SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *McIntosh v. St. Georges*, 2015 NSSC 114

Date: 20150520
Docket: No. SFHMCA-069961
Registry: Halifax

Between:

Patrick Leo McIntosh

Applicant

v.

Jessica Monique St. Georges

Respondent

Judge:	The Honourable Justice C. LouAnn Chiasson
Heard:	April 8, 2015, in Halifax, Nova Scotia
Counsel:	Tammy Wohler for the Applicant Jessica Chapman for the Respondent

By the Court:

[1] This matter is before the court for a determination of the appropriate access arrangement relating to the child, Noah, now seven (7) years of age. The parties were involved in a common law relationship from approximately 2007 to 2009. The Applicant is the biological father of Noah. The Applicant filed a variation application on October 29, 2014, requesting this court vary the terms of access as found in the Order issued on November 28, 2011 (hereinafter referred to as the "Order"). The Order was issued following a settlement conference between the parties, and provided, in part, the following:

> "1. Jessica Monique St. Georges-Stanley and Patrick Leo McIntosh shall share joint custody of the child Noah Patrick Denis McIntosh, born March 22nd, 2008, with primary residence being with Jessica St. Georges-Stanley.
>
> 2. Jessica St. George-Stanley shall have the day to day responsibility of parenting Noah McIntosh.
>
> 3. Patrick McIntosh shall enjoy reasonable access, at reasonable times and upon reasonable notice to Jessica St. Georges- Stanley."

[2] The Order also included provisions which permitted the Applicant to travel to New Brunswick for the purpose of visiting family members (including the Applicant's three daughters living in New Brunswick). The Order also provided that the Respondent would consult with the Applicant concerning all major health, educational and developmental matters involving Noah. The Applicant and the Respondent were to have equal sharing of holidays and summer vacations. Further, the Order provided that:

> "…the ultimate goal at the time of the making of this order is to increase Patrick McIntosh's access time with Noah McIntosh, over what it has been in 2011 to date."

[3] The Applicant has made the present application to vary the Order to include a specified access schedule as between himself and Noah. The Respondent requests that the current ad hoc arrangement of supervised access continue. The Order provided for a review in 12 months time as requested by either party as Noah was commencing school in September, 2013, and in light of the desire to

increase the Applicant's access time. The review was not initiated by either party as contemplated by the Order but rather, the Applicant proceeded to request a variation of his access based upon section 37 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c.160, (as amended).

ISSUE:

[4] What is the appropriate access arrangement as between the Applicant and Noah?

LAW & DISCUSSION

[5] The application was made pursuant to section 37 of the Maintenance and Custody Act, *supra*, which provides:

> **37 (1)** The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.

[6] In order for the court to consider a variation of the access arrangement as set out in the Order issued November 28, 2011, the court must be satisfied that the circumstances have changed to such an extent as to warrant a variation. The onus in relation to proving a change in circumstances is on the Applicant. The test related to a change in circumstances is laid out in the case of S. (C.M.) v. K. (T.W.), 2013 NSSC 294 (NSSC). The Honourable Justice Jollimore reviewed the requirement of a change in circumstances at paragraphs 6-9 of the decision:

> "6 This requirement of a change in circumstances is more fully explained in the Supreme Court of Canada's decision in Gordon v. Goertz [1996 CarswellSask 199 (S.C.C.)], 1996 CanLII 191. At paragraph 10 of the majority reasons in Gordon v. Goertz, 1996 CanLII 191 (S.C.C.), then-Justice McLachlin wrote that before I can consider the merits of a variation application, I must be satisfied there has been a change in circumstances that has occurred since the last parenting order was made.
>
> 7 At paragraph 13, Justice McLachlin was more specific in identifying the three requirements that must be satisfied before I can consider an application to vary a parenting order. They are:

> 1. there must be a change in the children's condition, means, needs or circumstances or the ability of the parents to meet the children's needs;
>
> 2. the change must materially affect the children; and
>
> 3. the change was either not foreseen or could not have been reasonably contemplated by the judge who made the order that's sought to be varied.
>
> 8 All parenting applications, including variation applications, are determined on the basis of the children's best interests. Initially proving that there has been a material change establishes that the current order is no longer in the children's best interests. Proving a material change has happened does more than show that the current order is no longer best for the children; it also highlights what the new circumstances are, so that the new order can reflect the children's best interests in the new circumstances.
>
> 9 The first step in my analysis is to determine if there's been a change in circumstances of the sort described in paragraph 7. If there has not, then I cannot change the current order. If there has been a change in circumstances, then I may change the current order and the changes I make to it must reflect the children's best interests in the changed circumstances."

