SUPREME COURT OF NOVA SCOTIA
Citation: *Jones v. Cavanaugh*, 2015 NSSC 139

Date: 2015-05-07
Docket: Tru No. 1201-66032
Registry: Truro

Between:

Leah May Jones

Applicant

v.

Marc Corey Cavanaugh

Respondent

Judge:	The Honourable Justice Peter Rosinski
Heard:	March 11, April 28 and April 30, 2015, in Truro, Nova Scotia
Oral Decision:	April 30, 2015
Counsel:	Damian Penny, for the Applicant Thomas Kayter, for the Respondent

By the Court:

INTRODUCTION

[1] Ms. Jones and Mr. Cavanaugh were married July 17, 1999. They were favoured with the birth of a child, Liam Derrick Cavanaugh on August 29, 2004. He is presently 10 ½ years old.

[2] The parties were divorced in 2013. The Corollary Relief Judgment of April 4, 2013 provided that:

> Leah May Jones and Marc Corey Cavanagh shall have joint custody of the child, and the child's primary care and residence shall be with Mark Corey Cavanaugh.

[3] On July 24, 2013 Ms. Jones filed a notice of application in chambers, seeking a variation pursuant to s.17 of the *Divorce Act*. She sought to have changed the custody and access for Liam. On August 12, 2013 Mr. Cavanaugh filed a Notice of Contest.

[4] Unfortunately this matter was not heard until March 11, 2015, with adjourned dates on April 28th and, today, April, 30th 2015.

THE LEGAL CONSIDERATIONS

[5] The court must decide whether:

1. There has been a material change in circumstances as envisaged by the Supreme Court of Canada decision *Gordon v. Goertz* [1996] 2 SCR 27; and also referred to in *Zinck v. Fraser* 2006 NSCA 14.

2. If there has been such a change, what adjustments if any should be made to the existing custody/access order contained in the Corollary Relief Judgment?

1 – Has there been a material change in circumstances?

[6] Firstly then, has there been a material change in circumstances? The following principles, in my words, emerge from the *Gordon* case [also summarized by the court at paragraph 49]:

> i-the material change in question must be a change that has altered the child's needs or the ability of the parents to meet those needs in a fundamental way [i.e. a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child];
>
> ii-the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order [i.e. which was either not foreseen or could not have been reasonably contemplated by the judge that made the initial order];

For example, in paragraph 21 of *Gordon* the Court summarizes it as: "the material change places the original order in question."

iii- Once the threshold condition of material change is satisfied, the court should consider the matter afresh without defaulting to the existing arrangement. The earlier conclusion that the custodial parent was the best person to have custody is no longer determinative, since the existence of the material change presupposes that the terms of the earlier order might have been different had the change been known at the time. The judge on the variation application must consider the findings of fact made by the first judge as well as the evidence of changed circumstances to decide what custody arrangement now accords with the best interests of the child.

Thus, the Court, in that circumstance must turn again to Section 17(5) of the *Divorce Act:* 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.

There is therefore no presumption in favour of the custodial parent. However: The views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability.

(iv) s. 17(9) of the *Divorce Act* reads:

- 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.

v-past conduct of the parents shall only be considered insofar as it is relevant to his or her ability to act as parent of the child.

vi-a judge should particularly consider:

a-the existing custody arrangement and relationship between the child and the custodial parent;

b-the existing access arrangement and the relationship between the child and the access parent;

> c-the desirability of maximizing contact between the child and both parents;
>
> d-the views of the child;
>
> e- the anticipated disruption to the child of a change in custody;
>
> f-the anticipated disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

[7] As the court said in *Gordon* at paragraph 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?

[8] Regarding whether there has been a material change in circumstances affecting Liam, I look to the condition, means, needs or other circumstances of Liam occurring since the making of the custody order.

[9] Having said that, although the Corollary Relief Judgment was signed April 4, 2013, the trial determining those issues was held in May, 2012 and an oral decision given by Justice Williams June 14, 2012. Thus, the point of reference is May – June 2012.

