation;

(b) how recently the family violence, abuse or intimidation occurred;

(c) the frequency of the family violence, abuse or intimidation;

(d) the harm caused to the child by the family violence; abuse or intimidation;

(e) any steps the person causing the family violence, abuse or intimidation has taken to present further family violence, abuse or intimidation from occurring; and

(f) all other matters the court considers relevant.

(8) In making an order concerning care and custody or access and visiting privileges in relation to a child, the court shall give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child, the determination of which, for greater certainty, includes a consideration of the impact of any family violence, abuse or intimidation as set out in clause (6)(j).

[21] As referred to earlier, this variation application is a fresh inquiry into the best interests of the child based on the issue of mobility. The decision of the Supreme Court of Canada in *Gordon v. Goertz* [1996] 2 SCR 27 provides a summary of the law in section 49.

[22] The issue of the views of the parent with primary care or custody status was referred to in *Rafuse v. Handspiker*, (2001) 190 N.S.R. (2d) 64 by Justice Oland of the Nova Scotia Court of Appeal.

> "The trial judge did not mention that case or any other mobility case in his decision. In ***Gordon*** v**. *Goertz*,** the Supreme Court of Canada rejected any legal presumption in favour of the custodial parent but indicated at § 48 that:
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> ' ... the views of the custodial parent, who lives with the child and is charged with making decisions in its interests on a day-to-day basis, are entitled to great respect and the most serious consideration.'
>
> While the trial judge cited ***Foley*****, supra**, that decision did not include this principle among the factors enumerated for determining the best interests of a child.
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> The failure by a trial judge to afford proper respect to the vies of a custodial parent can constitute an error in principle: ***Burns*** v. ***Burns***, reflex, [1200] 3 R.F.L. (4th) 189 (N.S.C.A.) at p. 205. Here the child of the appellant and the respondent was eight years old when custody proceedings commenced in February 2000. She had lived with the appellant, her mother, and with the appellant's two other daughters since her birth. There is no indication in the decision that the judge gave the views of the appellant as the custodial parent the degree of respect and consideration required by ***Gordon*** v. ***Goertz***. Rather, as his reasons show, the judge disagreed with the move itself."

[23] In the order sought to be varied made in 2004, Judge Levy made a recital in the preamble that the child was primarily resident with the Respondent mother. As set out in the evidence, that has not been the case for a considerable period of

time. The past placement of the child with the father should not have a negative effect on the Respondent's case, but it is a fact to be considered in the child's best interest. The reason why a child is living in a particular environment is less important than how they are doing there. See *MacKinnon v. MacKinnon*, 2009 Carswell NS 615, 2009 NSSC 278, 283 N.S.R. (2d) 204 (S.C.) which deals with the status quo and mobility where stability is a prime consideration.

[24] In the final analysis, the Court must determine what is in the best interests of the child.

Conclusion / Decision:

[25] The child Rhianna has been with her father full time since March, 2013 and between 2006 and that time Monday after school to Thursday morning. The rest of the time with the Respondent mother until she moved to Alberta in March of 2013. Rhianna wants to stay with her father and his partner F.M.V. She is happy there in a stable environment and has a very good relationship with F.M.V. She has been described as extremely capable of expressing her residential wishes. There is no evidence she was unduly influenced to side in favour of living with her

father. She is mature enough to understand proceedings and form an independent opinion to the assessor (see *Manitoba Director of Child and Family Services v. C(A)*, 2009 SCC 30)

[26] There is evidence that the Respondent mother's partner has perpetrated some form of domestic violence on her (assault) for which he was arrested. It appears she has forgiven him for this and has no concerns for her or her daughter residing with him, although the Applicant in his affidavit refers to a second domestic dispute between the two.

[27] In her evidence the Respondent mother made reference on a number of occasions in her evidence that Gavyn (Rhianna's half brother) was a difficult child that needed her constant vigilance.

[28] There is no evidence that Rhianna was asking to see her brothers and this could be arranged during mother's access anyway.

[29] Rhianna is a stable and involved child, happy where she is being well cared for and her needs being met. She wants to stay where she is.

[30] It is evident that both parents are capable and loving parents and the Respondent mother should be commended by bettering her life through education and dedication to her future and that of her children. There is a concern that the Court must consider over her relationship with D.T. (see s. 18(7) of the *MCA* supra.)

[31] The result is, taking into consideration all the factors referred to earlier, the child Rhianna's best interests are served by remaining in the care and custody of her father the Applicant.

[32] Counsel for the Applicant shall prepare the following order.

1. The parties shall have joint custody of the child Rhianna, with primary care to the Respondent father.

[33] The purpose of a joint custody order is so the access parent (mother) may deal with any emergency when she is exercising access and she is unable to consult with the Applicant father. The Court is considering medical emergencies.

[34] Generally the parties shall consult with respect to anything that affects the welfare of the child.

2. The Respondent mother shall have access as follows:

a) Liberal phone and e-mail contact which may include skyping;

b) Every March Break;

c) Four consecutive weeks during the summer either in July or August so long as the child is returned within a reasonable time to prepare for the start of school. At least three days before school starts;

d) Such other reasonable access as can be agreed upon by the parties;

e) Access at any time the Respondent mother is in Nova Scotia;

f) The Respondent mother shall pay the child's travel expenses although some consideration should be considered for this on the issue of child support.

Child support

[35] The order of October 15, 2004 and issued November 1, 2004 with respect to child support payable by the Applicant father is hereby terminated. Any arrears are set at 0.

[36] The Respondent mother indicated her most current income is $1,724.76 per month although this is commission income. She also gets the child tax credit (no evidence of whether it is for three children or two) and $250 per month from the father of Rhianna's two step brothers.

[37] With respect to determination of annual income for the purpose of determining the table amount under the Child Support Guidelines, the Court will calculate by using her commission income, only to off set child access costs.

[38] The Respondent mother's annual income is determined at $20,697.12.

[39] The Table amount for Alberta (payor's residence) is $181.02 a month and this will be payable through Nova Scotia Director of Maintenance Enforcement starting August 1, 2013. May be payable direct if the parties agree.

[40] Order accordingly.

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JOHN D. COMEAU
JUDGE OF THE FAMILY COURT OF NOVA SCOTIA