[7] In the present case, the Applicant alleges that the following changes have occurred since the issuance of the last order:

1) The Respondent has refused to allow unsupervised visitation to occur between the Applicant and Noah since December, 2014.
2) The Respondent has decreased his contact with Noah by telephone and in person.
3) The Respondent has appointed her mother, Cheryle Gaston, as the supervisor of the visitation occurring from December 2014 to the present time.
4) The access time between the Applicant and Noah is typically a supervised visit two hours once per week.
5) The Applicant has relocated back to Nova Scotia (from Newfoundland).
6) The Applicant has not had equal sharing of holidays and summer vacations with Noah.

[8] The Respondent alleges that the following changes have occurred since the issuance of the last order:

1) The Applicant did not exercise parenting time with Noah for an extended period of time prior to October 2014.
2) The Applicant's access with Noah was sporadic from the time of the granting of the Order up until December 2014.
3) The Applicant was charged with "driving under the influence" in October 2013.

[9] The parties do not agree on the reasons behind the changes in access as noted above, but both parties clearly acknowledge that the access which was to be liberal and open pursuant to the Order of 2011, has been modified into the current supervised access regime. The change in circumstance sufficient to warrant a variation to the liberal and open access as set out in the Order has been established by the evidence.

[10] In particular, the Respondent conceded that she would not allow the Applicant to have unsupervised access with Noah (and continues to be unwilling to allow unsupervised access). The evidence established that there has been consistent supervised access between the Applicant and Noah between December 2014 and the time of the court application. This factor, in and of itself, is sufficient to warrant a variation of the current unspecified access regime set out in the Order.

[11] Once a change in circumstances has been established, the court is then tasked with determining the appropriate access arrangement. The Applicant is seeking a specified access schedule which is unsupervised. The Respondent is seeking a continuation of the supervised visitation schedule currently in place. It should be noted that the supervision in this matter was not court imposed but was an informal arrangement made as between the parties. The Applicant asserts that he agreed to the supervision in order to be able to see Noah and does not acknowledge the necessity for a supervision order. The Respondent asserts that the supervision of access was necessary as a result of the concerns related to the Applicant's parenting and concerns related to Noah himself (i.e. anxiety, behavioural concerns).

[12] The burden is on the Respondent to prove that supervision of the parenting time of the Applicant is warranted. The Respondent must prove that this restriction on the Applicant's access is in the child's best interest (reference *Abdo* v. *Abdo* [1993] NSJ No. 445 (N.S.C.A.).

[13] The Nova Scotia Court of Appeal set out the factors to be considered by the court in determining whether supervision is warranted in the case of *Slawter* v. *Bellefontaine*, 2012 NSCA 48 (NSCA). The court cited with approval the case of *Lewis v.* Lewis, 2005 N.S.S.C. 256 (N.S.S.C) at paragraph 47 of the decision which provided in part:

> "… Supervised access is appropriate in specific situations, some of which include the following:
>
> (a) Where the child requires protection from physical, sexual or emotional abuse;
>
> (b) Where the child is being introduced or reintroduced into the life of a parent after a significant absence;
>
> (c) Where there are substance abuse issues; or
>
> (d) Where there are clinical issues involving the access parent."

[14] The Respondent submits that supervision of the visitation between the Applicant and Noah is warranted in this case premised upon the factors noted in (a), (b) and (c) above. Each of these factors and the evidence pertaining thereto will be reviewed.

(a) *Protection from physical, sexual or emotional abuse*- There was no evidence whatsoever led by the Respondent in relation to physical or sexual abuse. In relation to emotional abuse, the Respondent proferred the following evidence:

a. The Applicant has used profanity and inappropriate language in front of Noah. The Applicant acknowledges that he has used profanity in front of Noah (i.e. use of the word "shit", "buggar") but disputes that those terms were used disparagingly about Noah. His evidence was that any such references were made in jest. The evidence presented in relation to this concern was that profane and/or inappropriate language was used in Noah's presence on a handful of occasions. Were the test to be the use of inappropriate language in front of Noah, the court would be inundated with requests for supervision in innumerable cases before the court. The magnitude and the language used by the Applicant is insufficient to lead to a finding of "emotional abuse" as noted in the Slawter case. The concern related to "immature behavior" on the part of the Applicant, even if the evidence were to be accepted by the court, would be insufficient to consider that this amounts to "emotional abuse" of the child.

b. It is difficult to decipher from the materials filed on behalf of the Respondent as to any other factors which would lead one to consider that Noah requires protection from emotional abuse. Perhaps the Respondent feels that the Applicant has had inappropriate conversations with Noah but, on cross examination, Cheryle Gaston conceded that the visits were never interrupted or ended as a result of any inappropriate behavior on the part of the Applicant.