[10] At the time of the Corollary Relief Judgment:

(i) Mr. Cavanaugh and Liam lived at Mr. Cavanaugh's parents' home [from approximately January 2012 to June 2014 – in Lower Onslow]. Thereafter,

they lived for approximately five months in an uncompleted prefabricated house at Loranda Avenue, Onslow, until it became uninhabitable, then moved to an apartment on Curtis Drive in Truro for approximately one month; and have since lived at 963 Brookside Road "Valley". That bungalow is approximately 12 kms. from Mr. Cavanaugh's parents' home, and minutes from downtown Truro. There, Liam shares his residence with his father, his father's partner Angela Noseworthy, and her 16-year-old daughter Rachel. Ms. Noseworthy has been seeing and living with, I believe, Mr. Cavanaugh since 2013, for our purposes.

(ii) Liam attended French immersion at Bell Park Academic Centre in HRM [until he transferred to Truro Elementary School, for repetition of Grade 2, although still in French Immersion, starting in September 2012] after he had failed Grade 2 in the school year September 2011 – June 2012 in HRM;

(iii) Ms. Jones has lived in HRM from approximately June 2011 to present. She had a brief relationship with Lee Eastman, but that was no longer the case at the time of the trial in May 2012. After several months of having met, in December 2012, she moved into the residence of Darren MacDonald [DOB November 22, 1969] who is presently renting a house on Shore Road in Bedford. The four-bedroom house also has as its residents, Mr. MacDonald's children –

Jade, a19-year-old university student; and Fyfe , a16-year old. There are also a number of pets: dogs and cats, etc., present in the household.

(iv) Before the trial in 2012, Mr. Cavanaugh quit his job at SOS Family, a program in, I believe, HRM. Mr. Cavanaugh's work history has been sporadic in some respects since then, recently working at Leon's and most recently, since May 23, 2014 at Metro-Works, which is a program involving his employment from 9-5, Monday to Friday, [in cycles of] six weeks of classroom and eight weeks of placement for the perspective employees, and one week preparation for the next group. The latter weeks he would work [the eight weeks and one week] at the Musquodoboit or Halifax, HRM office.

(v) In May/June 2012 Ms. Jones was working part-time doing bookkeeping and childcare services according to Justice Williams' decision – she is presently a full-time student at Mount St. Vincent University pursuing a Bachelor of Education. She is doing so over a period of six years, and is in the process of completing the third year [which suggests she started in September 2012]. She has no employment at present. In 2012 the court was aware that Ms. Jones had epilepsy, and that, in part as a result of motor vehicle collisions, she had residual medical issues associated therewith, which persist.

(vi) According to Justice Williams' 2012 decision, he was satisfied that during early 2011, Liam was at risk while in Ms. Jones care, and that she was nevertheless, an intelligent and highly sympathetic individual. According to a April 24, 2012 memorandum by Justice Williams, "a custody and access assessment report has been received from Cindy Pedvis…. Ms. Pedvis has requested that she have access to a Department of Community Services file. Arrangements have been made for that to be done [an order for production of same was signed by Justice Williams May 4, 2012]."

[11] Ms. Pedvis' report was the basis for the existing Corollary Relief Judgment provisions as to custody and access. It was premised on the fact that neither parent was prepared to relocate, Ms. Jones from HRM or Mr. Cavanaugh from Truro area, and effectively, she concluded that at that time Mr. Cavanaugh should have primary custody.

[12] There is no doubt in my mind that there has been a material change in circumstances in this case.

[13] At the time of Justice Williams' decision, he noted that Ms. Jones faced challenges in caring for herself, which at times had compromised her ability to care for Liam. He noted that at the time she faced these challenges with far less support

than Mr. Cavanaugh. Ms. Jones was living in a two-bedroom apartment, sharing it with a Ms. Adams at the time. Ms. Jones was having difficulty managing her medications.

[14] Ms. Jones' circumstances and ability to parent Liam have materially changed. There is no evidence that the level of challenges facing her in caring for herself at that time remain. The evidence is that she has much greater support through friends and family at present, and she has been in a stable relationship with Mr. MacDonald since December 2012, and living in a single-family dwelling on Shore Road in Bedford. She is in the process of completing her third year of studies towards a Bachelor of Education. Ms. Jones also is now a stepparent to Mr. MacDonald's children, Jade and Fyfe, and has the benefit of their contact and affection for Liam.

[15] I have very little evidence of Liam's condition, means, needs or circumstances in the May – June 2012 period; although I do have Dr. Wournell's report of February 21, 2014, which had a retrospective aspect to it, and as well, I have some report cards from the year 2012-2013 in one of the affidavits and, of course a more recent Term 2, 2015 report card was referenced.

