

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: McGrath v. McGrath, 2005 NSSC 281

Date: 20051018

Docket: 1201-52402 (00432)

Registry: Halifax

Between:

Kelli Francis McGrath (now Blair)

Petitioner

v.

Jason Robert Alexander McGrath

Respondent
(Applicant)

Judge:

The Honourable Justice Leslie J. Dellapinna

Heard:

October 11, 2005 in Halifax, Nova Scotia

Counsel:

Gordon Kelly, counsel for the Applicant
Roseanne Skoke, counsel for the Respondent

By the Court:

[1] This is an application pursuant to section 17 of the *Divorce Act* to vary the custody and access provisions of the parties' Corollary Relief Judgement.

BACKGROUND

[2] Jason McGrath (the Applicant in this proceeding) and Kelli Blair (the Respondent) were married in January 1994. They had one child Dawna Jillian McGrath who was born on July 22, 1994. She is now 11 years of age.

[3] The parties separated on June 1, 1996. Subsequent to the parties' separation Jillian resided primarily with her mother.

[4] The parties were divorced on January 16, 1998. At the same time a Corollary Relief Judgement was granted incorporating the terms of Minutes of Settlement which were signed by the parties on December 5, 1997. Among other things the Minutes of Settlement provided that Ms. Blair would have "sole custody" of Jillian and that Mr. McGrath would have "reasonable and liberal access upon reasonable notice".

[5] Following their divorce disagreements arose with respect to Mr. McGrath's access which resulted in him filing an application to vary the access provisions of the Corollary Relief Judgement in May of 1999. The parties ultimately agreed on a variation of some of the terms and the Court made a determination on the remaining issues. As a consequence of that application the Order was varied to specify Mr. McGrath's access. The current Order provides that he is to have access every second weekend from Friday at 6:00 p.m. until the following Sunday at 6:00 p.m.. If his weekend with Jillian happens to be a long holiday weekend, his access is extended to include the holiday. He is also to have access every second Thursday overnight to Friday morning and every second Tuesday overnight to Wednesday morning. The Order also contains specific provisions for additional access during holidays and other special events such as Easter, Thanksgiving, Halloween, Jillian's birthday, the birthdays of other relatives, Father's Day, Mother's Day, March Break, Christmas and summer vacations. Mr. McGrath also has telephone access each day.

[6] Since that Variation Order was granted the relationship between the parties improved and they began to communicate better. They have themselves modified the access enjoyed by Mr. McGrath. They have not adhered strictly to the provisions of the Order as it relates to Easter, March Break or Christmas access and Mr. McGrath has enjoyed additional time with his daughter during the week by agreement between the parties.

[7] In the Fall of 1997 Mr. McGrath began a relationship with Stacey Black. They married in October 2001. Since September 2001 they have lived in a five bedroom home in Waverley, Halifax County, approximately 15 minutes by car from Ms. Blair's apartment in Bedford. Mr. McGrath and Ms. Black are expecting their first child in January 2006.

[8] Mr. McGrath also has a 14 year old daughter, Lacie, from a previous relationship. Lacie lives in New Glasgow, Nova Scotia. Mr. McGrath exercises access with Lacie every second weekend and has additional access at Christmas, March Break and during their summer vacations. He has tried to coordinate his access to his daughters so that he has them both on the same weekends. Jillian and Lacie have a good relationship and enjoy each other's company.

[9] At the time of their separation in 1996 the parties and Jillian lived on Tobin Street in Halifax. Ms. Blair and Jillian continued living at that residence until August 1998 when Ms. Blair married her second husband, Ryan Blair. They then moved with Mr. Blair to Willowbend Court in Halifax. In July of 1999 they moved to Oceanview Drive in Bedford where they had built a house. In May 2003 they moved to Kingswood, Hammonds Plains, Halifax County where they had built another home.

[10] Mr. and Ms. Blair separated in December 2003. Ms. Blair continued to live in Kingswood until February 2004 when she moved with Jillian to an apartment in Bedford.

[11] Ms. Blair's moves necessitated Jillian changing schools from time to time. Originally she attended Bedford South School. In grade 4 Jillian attended Rockingham Ridge School as a result of the family's move to Hammonds Plains. In the middle of grade 4 she moved back to the Bedford area after the Blairs' separated but she completed grade 4 at Rockingham Ridge. She returned to Bedford South School for grade 5.

[12] In February 2004 Ms. Blair began a relationship with Mr. C., a co-worker at O'Regan's Chevrolet where she worked at the time. Mr. C. had recently separated from his wife.

[13] In February 2005 Ms. Blair left her employment at O'Regan's and began collecting Employment Insurance benefits. She was also working part-time at a women's clothing store.

