FAMILY COURT OF NOVA SCOTIA
Citation: *S.M. v. M.S.*, 2017 NSFC 28

Date: 20171127
Docket: Pictou No. FPICMCA94497
Registry: Pictou

Between:

S.M., T.M., and H.M.

Applicants

v.

M.S.

Respondent

Editorial Note: **Identifying Information has been removed from this electronic version of the judgment.**

Judge: The Honourable Judge Timothy G. Daley

Heard November 23, 2017 in Pictou, Nova Scotia

Counsel: Hector MacIsaac, for the Applicants, S.M. & T.M.
Respondent M.S., self-represented

Introduction

[1] This case is about a child, M., who is now 11 years old and what is in his best interests. More specifically, I must determine whether this Court could and should take jurisdiction in this matter and determine what is in M.'s best interest or whether Alberta is the appropriate jurisdiction to determine these matters for him.

Prior Proceeding and Order

[2] M.'s best interest was the subject of the prior proceeding before this court. A hearing took place in late August of 2016 with respect to whether M. should remain in Nova Scotia in the care of his paternal grandparents, S.M. and T.M. or whether he should be permitted to relocate with his mother, M.S., to Calgary, Alberta. After hearing three days of evidence, I gave a written decision (*M.S. v. S.M., T.M. & H.M.*, 2016 NSFC 27) on November 14, 2016 in which I granted M.S.'s application to permit M. to relocate to live with her in Calgary, Alberta. It will be helpful in providing context in the current application to briefly review that earlier circumstance and decision.

[3] S.M.is M.'s paternal grandfather. T.M. is S.M.'s spouse but is not biologically related to M. In the 2016 decision, I found that T.M. had been, in all other respects, a grandmother to M. and she was granted standing as a party. She was also a party to the resulting order. She continues to have standing in this current application. I will therefore refer to her as the paternal grandmother and she and her husband as the paternal grandparents.

[4] H.M. is the son of S.M. and T.M. and the father of M. In the prior application, he did give evidence and is a party to the resulting order. Though he is a respondent in the current application, he has not participated by filing an affidavit. This is consistent with the evidence accepted in the prior matter that he deferred to the decisions and parenting roles of the paternal grandparents and though he had contact with M., he was not involved in the day-to-day decisions or care of M.

[5] M.S. is M.'s mother and she resides in Calgary, Alberta. Under the order issued resulting from my 2016 decision, she has primary day-to-day care and control of M.

[6] The evidence in the prior proceeding revealed that M. had resided with M.S. in Alberta without the involvement of his paternal grandparents or father for the

first eight years of his life. M. then visited with his paternal grandparents and father in Nova Scotia in August 2010. He next visited with his paternal grandparents in Nova Scotia in the summer of 2011 though he had no contact with his father at that time. Thereafter, the paternal grandparents became more involved in M.'s life.

[7] Over the next few years, M.S. suffered several mental health crises which are set out in some detail in the 2016 decision. At times, Alberta's Children and Family Services (the "Agency") were involved with her and her family.

[8] As a result of the first mental health crisis in 2011, M.S. sent M. to live with his paternal grandparents in Nova Scotia from mid October 2011 until early January 2012, a period of approximately two to four months, after which he was returned to his mother's care in Alberta.

[9] A second mental health crisis occurred in March 2013. The paternal grandparents made efforts to have M. placed with them through the Agency but were unable to complete the appropriate processes before M. was returned to his mother.

[10] In early January 2015 M.S. experienced a third mental health crisis. She contacted the father and the paternal grandparents seeking to have them take M. into their care in Nova Scotia rather than having him placed in foster care in Alberta. He travelled to Nova Scotia with his father and resided with his paternal grandparents from January 2015 until his return to Alberta into his mother's care in late November 2016, a period of approximately 21 months.