(b) *The child is being introduced or reintroduced into the life of a parent after a significant absence*- Noah had a relationship with the Applicant prior to the parties' separation. He knew who is father was. The parties both acknowledge a period where there was limited contact between the Applicant and Noah. The Applicant asserts that this limitation resulted from demands made by the Respondent. The Respondent asserts that this limitation was self imposed by the Applicant's actions. The reasons behind the limitation of contact in the past need not be determined in an examination of this factor. The fact remains that contact was limited, contact was re-established over five months ago and has been consistent thereafter. Noah is well aware of the fact that the Applicant is his father and, as noted by the Respondent's mother, enjoys his visits with his father.

(c) *Substance abuse issues*- The evidence in relation to this factor relates to the admission by the Applicant of a criminal charge of "driving while under the influence of alcohol" in October 2013. There is no other evidence proferred in relation to the consumption of alcohol by the Applicant. The evidence of Ms. Gaston, the Respondent's mother, was that she had no indication of the Applicant having consumed alcohol prior to the visits nor of being under the influence of alcohol during any of the visits with Noah.

Evidence was led by the Respondent in relation to issues of alcohol consumption prior to the Order of 2011. This evidence was not considered for three reasons: (1) the evidence pre-dated the last order of the court (2) the consumption of alcohol by the Applicant was not a factor for the Respondent in 2011 as there is no prohibition related to alcohol, there is open and liberal access for the Applicant (including a sharing of holidays and special occasions) and (3) there is nothing in the Order of 2011 to indicate any such concern including the agreement between the Applicant

and Respondent that they would have a joint custodial parenting arrangement.

In addressing the concern expressed by the Respondent, the Applicant voluntarily agreed to a prohibition of the consumption of alcohol while he is in a child caring role for Noah. This voluntary agreement on the part of the Applicant addresses the concern noted by the Respondent given the scant evidence led by the Respondent in relation to alcohol consumption by the Applicant since 2011.

[15] The Court of Appeal in the case of *Slawter v. Bellefontaine*, *supra*, noted at paragraph 44:

> 44 There is ample authority that an order for supervised access is seldom seen as an indefinite order or long term solution (Jennings v. Garrett, [2004] O.J. No. 2238 (Ont. S.C.J.); E. (K.M.) v. Z. (D.M.), [1996] B.C.J. No. 464 (B.C. S.C.).

[16] The court is also mindful of the principles enunciated in the case of M. (C.) v. S. (C.) 2013 NSSC 273 (NSSC). The court in M. (C.), supra, cited with approval the case of *Lewis* v. *Lewis* 2005 NSSC 256 (N.S.S.C.) at paragraph 23 of the decision:

> [23] Supervised access is an exceptional remedy. A child is entitled to share in the daily life of his/her parents unless such is not in the child's best interests to do so. Access is the right of the child and not the right of the parent

[17] Justice Jollimore in M.(C.) set out the applicable legal principles in examining the issue of supervised visitation, at paragraph 73:

> "The following legal principles are distilled from *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.); *Abdo v. Abdo* (1993), 126 N.S.R. (2d) 1 (N.S. C.A.); and *Bellefontaine v. Slawter*, 2012 NSCA 48 (N.S. C.A.)
>
> • The right of the child to know and be exposed to the influence of each parent is subordinate in principle to the child's best interests.
>
> • The burden of proof lies with the party who alleges that access should be denied or restricted, although proof of harm need not be shown.
>
> • The court must be slow to extinguish or restrict access, unless the evidence dictates that it is in the best interests of the child to do so.

> • An order for supervised access is seldom seen as an indefinite or long term solution."

[18] The case of N. (R.R.) v. M. (L.M.) 2014 NSSC 396 (NSSC) also involved the issue of supervision. One of the factors in that case involved the re-introduction of a parent after a period of absence. At paragraph 77, the court held:

> "At paragraphs 87 to 90 in *S. (L.E.) v. S. (M.J.)*, 2014 NSSC 34 (N.S. S.C.), I described various types of parenting supervision. If supervision was appropriate in this case, it would be to ensure visits are comfortable for E as she resumes her relationship with her father."