[14] By July 2005 Ms. Blair was contemplating co-habiting with Mr. C. and even discussed that possibility with Jillian. On or about August 2, 2005 during what was to be a vacation with Mr. C. and his children, Ms. Blair and Mr. C. ended their relationship after Mr. C. decided to return to his wife. Within a couple of weeks Ms. Blair resigned from her part-time employment and went to stay, temporarily, with her parents in Pictou County. The day after she went to Pictou County Mr. McGrath put Jillian on a bus to New Glasgow to join her mother. From August 19 to August 28 Jillian was in her father's care for a family vacation. At the end of that vacation he returned Jillian to her mother who was still at that time in Pictou County.

[15] On August 28 Ms. Blair advised Mr. McGrath for the first time that she was considering moving permanently to New Glasgow. Mr. McGrath told her that he was against the idea of Jillian moving.

[16] September 7, 2005 was the first day of school. Ms. Blair returned Jillian to school in Bedford. On the same day she sent an e-mail to Mr. McGrath asking him to reconsider his position on Jillian moving to New Glasgow. On September 8 Mr. McGrath responded and indicated he had not changed his mind.

[17] It is obvious from the evidence and in particular an e-mail sent by Ms. Blair to her former mother-in-law (Mr. Blair's mother) on September 6 that she had already decided, at least by September 6, to relocate to New Glasgow. Among other things she stated in that e-mail:

“We are in the midst of moving to New Glasgow, but will send you a new address, as Jillian mentioned it as soon as she started thinking we were moving.”

[18] It is also apparent that Ms. Blair sought employment in the New Glasgow area sometime during the week of August 1.

She states in paragraph 39 of her affidavit:

“That the following week [the week after she first phoned Mr. McGrath on August 29 about the possibility of moving to New Glasgow], I returned to Halifax to start Jillian in school. At this time I had called Highland Ford and asked them to hold the position for me. I was told they could hold the position for another week, until September 19th, 2005. At this point, Highland Ford had already held the position for five weeks, so I was placed in a position of either accepting or rejecting the career opportunity within the week.”

[19] Mr. McGrath had Jillian in his care from Thursday September 15 until Friday morning September 16 when he dropped her off at school. Later that same day he received another e-mail from Ms. Blair in which she told him that she and Jillian were moving to New Glasgow the following day and that she would be starting her new job the following Monday and on the same day Jillian would be attending school at West Pictou Consolidated School.

[20] Ms. Blair and Jillian now reside with Ms. Blair’s parents in Durham, Pictou County, which is a rural area outside of the town of Pictou. Ms. Blair is employed as a marketing agent for a car dealership in the same area (the precise address was not provided) where, she says, she earns the same income and receives the same benefits as she did from her previous employment at O’Regan’s. She says that it is her plan to save money while living with her parents and eventually build her own home.

THIS APPLICATION

[21] Mr. McGrath has applied pursuant to section 17 of the *Divorce Act* to vary the custody and access provisions of the Corollary Relief Judgement. He seeks custody and primary care of Jillian. In paragraph 46 of his affidavit he states:

“...I believe that my having Jillian in my care and allowing her to continue at her regular school and in her regular activities would be the option that would least disrupt Jillian’s life. I am concerned that the Respondent’s latest move is a knee jerk reaction to her failed relationship and that she has not considered the longer term situation

from Jillian's point of view. If the Respondent plans to continue living in Pictou County, I would request that Jillian be in my care primarily and that the Respondent have liberal access, especially during times that Jillian is not in school. I would have no difficulty sharing in the transportation between Halifax and Pictou County and would work around the Respondent's schedule in arranging for her time with Jillian."

[22] Mr. McGrath testified that he would be prepared to withdraw his application if Ms. Blair returned to the Bedford area and agreed to comply with the existing Order.

THE LAW

[23] The applicable legislation is found in section 17 of the *Divorce Act* and in particular s.s. (5) (6) and (9) which read as follows:

(5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

(6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.

...

(9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

[24] The Supreme Court of Canada decision in *Gordon v. Goertz*, [1996] S.C.J. No. 522; 196 N.R. 321 remains the leading case on parental mobility rights. Chief Justice McLachlin stated the applicable law at paragraphs [49] and [50]:

[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 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

[25] I am satisfied that there has been a material change in the circumstances of Ms. Blair and the child. Specifically I refer to their relocation to Pictou County and the resulting impact that has had on Jillian including her change of schools, separation from her community and her reduced contact with her father. It remains then for the Court to determine what custodial arrangement now is in the best interests of Jillian having regard to the existing circumstances.

[26] As stated previously Jillian has been in the primary care of her mother since the parties separated and the existing Order provides that Ms. Blair has "sole custody". While Ms. Blair and Mr. McGrath have different parenting styles Jillian appears to respond well to both of her parents and from their descriptions she is a happy, healthy, well-adjusted and active 11 year old.