[11] In that proceeding, I found that, though M.S. had experienced three serious mental health crises from 2011 to 2016, she had taken all reasonable steps to address her mental health challenges. I found that she had recovered sufficiently to parent M. effectively and that it would be in M.'s best interest to return to her care in Alberta. As a result, I granted an order of joint custody among M.S., S.M., T.M. and H.M. This order permitted all of them and to have direct access to any third party service providers and information respecting M. and required them to meaningfully consult on any major issues concerning the health, education and general well-being of M. If they were unable to agree on any major decision for M., M.S. would have the right to make a final decision, subject to the right of the father or paternal grandparents to have that decision reviewed by a court of competent jurisdiction.

[12] M.S. was granted permission to relocate M. from Nova Scotia to Alberta into her primary care.

[13] The paternal grandparents were granted access with M. which included M. spending at least six weeks of each summer in Nova Scotia in their care, during which time the father would have access with M. at the absolute discretion of the paternal grandparents.

[14] The paternal grandparents would also have reasonable access on reasonable notice with M. in Calgary if they were able to travel there.

[15] The mother and paternal grandparents were also to share, on an approximately equal basis, Christmas, Easter and school spring break time for M. All parties were granted reasonable telephone, text and or videoconferencing contact with M. when in the care of the other party and they were required to cooperate and facilitate the exchange of gifts, messages, cards, letters, social media communication and all forms of interaction for M. with each other.

[16] There were other provisions of the order, including a requirement that M. participate in therapeutic and counselling support.

Current Application

[17] The current proceeding came before the court as a result of an *ex parte* application by the paternal grandparents seeking to have M. remain in their care in Nova Scotia. This application was filed on August 14, 2017. Given the matter was heard *ex parte*, the only evidence before the court was that of T.M. by way of an affidavit.

[18] In that affidavit, T.M. said that M. arrived in Nova Scotia for the summer on July 11, 2017. She subsequently received a text message from M.S. in early August informing her that the police had been at M.S.'s home but that she was fine.

[19] Later that day T.M. received a call from M.S.'s 19 year old daughter, X.S., informing her that M. should not be returned to M.S.'s care as she was not well again and that X.S. was proposing to take care of M. upon his return to Alberta. She informed T.M. that M.S. was being taken to the hospital.

[20] T.M. said that, as a result of various conversations she had with Agency representatives, the police and with M.S., she understood that M.S. was having

another mental health crisis and there was a plan for M. to be cared for by the maternal grandmother until M.S. was able to leave the hospital. T.M. believed that the maternal grandmother suffered from mental health challenges herself.

[21] T.M. said that she was later informed that the plan for M. was to return to Alberta and to ultimately stay with his maternal grandfather while M.S. recovered.

[22] Finally, T.M. said that M.S. told her repeatedly in those calls that she had no support from her family and had no support network over the past year. T.M. did not know whether M. had a relationship with his maternal grandfather. She was concerned that the Agency in Alberta was unable to verify if there was any safety plan in place for M.'s return to that province.

[23] As a result of this evidence, I assumed interim jurisdiction and granted an interim *ex parte* order granting primary care of M. to his maternal grandparents in Nova Scotia.

[24] In granting the interim *ex parte* order, I considered the urgent nature of the application; the fact that M. was present in this province at that time; that he was due to return to Alberta; that the paternal grandparents share joint custody of M. with his mother and father; that there was evidence that M.S. was experiencing another mental health crisis. In the context of the history of this family and particularly M.S., it was necessary for this Court to at least temporarily take jurisdiction over the matter and it was in M.'s best interests to issue the interim *ex parte* order.

[25] Since that time, T.M. and M.S. have each filed several affidavits providing further evidence in this proceeding and a hearing was conducted on November 23, 2017. M.S. testified via video from Alberta.

Issue for Determination

[26] At this time, there is one issue for determination by this Court. I must decide whether this Court can and should assume jurisdiction over this matter in determining what is in M.'s best interests or whether jurisdiction properly resides with Alberta.

