IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Nickerson v. Chapdelaine, 2007 NSSC 316

Date: 20070920
Docket: 1201-058598
Registry: Halifax

Between:

Angela Nickerson

Applicant

v.

Wayne Thomas Chapdelaine

Respondent

Judge:	The Honourable Justice Leslie Dellapinna
Heard:	September 18 and 19, 2007, in Halifax, Nova Scotia
Written Decision:	October 30, 2007
Counsel:	Jennifer Schofield, counsel for the Applicant Terrance Sheppard, counsel for the Respondent

By the Court:

[1] Ms. Nickerson applied, pursuant to s. 17 of the *Divorce Act,* to vary the custody and child support provisions of the Corollary Relief Judgment herein. Specifically, she is seeking sole custody of the parties' son as opposed to the current joint custody arrangement and a sharing of her child care costs pursuant to s. 7 of the *Child Support Guidelines*. Mr. Chapdelaine responded with an application of his own to vary the custody provisions of the Corollary Relief Judgment. He seeks a shared custody arrangement or, alternatively, more liberal access with their son than is presently the case.

BACKGROUND

[2] The parties were married on June 22, 1996. They have one child, Connor, born March 13, 2000. He is now seven years of age.

[3] The parties separated in November of 2001 and were divorced on June 14, 2004. The Corollary Relief Judgment, also granted on June 14, 2004, was a consent arrangement which, among other things, provided that the parties would share joint custody of Connor with Ms. Nickerson having primary care and control.

The Corollary Relief Judgment provided that she “shall make decisions surrounding his daily care” and that she “shall share decision making with [Mr. Chapdelaine] for the child in the areas of non-emergency medical care, education and religion”. Mr. Chapdelaine was granted reasonable access with Connor on reasonable notice to Ms. Nickerson at times agreed upon by the parties.

[4] The order also provided for child support in the sum of $650.00 per month based on Mr. Chapdelaine’s income at that time of $62,000.00. It was acknowledged that $650.00 was greater than the table amount required by the *Federal Child Support Guidelines* for the Province of Nova Scotia and the order stated that the parties understood that that amount was intended to cover both the table amount as well as a portion of Mr. Chapdelaine’s share of any s. 7 expenses relating to Connor.

[5] In 2006 Ms. Nickerson initiated contempt proceedings stating Mr. Chapdelaine was not providing copies of his tax returns as required by the Corollary Relief Judgment. In July 2006 he was ordered by Justice Gass of this Court to provide his 2004 and 2005 tax returns to Ms. Nickerson and was also ordered to pay costs of $250.00.

[6] In October 2006 the parties agreed to a variation of the child support and custody terms of the Corollary Relief Judgment and a variation order was granted on November 7, 2006. By virtue of that order, the child support was increased to $897.00 per month which was the table amount for Mr. Chapdelaine's income which at that time was $107,542.00 per year. Regarding s. 7 expenses clause 4 of the order stated:

> "Angela Lynn Nickerson (Chapdelaine) shall be responsible for any before and after school child care expenses at this time."

[7] With respect to custody, the order states:

> "6. Both parents shall be involved in making decisions related to a change in child care for Connor. Both parties are at liberty to investigate alternate child care arrangements but no change in the current arrangements will be made until both parties have consulted one another and are in agreement.
>
> 7. Connor will attend St. Margaret's Bay Elementary School for the academic year of 2006/2007. Connor's attendance at St. Margaret's Bay Elementary will be reviewed by the parties after Connor's initial report card is available in November."

[8] Both before the issuance of that order and after, the parties have had a running disagreement over the child care arrangements for Connor. It seems the

disagreement began in the summer of 2006. In May of 2006, Connor was apparently involved in a bullying incident at St. Margaret's Bay Elementary and the parties considered moving him to a different school. That didn't happen but in July of 2006, Ms. Nickerson moved to Boutilier's Point and decided that she needed a new care provider for Connor for when school began because his previous care provider lived outside of Connor's school district. The parties couldn't agree on who that person would be.

[9] It was Ms. Nickerson's evidence, which I believe, that until last year she was the one who had always decided on Connor's care providers and Mr. Nickerson agreed with those choices or, at the very least, acquiesced. Ms. Nickerson learned of an individual who lived in Connor's school district and who cared for children in her home. In keeping with her past practice, she advised Mr. Chapdelaine of the new sitter. In his affidavit he said that Ms. Nickerson did not provide him with an opportunity to discuss the new child care provider and he found her presentation as "very dictatorial." It may be worth noting that in the summer of 2006 the wording of the Corollary Relief Judgment gave Ms. Nickerson the right to choose the child care provider. Nevertheless, Mr. Chapdelaine had his lawyer, Mr. Sheppard, write to the proposed care provider and, in his letter, he stated:

> "If you continue to care for Connor, I have instructions from Mr. Chapdelaine to immediately make application to the Supreme Court of Nova Scotia for an injunction preventing you from caring for Connor and to seek costs against you on a solicitor/client basis."