[27] Jillian continues to spend the majority of her time in her mother's care and there is no suggestion that her mother is not a capable and loving parent.

[28] Mr. McGrath has, as the existing Order states, reasonable and liberal access to Jillian. He exercises every bit of his specified access and more. Taking into account

not just his weekend and weekday access but also his access during special occasions, it would appear that Mr. McGrath has access to his daughter more than 40% of the days in a given year. The parties have worked cooperatively in the care of Jillian.

[29] Mr. McGrath is in every sense an involved parent. He says, and Ms. Blair does not dispute, that over the past several years he has taken their daughter to the majority of her medical and dental appointments, he is generally the parent who stays home with her when she is sick or during in-service days and storm days (because of the flexibility in his work schedule) and he is involved in her education. At the beginning of each year he meets with her teacher and attends the parent-teacher meetings and helps her with her studies and homework. He volunteers for school events including class trips and Spring Fairs. He takes Jillian to many of her recreational activities. In addition to those times that Jillian is with him he talks to her on the phone daily or they communicate with each other regularly through instant messaging on their computers. Ms. Blair acknowledges that he loves his daughter and Jillian loves him. Had the parties decided to describe their custodial arrangement as a shared custody arrangement, it would not have been an inaccurate description.

[30] In the absence of any other considerations it would be desirable to continue the present care arrangement which, insofar as is practical, maximizes Jillian's time with both of her parents. However, the determination of what is in Jillian's best interests necessitates a consideration of other factors.

[31] Ms. Blair claims that Jillian is in favour of relocating to Pictou County and is happy to be there. Mr. McGrath neither confirms nor denies this but believes that whatever Jillian's views on Pictou County might be, that should not be a deciding factor. Rather, it is his position that the parents should determine what is best for Jillian and he believes that the care arrangements prior to Ms. Blair's relocation better served Jillian's interests. It is his position that the move by Ms. Blair had nothing to do with what is best for Jillian but rather was a reaction by Ms. Blair to her breakup from Mr. C.. There is no independent evidence of Jillian's wishes.

[32] Ms. Blair did not articulate well her reasons for moving to Pictou County. She argues that the move to Pictou County is in Jillian's best interests. I agree with Mr. McGrath that her move to Pictou was not motivated by a desire to do what is best for

Jillian but rather was an impulsive reaction by Ms. Blair to Mr. C.'s decision to return to his wife.

[33] Ms. Blair did say that she has been thinking about returning to Pictou County for some time and had mentioned the possibility to Mr. McGrath on previous occasions. She sees the move as a matter of returning home (although more than once during cross-examination she referred to Bedford as home). Both she and Mr. McGrath are from Pictou County. They were both born and raised there, they were married there and lived there for the first seven months of their marriage. Both continue to have family in Pictou County. In addition to Ms. Blair's parents, her maternal grand-parents live in Pictou County as does her sister and her sister's eight year old daughter. Mr. McGrath's mother and grand-parents live in Pictou County. Mr. McGrath's 14 year old daughter continues to live in New Glasgow with her mother.

[34] Because of their family ties both parties and Jillian have spent many holidays and special occasions in that area of the province and Jillian has a connection with most of her relatives.

[35] Although Ms. Blair's reason for moving to Pictou County had little to do with Jillian's needs, that is not to say that there are not benefits to Jillian remaining there with her mother. Obviously, she will be spending more time with her maternal grand-parents - at least until Ms. Blair moves them to their own home. She will get to spend more time with other relatives. How much more time remains to be seen. Mr. McGrath says that the only time Jillian has seen Lacie since her move has been during his access periods.

[36] Ms. Blair's reasons for moving to Pictou County are not relevant. However, I do find that Ms. Blair has no desire to limit Mr. McGrath's access to Jillian.

[37] Interestingly, although Jillian was very actively involved in various extra-curricular activities in Bedford, it appears that she does not have many close friends nor does she appear to have any community interests that could not be replaced by

activities in Pictou. Ms. Blair points out that since moving in with her parents Jillian plays almost every day with numerous children who live on the same cul-de-sac as her grand-parents.

[38] Ms. Blair has been successful in obtaining employment in Pictou County. Being gainfully employed would presumably benefit her daughter.

[39] If the Court was to grant custody of Jillian to her father (assuming her mother continued to live in Pictou County) that would in my view cause considerable disruption to Jillian. While Mr. McGrath seems well suited to the role of a parent and has an excellent relationship with his daughter, Jillian has, since she was approximately two years of age, lived primarily with her mother. Liberal access by Ms. Blair may help soften the impact of that disruption but it would not eliminate it.

[40] If Mr. McGrath's application is granted, Jillian would of course be residing with him the majority of the time. His home and neighbourhood are familiar to her. It is likely that she will be able to continue with community activities just as she would if she continued to live with her mother in their Bedford apartment. While Mr. McGrath is attempting to ensure that Jillian can continue attending the same school as last year, because his home is in a different school area, it is possible if not likely that Jillian would have to change schools.