[27] It is important to note that this decision is not about whether M. should reside with his paternal grandparents in Nova Scotia or with his mother in Alberta. That evidence will be heard and a decision will be made at a subsequent hearing in

either Nova Scotia or Alberta. I will not be determining any of those issues in this decision.

The Law and Evidence

[28] Before reviewing the evidence in this hearing, it will be helpful to review the law which must be applied in determining the matter of jurisdiction. I note I had previously summarized the law applicable to such circumstances in the decision of *A.J. v. K.M.*, 2015 NSFC 19 which I set out below.

[29] The first issue to be determined when deciding jurisdiction is what test must be applied in arriving at that decision. Under the *Parenting and Support Act* there is no specific direction for determination of jurisdiction in such circumstances but I do note the act does indicate at section 18 (5) as follows:

> (5) In any proceeding under this Act concerning custody, parenting arrangements, parenting time, contact time or interaction in relation to a child, the court shall give paramount consideration to the best interests of the child.

[30] I therefore remind myself that I must be governed by the best interests of M. and not the interests of his mother, father or paternal grandparents.

[31] The test for deciding jurisdiction is outlined in the leading case of *Yonis v. Garado*, 2011 NSSC 110, a decision of Justice Jollimore of the Nova Scotia Supreme Court Family Division, in which she discusses a circumstance somewhat analogous to this matter. In paragraph 6 of that decision she finds as follows:

> 6. In *Penny (Litigation Guardian of) v. Bouch*, 2009 NSCA 80 (N.S.C.A.), Justice Saunders, with whom Justices Rosco and Oland concurred, approved of the two-step analysis Justice Wright preformed in deciding the application at first instance. Justice Wright said, at paragraph 40 of his decision in *Penny (Litigation Guardian of) v. Bouch*, 2008 NSSC 378 (N.S.S.C.), that where there's a dispute over assumed jurisdiction, the *Court Jurisdiction and Proceedings Transfer Act* requires I must first determine whether I can assume jurisdiction given the relationship between the subject matter of the case, the parties and the forum. If that legal test is met and I can assume jurisdiction, I must then consider whether I ought to assume jurisdiction. He said this means considering the discretionary doctrine of *forum non conveineus*. There may be more than one forum capable of assuming jurisdiction and I may decline to exercise jurisdiction because there is another, more appropriate, forum.

[32] From this it is clear that I must apply a two-part test in determining jurisdiction. First, I must determine if I could assume jurisdiction. If I find that I could, I must next determine if I should assume jurisdiction.

Step One – Could I Assume Jurisdiction?

[33] To determine whether I could assume jurisdiction, Justice Jollimore refers to the *Court Jurisdiction and Proceedings Transfer Act*, 2003 (2d Sess.), c. 2, s. 1 which assists the court in its analysis of a matter such as this. Section 4 of the *Act* says:

> 4 A court has territorial competence in a proceeding that is brought against a person only if
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> that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counter-claim;
>
> during the course of the proceeding that person submits to the court's jurisdiction;
>
> there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding;
>
> that person is ordinarily resident in the Province at the time of the commencement of the proceeding; or
>
> there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based.

[34] In this case, sub-paragraph (a) is inapplicable. As well, M.S. did not, at any time, submit to this court's jurisdiction, there is no agreement among the parties respecting jurisdiction and M.S. is not a resident of Nova Scotia. Thus, only subsection (e) is applicable. Therefore, it is the question of real and substantial connection with the Province that must be addressed in this analysis.

[35] Section 11 of the same *Act* provides some guidance with respect to substantial connection. It says, in part:

> 11 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Province and the facts on which a proceeding is based, a real and substantial connection between the Province and those facts is presumed to exist if the proceeding…

[36] Section 11 then goes on to list 12 circumstances under which it might be presumed that a matter has a real and substantial connection to the Province. None of those apply here. However, and to repeat, Section 11 begins with the phrase:

> Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Province and the facts on which a proceeding is based…

[37] This quite clearly indicates that, though there are 12 examples listed in the *Act*, those are not a closed class or group. If the party can establish other circumstances of a real and substantial connection, it may satisfy the court that it should take jurisdiction.