[10] Not surprisingly, the arrangements with that lady broke down. For reasons that were not explained to me, Ms. Nickerson subsequently agreed to the variation order to which I referred earlier which, as of November 2006, gave Mr. Chapdelaine more say in the child care arrangements.

[11] Since last summer, the parties have had a number of meetings over this issue. They have exchanged e-mails. They have had discussions through their lawyers, including four-party meetings, and settlement conferences held at this Court. Notwithstanding all that time and effort, no final agreement was reached. While Ms. Nickerson eventually secured the services of a care provider there's every reason to believe this sort of disagreement will occur again. Also, as a result of their disagreement over the issue of child care the parties have adopted significantly different positions on the type of parenting arrangement that should be put into place.

LEGISLATION

[12] Section 17 of the ***Divorce Act*** provides as follows:

> 17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses; or
>
> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
>
> . . .
>
> (3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.
>
> (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.
>
> . . .
>
> (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.
>
> . . .
>
> (6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

[13] Section 14 of the *Federal Child Support Guidelines* says the following regarding what constitutes a change of circumstances that may give rise to a variation order:

> 14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
>
> (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;...

ANALYSIS

[14] Ms. Nickerson now seeks an order for "sole" custody presumably so that she does not have to go through again what has transpired over the last year. She also seeks a sharing of the child care costs in addition to the table amount.

[15] Mr. Chapdelaine, on the other hand, wants not only joint custody but also shared custody. His preference would be a week-on, week-off arrangement with Connor.

[16] I am satisfied that there have been changes in circumstances since the granting of the variation order on November 7, 2006. Specifically, the parties have been unable to agree on child care arrangements without incurring significant expense and damaging what used to be a good relationship between the two of them. Clause 6 of the variation order which provides that no change in the child care arrangements for Connor will be made until both parties are in agreement has proven to be unworkable. The animosity and uncertainty that clause has created is a significant change in Connor's circumstances and one that has been to his detriment. There has also been a further change in Mr. Chapdelaine's income. It has increased from approximately $107,500.00 to almost $112,000.00. Also, by

agreement between the parties Connor has been spending Wednesday overnight to Thursday with his father since April.

[17] I will deal with custody and access first.

[18] Joint custody can be an attractive parenting option for divorced parents. It can enable both parties to continue to co-parent their children, to stay involved in the decisions that affect the development of their children, share information relating to their children and stay involved generally in the raising of their children notwithstanding the physical breakup of their family. However, for a true joint custody arrangement to function properly the parties need to respect each other's judgment, even when they do not necessarily agree all of the time. They must respect each other's ability to parent even if they have different parenting styles. They must be able to communicate constructively and respectfully with each other regarding their children, especially when they disagree. Preferably, they should have a means of working through their disagreements while at the same time insulating their children from what are adult decisions.

[19] They must have a system in place that allows for day-to-day parenting decisions to be made much like they would be made or should be made if the family was intact. Their relationship should be such that resorting to the court would be a rarity.

[20] Mutual respect and the ability to compromise and agree are essential for the proper functioning of any true joint custody arrangement.

[21] The joint custody arrangement that the parties presently have is not functioning the way it should. While I appreciate Mr. Chapdelaine's desire to be consulted, he has, in my opinion, abused the power granted to him by the variation order. He was unreasonable in stonewalling Ms. Nickerson's efforts to obtain a child care provider. He acknowledged that it is difficult to find a suitable child care provider who lives somewhere between Ms. Nickerson and himself. Ms. Nickerson came up with at least two possible care givers, both of whom charged reasonable rates and, from what I have read, would appear to have been reasonable choices to provide care for their son. She made reasonable efforts to try to accommodate Mr. Chapdelaine's concerns over additional travel time. He refused to accept her choices essentially based on what he considered to be principle. His position led to

arguments and uncertainty. It is almost incomprehensible to me that he had his lawyer threaten a potential child care provider with legal action. He put his own self interest before the interests of his son.

[22] I'm not blind to the mistakes made by Ms. Nickerson over the past year. She shouldn't have offered Christmas access as an enticement to get Mr. Chapdelaine to agree to her choice of care provider and she shouldn't have scheduled Connor's Tai Kwan Do lessons on Saturday without Mr. Chapdelaine's consent as it affected his access. But for the most part I believe she was focussed on what she thought was best for Connor.