[41] Mr. McGrath has not outlined his planned after school care arrangements for Jillian. He does however say that he is the president of his own computer company and although he is generally home by 6:00 p.m. he is also able to work from home periodically and he has the flexibility of arranging his work hours around family responsibilities. His wife, Stacey, is employed by what he describes as a "sister company" to his computer company and works out of Windsor, Nova Scotia. He does not indicate her days or hours of work. She is expecting a child in January and it is not unreasonable to assume that she will be taking some time off work after her child is born.

[42] Mr. McGrath proposes that Ms. Blair have liberal access not unlike the access that she would propose for him if his application is dismissed.

[43] There is no suggestion that Mr. McGrath could not financially support Jillian.

[44] If Mr. McGrath's application is not granted Ms. Blair intends to continue living with her parents at least until she has saved for a down payment on the construction of a new home. She did not say how much she earns and she did not say how long she expects it will take her to save enough money to begin construction. She does, though, have the support of her parents. In her parents' home both she and Jillian have their own bedrooms.

[45] Jillian has already moved from Bedford to Pictou County. There is no evidence that she has been adversely affected by the relocation. The move has necessitated a change of schools (and therefore school mates) but the evidence suggests that she has adapted well. While she is seeing slightly less of her father as a result of the discontinuation of the weekday access, she continues to see him on alternate weekends and I assume that she continues to communicate with him regularly by way of instant messaging. There is no evidence that she has been negatively affected by the change in the amount of time that she spends with her father.

[46] It appears that there are more children for Jillian to play with in the vicinity of her grand-parents' home than was the case at her mother's apartment in Bedford. Her mother has pointed out too that there are many extra-curricular activities available to Jillian in Pictou, not unlike the activities that were available in Bedford. She has already joined the school band.

[47] If Jillian continues to live in Pictou County Mr. McGrath's weekend access and access during special events and holidays would remain more or less unchanged. What will be affected is his weekday access which would not be practical. Mr. McGrath's ability to speak with Jillian on the phone would continue (albeit at a higher cost) as would his ability to communicate with her daily by way of instant

messaging. I believe Mr. McGrath would continue to be an “involved parent”. His interest, concern and love for his daughter would be unchanged.

[48] While it would appear that Ms. Blair’s decision to move to Pictou County was poorly planned and an emotional reaction to personal difficulties, things appear, as she has said, to have “come together” for her.

[49] It is not for the Court to tell Ms. Blair where to live but the Court can vary custody if the Court determines that, considering Ms. Blair’s relocation and all other factors, it would be in Jillian’s best interest to be in the custody of her father. Ms. Blair appreciates this and for that reason has, as a precaution, maintained her apartment in Bedford pending the Court’s decision. I do not interpret that as a sign of indecision on her part but rather a reasonable precaution by a parent who places custody of her daughter in priority to her own happiness. Ms. Blair candidly has stated that if the Court was inclined to grant the application she would return to Bedford.

[50] While one might criticize Ms. Blair for her impulsiveness and lack of planning, and for being less than totally candid with Mr. McGrath, it is understandable why she moved to Pictou County and why the move took place when it did. After her breakup from Mr. C. she realized she had no ties to Bedford other than her daughter (who she would not be leaving behind), a few friends and an ex-husband. In Pictou she has her parents, grandparents, a sister, and other relatives. Jillian too has grandparents from both sides of the family and in nearby New Glasgow, a sister. Ms. Blair viewed Pictou County as a place that would provide her with emotional support. Fortunately, she was able to secure employment almost right away. The community offers Jillian opportunities similar to those found in Bedford in the form of education and recreational activities and it would appear, for her, to offer a better opportunity to socialize with children of similar age.

[51] Before her move Ms. Blair was a good mother who did a good job caring for her daughter. She is no less so because she has relocated less than two hours drive from Mr. McGrath’s home.

[52] While the disruption to Mr. McGrath's access to his daughter is unfortunate he and Jillian continue to be close enough for him to have liberal access.

CONCLUSION

[53] In conclusion, I believe that it is more important that Jillian remain in the primary care of her mother with continued access by her father, albeit slightly less than before their move. I therefore dismiss Mr. McGrath's application to vary custody. By necessity the access provisions of the previous Variation Order will have to be varied once again if nothing else than to delete the regular weekday access. It is my hope that the parties will be able to agree on Mr. McGrath's new access arrangements. The bulk of the parties' argument addressed the issue of custody and therefore if they are unable to agree on the terms of access I would be prepared to hear further argument on that issue. If an agreement on those terms can be reached I ask that counsel for Mr. McGrath prepare the Order.

J.