[38] This section has been interpreted and applied in the case of *Detcheverry v. Herritt*, 2013 NSSC 315, a decision of Associate Chief Justice O'Neil of the Nova Scotia Supreme Court Family Division.

[39] In paragraph 56 of that decision, Justice O'Neil was analyzing section 11 of the *Act*, aforesaid, and found as follows:

> 56 But for s. 11(a), it is noteworthy that none of these presumptions appear to be directly applicable to family proceedings. The statue does not give a comprehensive guide, encompassing all common law principles and presumptions including those that are long established in the area of family law. We must look to the common law for more guidance in defining a real and substantial connection.
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> 57 Justice Saunders summarized the considerations at common law that assist in determining whether "a real and substantial connection exists" as that phrase is used in section 4(e) of the "*CJPTA"*. He wrote the following in *Penny (Litigation Guardian of) v. Bouch*, 2009 NSCA 80 (N.S.C.A.):
>
> [51] Accordingly, I reject the suggestion that considerations of fairness have no place in the inquiry into the existence of a real and substantial connection, and are only to be weighed during the application of the discretionary forum non conveniens doctrine. In my respectful view, such a prohibition would introduce an unnecessary and unrealistic rigidity to a test that is clearly designed to be flexible. To impose such a constraint would prevent a judge's assessment of the totality of the evidence when deciding whether the circumstances made it proper to accept jurisdiction over the action as framed by the plaintiff.

> [52] From the cases he reviewed, Justice Sharpe identified a list of emerging factors which would be relevant in assessing these jurisdictional questions. Sharpe, J.A. offered a list of eight factors:
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> 1. The connection between the forum and the plaintiff's claim
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> 2. The connection between the forum and the defendant
>
> 3. Unfairness to the defendant in assuming jurisdiction
>
> 4. Unfairness to the plaintiff in not assuming jurisdiction
>
> 5. The involvement of other parties to the suit
>
> 6. The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis
>
> 7. Whether the case is interprovincial or international in nature
>
> 8. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere

[40] Justice Saunders in *Penny*, supra, goes on to say in Paragraph 53 of that decision:

> [53] These were the same eight factors considered by Justice Wright in satisfying himself that Nova Scotia had acquired a real and substantial connection to the present litigation. I would endorse this list as a useful series of criteria with which to judge such matter, while at the same time observing that the list is by no means exhaustive. It offers a roadmap to guide judges hearing such applications. To borrow the language of s. 11 of the Act, the list of factors serves to complement "[w]ithout limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection…" I would conclude on this point by endorsing the observations of Justice Sharpe in introducing the factors he identified:
>
> [75] It is apparent from Morgaurd, Hunt and subsequent case law that it is not possible to reduce the real and substantial connection test to a fixed formula. A considerable measure of judgment is required in assessing whether the real and substantial connection test has been met on the facts of a given case. Flexibility is therefore important.
>
> [76] But clarity and certainty are also important. As such, it is useful to identify the factors emerging from the case law that are relevant in assessing whether a court should assume jurisdiction against an out-of-

> province defendant on the basis of damage sustained in Ontario as a result of a tort committed elsewhere. No factor is determinative…

[41] Although that decision related to a tort damage claim, it is clearly applicable in this circumstance.

[42] As well, the issue of domicile is important. I note that *Yonis v. Garado*, supra, Justice Jollimore found at paragraph 11:

> Domicile refers to the children's permanent home, the place to which they'd return from an absence.

[43] In the present case, I do find that I could assume jurisdiction for several reasons. The paternal grandparents have resided in Nova Scotia their entire lives. M. has spent significant amounts of time with them over the last few years, including around 21 months in their care in 2015 through 2016. M. has also spent time in Nova Scotia during some summers, including the summer of 2017. M.'s father resides in Nova Scotia.