[16] I also have the benefit of the psycho-educational report, Exhibit No. 1 which canvases Liam's academic performance between September 2011 – June 2014. I note he had to repeat Grade 2. He was at school in HRM that year in French Immersion, but notionally in the primary custody of Mr. Cavanaugh, while living in Truro with Mr. Cavanaugh's parents. Thus, Liam has changed schools and residences, which may, however, have been in contemplation of Justice Williams in June 2012.

[17] Mr. Cavanaugh's circumstances and ability to parent Liam have also materially changed. In 2012, he was not employed as he left his employment with Family SOS in Halifax. His Notice of Assessment for 2012 shows only $3,556.00 in income. I do note that in 2013, it was closer to $25,000, and he is now more fully employed at present than he was then.

[18] He has been in a stable relationship with Ms. Noseworthy for the last two years. Mr. Cavanaugh is also now a stepparent to Ms. Noseworthy's daughter Rachel. He also has had, I infer, the benefit of their contact and affection for Liam.

[19] Having found a material change in circumstances I will next consider what changes, if any, should be made to the existing custody – access order contained in the Corollary Relief Judgment.

2. What adjustments, if any, should be made to the existing Custody/Access Order?

[20] Ms. Jones' position is that in effect, Mr. Cavanaugh's behaviour has had such a detrimental effect on Liam that having her as the custodial parent would be in the best interests of Liam. She cites her more stable present circumstances as contrasted with Mr. Cavanaugh's unwillingness to honour the spirit and letter of the existing custody and access order.

[21] Her counsel notes that the fact that Liam has been in Mr. Cavanaugh's primary custody and care since, at least, 2012, in some respects this gives Mr. Cavanaugh the benefit of arguing the status quo ought not to be disrupted; but that also means correspondingly, that if Liam has any demonstrable material problems, then Mr. Cavanaugh is primarily responsible for either creating them, or not alleviating them - for example, Liam's dental situation, his school performance, his mental health, and arguable obesity.

[22] It is true that Ms. Jones' circumstances have dramatically and positively changed since May – June 2012. Her ability to parent Liam is now certainly comparable with that of Mr. Cavanaugh.

[23] If Ms. Jones and Mr. Cavanaugh lived in the same vicinity, arguably they could have shared parenting custody. However, the difficulty remains that due to

their residences being in HRM and Truro, there really can only be one parent who has "primary" custody of Liam.

[24] In essence, the Court must weigh what is in the best interests of Liam insofar as his condition, means, needs or circumstances are concerned. The ability of each parent to meet those needs is also relevant.

[25] At present, the evidence suggests that Liam has had a struggle in his adjustment to the Truro area. He has had some struggles in school: which may be attributable to his continuation in French Immersion until he began instruction in English albeit only recently in Grade 4; and, the reality of the new location, in which he moved from his grandparent's house, to a pre-fabricated home for five months, to an apartment for one month, and then to his present location at 963 Brookside Road in Valley, Nova Scotia.

[26] Certainly the protracted litigation herein will also have affected his school performance and general mood. He has been variously referred to as "anxious" and in need of counselling. The evidence suggests that this is disproportionately as a result of the continued conflict between his parents, and the uncertainty of the outcome of this application which could alter his place of residence, the school he attends, and who his friends might be.

[27] He does have an issue in relation to his excess weight. This will be an ongoing issue for him, as he appears to have a genetic predisposition thereto, though by no means needed to be so if his physical activity, caloric intake and, food choices are carefully managed.

[28] While Mr. Cavanaugh bears significant responsibility for putting such measures in place, to date they have not nearly been as successful as they could be, in my view. Nevertheless, this is not a material issue that would favour changing primary custody to Ms. Jones.

[29] Ultimately, before the court would change primary custody to Ms. Jones it would need to be satisfied that doing so is clearly in the best interests of Liam. Liam's situation in Truro with Mr. Cavanaugh has not been demonstrated to be so contrary to Liam's best interest that the proposed primary custody with Ms. Jones becomes correspondingly in his best interests.

[30] The Court would want to have seen expert evidence and/or a more detailed plan in evidence of why custody with Ms. Jones would be in his best interests and custody with Mr. Cavanaugh would be contrary to his best interests.