[23] I have concluded that it is in Connor's best interest to revert to a custody arrangement similar to that which is contained in the original Corollary Relief Judgment and, therefore, I order the following:

1) The parties shall continue to share joint custody of Connor;
2) Connor will reside primarily with Ms. Nickerson;
3) Mr. Chapdelaine will have access to Connor as agreed by the parties and as outlined on pages 5 and 6 of Mr. Sheppard's pre-hearing brief;

4) In addition to the foregoing, Mr. Chapdelaine will have access to Connor every second weekend from Friday after school until Monday morning when Mr. Chapdelaine will deliver Connor to his school or to his care giver, whichever is preferred by Ms. Nickerson, and every Wednesday after school until the following Thursday morning when he will deliver Connor to his school or to his care giver, whichever is preferred by Ms. Nickerson;

5) When Connor is with his mother, Ms. Nickerson will make the day-to-day decisions regarding his care and, when he is with his father, Mr. Chapdelaine will make the day-to-day decisions regarding Connor's care;

6) Ms. Nickerson will have the final say in any decision regarding Connor's education (including what school he may attend), child care arrangements, extra-curricular activities and non-emergency medical care, provided however, that she will not make any such decision without first consulting with and seriously considering any suggestions made by Mr. Chapdelaine. Also, she will not schedule any extra-curricular activity for Connor during the time he would normally spend with his father without Mr. Chapdelaine's consent, which consent will not be unreasonably withheld.

7) Both parties will have the ability to provide medical consent for Connor in the event of a medical emergency provided they will – as soon as possible – contact and inform the other party of the nature of the medical emergency and the treatment authorized;

8) Both parties will be entitled to receive information relating to Connor such as school report cards, medical reports, information regarding his recreational activities and the like and will continue to be entitled to attend any functions and meetings relating to Connor that parents are normally entitled to attend such as school related events, medical and dental appointments, recreational activities, concerts and the like;

9) Both parties will share with each other any information they receive regarding or concerning Connor's health, education, recreational activities and the like (including advising each other of any upcoming medical appointments, parent-teacher meetings, sporting activities and so on) and will make reasonable efforts to keep the other informed of matters relating to Connor. In addition, both parties will pass on to the other party, as soon as

reasonably possible, any invitations, notices, report cards and other information which he/she may receive relating to Connor;

10) Both parties will keep the other up to date on any changes to his/her home address, home phone number, work phone number or any other means of contact such as e-mail addresses.

[24] The parties must understand that they both have an important role in the raising of Connor but decisions have to be made. Endless negotiation leads to inaction and inaction is usually not in their son's best interest. Mutual consultation is. Should either abuse the privileges afforded by this order, they will do so at the risk of losing those privileges in the future.

[25] I considered Mr. Chapdelaine's request for shared custody but I find the evidence does not support the conclusion that shared custody at this time would be in Connor's best interests. Ms. Nickerson offers a stable environment for Connor - one that he is used to. Also, there are too many new developments going on in Mr. Chapdelaine's life and it would not be in Connor's best interest to parachute him in the middle of that right now.

[26] With respect to child support, I find that Mr. Chapdelaine's income, for the purposes of determining the table amount, is $111,427.33 based on his 2006 tax return. His line 150 income was $111,939.33 (exclusive of deregistered RRSPs) from which I have deducted $512.00 paid for union dues. For the purposes of s. 7, I find Ms. Nickerson's income to be $50,413.44 being her employment income plus the Child Tax Benefit and GST credit, both of which I've grossed up.

[27] Based on these figures, I order Mr. Chapdelaine to pay to Ms. Nickerson for the support of Connor the table amount in a sum of $926.00 per month commencing October 1, 2007, and continuing on the first day of each month thereafter until otherwise ordered. In addition, I see no reason why Mr. Chapdelaine should not share the cost of Connor's child care expenses. It is an expense necessitated by Ms. Nickerson's employment and the cost incurred by Ms. Nickerson is reasonable in the circumstances of the parties. Such expenses shall be shared by Ms. Nickerson paying 31% of the total cost and Mr. Chapdelaine paying 69% of the cost. The sharing of that expense will also commence as of October 1, 2007, for the month of October and will continue each month thereafter unless otherwise ordered.

[28] The order will contain the usual provisions that the child support will be paid to Ms. Nickerson through the office of the Director of Maintenance Enforcement. The order will also contain a provision that both parties will exchange copies of their tax returns and Notices of Assessment or Reassessment, as the case may be, by June 1 of each year commencing with their tax returns for the year 2007 which information shall be exchanged no later than June 1, 2008.

[29] With respect to costs, family law isn't that much different from any other litigation in that the successful party is generally entitled to costs. There are a number of considerations that help determine the amount. Although Ms. Nickerson wasn't entirely successful with her application, at least to the extent that she wasn't granted sole custody, in relative terms she was, in my view, the more successful of the two parties and I have concluded she is entitled to costs. Considered the time involved, the amount of preparation that went into these applications and also the incomes of the parties, I order Mr. Chapdelaine to pay costs to Ms. Nickerson in the sum of $1,750.00 inclusive of disbursements and he will have until the 31st of October, 2007 to pay.

J.