[44] On the other hand, M.S. has never resided in Nova Scotia. M. has spent most of his life as a resident of Alberta in her care. Significantly, M. was in her primary care under an order of this Court at the time the paternal grandparents made this application.

[45] As to the assessment of unfairness, it will clearly be a challenge to M.S. if I assume jurisdiction in Nova Scotia given that she and any witnesses would have to either travel to Nova Scotia or testify by video conference. This will certainly increase the complexity and her costs in such litigation and put her at a disadvantage. Even retaining counsel in Nova Scotia and providing instructions is a challenging task when the client and lawyer are separated by thousands of kilometres.

[46] The same challenges apply to the paternal grandparents. If I defer jurisdiction to Alberta, they will be challenged in pursuing litigation there, given the same factors at play for M... Their son is also a party to these proceedings although he has not yet filed an affidavit, the same challenges would arise for him.

[47] Fortunately, this is an interprovincial jurisdictional matter which reduces concerns the court might have regarding jurisdiction, comity and the standards of

jurisdiction. More concern might arise if the matter were an international dispute. There are various statues and protocols in place between Alberta and Nova Scotia to ensure that enforcement of orders, recognition of jurisdiction and other related matters can be handled appropriately.

[48] It is important as well to be clear that the test of real and substantial connection is, in my view, focused on the child M. In other words, while I certainly accept that M.S. has no real and substantial connection to the province Nova Scotia, that is not the main issue. The question is whether M. has a real and substantial connection.

[49] In reviewing this issue, I am also mindful that M.'s presence in Nova Scotia beyond the time that he would otherwise have returned to Alberta under the 2016 order of this court is due to the interim *ex parte* order granted in this proceeding. I find it would not be appropriate to consider his ongoing presence in Nova Scotia as a factor in determining whether he has a real and substantial connection to this province given that the order granted was interim and, in particular, because it was granted *ex parte* without any evidence or input from M.S. I therefore will not consider his presence in the province after the interim *ex parte* order was granted.

[50] For all these reasons, I conclude that I could find that Nova Scotia has jurisdiction in this matter. M. has a real and substantial connection to this province, both because of his history of living in the province with his paternal grandparents and his prior and ongoing time with them and his ongoing connection with his paternal grandparents and father even while he resides in Alberta.

Step Two – Should I Assume Jurisdiction?

[51] To the second part of the test of whether I <u>should</u> find that Nova Scotia has jurisdiction in the matter, the *Act* requires me to consider under s. 12(1) the following:

> 12 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside the Province is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
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> (b) the law to be applied to issues in the proceeding;
>
> (c) the desirability of avoiding multiplicity of legal proceedings;
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> (d) the desirability of avoiding conflicting decisions in different courts;
>
> (e) the enforcement of an eventual judgment; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[52] With respect to certain of these requirements, they can be dealt with quickly. Respecting enforcement of an eventual judgment in Canada, there are various reciprocating statues that permit the registering and enforcement of judgments for custody, parenting time and support. Nova Scotia and Alberta are reciprocating jurisdictions and have legislation to permit this. As a result, whichever jurisdiction determines the matter, the law will permit the enforcement of judgments in either jurisdiction.

[53] I am satisfied that the law to be applied to issues in the proceeding is substantially similar between Nova Scotia and Alberta, in that the paramount consideration is always the best interest of the child. I am not concerned that there would be such a substantial difference in law that it should come into the consideration of this court in deciding whether to accept or decline jurisdiction.

[54] However, other factors do come into account, including comparative convenience and expense for the parties to the proceeding and for their witnesses. I find that the most relevant evidence will likely be provided by witnesses located in Alberta. These would include not only M.S. and her family but, most significantly, expert witnesses who can address her mental health history and status. There may well be evidence from workers with the Agency in Alberta.