[31] I recognize that both Ms. Jones and Mr. Cavanaugh will no doubt have, since the filing of this application in July 2013, been vigilant about how they

conducted themselves and were cognizant about how their situations would be considered by the court at the ultimate hearing of the application.

[32] The protracted litigation herein has no doubt contributed to the tension that would have already existed between the two of them and their supporters. Moreover, that tension could not help but spill over onto and affect Liam's mood and behaviours.

[33] In general, I found Ms. Jones to be credible in her testimony. She admitted mistakes when she made them, and accepted that there was some room for criticism of her conduct as well. I conclude that she is intelligent and well-intentioned vis-à-vis Liam's best interests, but that she is understandably concerned that she is not getting her fair share of parenting time with Liam.

[34] I also sense that she may have an unhealthy level of hypervigilance regarding Liam's situation. For example, her criticism of Mr. Cavanaugh not informing her about Liam's taking taxi cabs twice a week from school is fair. Her concern for his safety in that situation, from my vantage point, having heard the evidence, is not sufficient to conclude that there is a real danger.

[35] Similarly, she understandably perhaps, given the overconsumption of food issues she and Mr. Cavanaugh have faced, is concerned about Liam's overall

weight. That is an issue both she and Mr. Cavanaugh will have to address with Liam in a delicate, but effective way.

[36] I found Mr. Darren MacDonald credible in his evidence. As he put it, Ms. Jones and Mr. Cavanaugh will come into conflict the more so there is vagueness or grey area in the custody/access order.

[37] I also heard from Ms. Audrey Cavanaugh and Ms. Angela Noseworthy. While I find them both credible in relation to the testimony they gave, there was not much doubt that they were here in order to support Mr. Cavanaugh's position.

[38] I did have some real difficulty with Mr. Cavanaugh's credibility. I got the sense that he was continually advancing his position when asked simple questions. He would always contextualize them to present his most favourable position, although he did admit he was not without faults himself in the parental relationship.

[39] He did, for example, frequently refer that any problems that Liam had were attributable to the litigation, which otherwise was attributable to Ms. Jones.

[40] I did find it troubling, as was evident, his testimony that: "I never received a copy of this before Court"; which was a reference to the psycho-educational report of June 2014. But being aware of it, which he said he was, he made no effort to

obtain that report regarding Liam. He somehow insisted that by asking Ms. Jones for it, that that was sufficient. The reality is, he didn't receive the report until it came in her affidavit in September 2014 and though, arguably, not all that legible at that time, he didn't ask for a clear copy to review until much closer to the March 11, 2015 hearing date.

[41] He insisted that Ms. Jones was involving Liam in adult issues, and he did not, which seems not credible. For example, he testified that "Liam told me that his mother says I had stolen all her money." Why would he even allow such a revelation to be made, and just not cut it off?

[42] I am satisfied that based on all the evidence, affidavit and otherwise that I have heard, that both parents to some extent have directly or indirectly allowed Liam to become aware of the contents of the litigation, and that has had a detrimental effect on him.

[43] There is no doubt it would be difficult to keep the reality of the litigation from him. I recognize that particular aspect.

[44] I was also troubled insofar as Mr. Cavanaugh was concerned by the fact that there was a sentence missing from the email in the December 10, 2014 email as

revealed in Exhibits 20 and 13 herein. Perhaps it was inadvertent, but it is troubling that it was not caught by Mr. Cavanaugh earlier than today.

[45] Mr. Cavanaugh also testified that he did not have "a voice in the process" when they met with Mr. McCrossin, yet paragraphs 16 and 18 of Exhibit 20 suggest otherwise. I won't dwell on further examples, but those are some which caused me to have some concern.

Conclusion

[46] In spite of my concerns about Mr. Cavanaugh's credibility, I still remain satisfied however, that I have a generally valid picture of Liam's situation in Truro. It appears to be a relatively stable situation now which had some bumps on the road in 2012-2014.

[47] Liam is starting to put roots down in Truro. They are tentative, but they will likely flourish soon. I believe Liam needs stability and there is no obvious demonstrated downside to his remaining in Truro with Mr. Cavanaugh.

[48] Although there has been a material change in the circumstances of the parties affecting Liam's needs, they are not such that the Court should order custody be changed from Mr. Cavanaugh to Ms. Jones.

[49] However, the Court believes it is appropriate to revisit the precise provisions of the Corollary Relief Judgment.

Rosinski, J.