[55] This is not to suggest that Nova Scotia witnesses would not be required, including the paternal grandparents and father, M.'s teacher and others. It is to say, however, that the central issue will be M.S.'s mental heath status and ability to parent and that evidence lies primarily in Alberta.

[56] There is no question that we should seek to avoid a multiplicity of legal proceedings. M.S. says that she commenced divorce proceedings in Alberta in

2014 and had the father substitutionally served. There is no evidence that she has taken any further steps in advancing that process since then. She has provided no evidence that, for example, a hearing has been sought or scheduled. I will further comment on this issue later in this decision but I do not see this as an issue of multiplicity. M.S. appears to have let this divorce process lie dormant until now and there is no evidence that any Alberta court is engaged in determining jurisdiction or any other issues for M. at this time.

[57] It certainly can be that the child is present in one jurisdiction and domiciled in a different jurisdiction. This child is currently in Nova Scotia. He has resided for most of his life in Alberta. This court had granted primary care of M. to his mother and permitted him to relocate and live with her there. I find that, though he is presently in Nova Scotia, his domicile, the place he would return to after an absence, is Alberta.

[58] With respect to the fair and efficient working of the Canadian legal system as a whole, I find this favours jurisdiction in Alberta. The evidence of M.S.'s circumstances and parenting is most readily available in that province. It is there that evidence may be called most fairly and efficiently.

[59] I note the decision of Justice Campbell in *S. v. D.*, 2004 NSSF 18, at paragraph 7, where he wrote:

> There is jurisdiction in the province where the child was taken because of the presence and existence of the child. There is also jurisdiction in the departing province by virtue of the fact that that province had been the child's habitual residence. … In light of that dual jurisdiction, it is the policy of most Courts as a matter of general rule that the receiving province would decline to use its jurisdiction in favour of the jurisdiction of the province of habitual residence with which the child has the most substantial connection. The main reason for this policy is to discourage the clandestine removal, whether it amounts to kidnapping or not, of children from one province to the other.

[60] I find that is the appropriate principle which must be applied in this circumstance.

[61] I do acknowledge there was evidence contained in the affidavits and touched on in the hearing around issues of parenting and where and with whom M. should ultimately reside. This included evidence of a potential that the Agency may become involved with M.S. and M. if he returns to her care in Alberta. I find that

this evidence is relevant to the ultimate disposition of the matter and may well affect an interim order that an Alberta Court may choose to grant. But I find it has little relevance to this jurisdictional proceeding. Any of the parties may file an application in Alberta to deal with these issues.

[62] Before concluding, I will comment on the issue raised by M.S. that Nova Scotia lacks jurisdiction because she had filed for divorce in Alberta in 2014. While her position may be generally correct, I do take note of the fact that this divorce process has lain dormant since then. It may be appropriate for a court to find jurisdiction in the face of such a circumstance if no steps have been taken to advance the claim or process in the other jurisdiction. Otherwise, it would invite the mischief of filing a claim or other process in one judication solely for the purpose of frustrating jurisdiction in another. Having said that, I do not find that I need to determine this issue in this case.

Conclusion

[63] For the reasons set out herein, I find that, though I could assume jurisdiction in this matter, I should not do so and defer to the Alberta jurisdiction.

[64] The interim *ex parte* order of this court of August 14, 2017 and the interim order of October 11, 2017 are hereby vacated. The order of this court of December 1, 2016 stands and M. shall be returned to his mother's care in Alberta.

[65] I hope that the parties will work co-operatively to facilitate that transition in a way that does not affect M.'s school term in Nova Scotia.

[66] Finally, I do have concerns about what may happen upon M.'s return to Alberta and whether the Agency may become involved again. I do not find that concern to be a compelling reason to assume jurisdiction, but I do note that any of the parties could notify the Agency of the court's decision in this matter and discuss what may occur after M. returns to Alberta.

Daley, JFC