[19] It may have been appropriate that the Applicant in the present case be re-introduced to Noah gradually. There was a significant period without access, and viewing the situation through the child's prism, there should be a period of re-introduction. This has taken place. The visits over the past four months have been supervised. Noah is well aware of who is father is and the evidence indicates that the visits have been enjoyed by Noah. It is time that the visitation increase and that it move to unsupervised. The Respondent has not discharged the burden on her of proving that continued supervision of the Applicant's parenting time is in Noah's best interest.

[20] In making that determination, the court is then tasked with the appropriate parenting time for the Applicant with Noah. At the commencement of the hearing, the Applicant provided an update to his current employment status. He indicated that he will probably be able to secure work "out west" within the next two weeks. If he secures that work, his shift will be nine (9) days on and five (5) days off. On the five days off, the first and last days will be necessary as travel days.

[21] Should the Applicant secure employment "out west", he shall inform the Respondent within 24 hours of securing employment. His access schedule, should this occur, would be as follows:

> On his five days off, the Applicant shall be entitled to have Noah in his care for days 2, 3 and 4 as follows:
>
> a. For the first return to Nova Scotia, the Applicant shall have Noah on days 2, 3 and 4 from 3 pm to 7 pm if it is a weekday and from 11 am to 3 pm if it is a weekend day;

b. On the second return trip to Nova Scotia, the Applicant shall have Noah on days 2, 3 and 4 from 3 pm to 7 pm if it is a weekday and from 12 pm to 6 pm if it is a weekend day;
c. On the third return trip to Nova Scotia, the Applicant shall have Noah on days 2, 3 and 4 from 3 pm to 7 pm if it is a weekday and from 10 am to 6 pm if it is a weekend day;
d. On the fourth return trip to Nova Scotia, the Applicant shall have Noah on days 2, 3 and 4 from 3 pm to 7 pm if the day falls on Monday- Thursday. Should one of the days fall on a Friday or a Saturday, Noah shall be in the Applicant's care from 6 pm to noon the following day.
e. On the fifth return trip, Noah shall be in the Applicant's care for days 2, 3 and 4 and shall include overnight visitation. The pick up shall be 6 pm on school day and noon on a non-school day. The drop off shall be to school on day 4 (should it be a school day) or at 6 pm on a non-school day.

[22] Should the Applicant not secure employment "out west" and he remains residing in Nova Scotia, his access schedule shall be as follows:

a. Every Tuesday (or another weekday as agreed in writing between the parties) between 3 pm and 7 pm;
b. Every second weekend as follows:
    i) On the first weekend of access, the Applicant shall have Noah in his care Saturday and Sunday from 11 am to 3 pm
    ii) On the second weekend of access, the Applicant shall have Noah in his care Saturday and Sunday from 10 am to 6 pm
    iii) On the third weekend of access from Saturday at 2pm to Sunday at 2 pm
    iv) On the fourth weekend of access from Saturday at 10 am to Sunday at 6 pm
    v) On the fifth weekend of access from Friday at 6 pm to Sunday at noon
    vi) On the sixth weekend and every second weekend thereafter from Friday at 6 pm to Sunday at 6 pm

[23] The parties shall share holidays and summer vacations as set out in the Order of 2011 unless the parties agree to do otherwise and such agreement shall be in writing. The parties shall exchange proposals for the sharing of these holiday

periods a minimum of 45 days in advance of the upcoming holiday. Both parties shall use their best efforts to accommodate reasonable proposals for the sharing of these special occasions and summer holidays.

[24] The Applicant shall not consume alcohol during periods where he has care of Noah (as consented to by the Applicant at the time of the hearing). Both parties shall be mindful of Noah's best interests at all times, including any medical concerns of Noah (i.e. allergies). Both parties shall actively participate in any counselling for Noah to the extent requested by the third party care provider to ensure that Noah receives the best possible care. Both parties shall communicate so as to ensure consistency and stability for Noah in all aspects of Noah's life.

CUSTODY

[25] The issue of custody was not directly pleaded but rather the application was made in relation to "access/ mobility" (reference Notice of Variation Application dated October 30, 2014). The reference to mobility was included by the applicant as a result of the indication by the Respondent that she was relocating outside of the jurisdiction with Noah. The Respondent admitted that she advised the Applicant that she was taking Noah and leaving the jurisdiction, but indicated that she lied out of anger as a result of the Applicant's commencement of the current application.

[26] This type of action is troubling in two respects: (1) the parties have an existing court order providing both parties with joint custody, and (2) the Respondent threatened the Applicant with unilateral removal of the child simply as a result of his request to have the court determine the appropriate access arrangement as between himself and Noah.

[27] At the very heart of joint custody is the responsibility of the parties to consult and agree on major developmental decisions. It would be difficult to envision that relocating with a child was not a major developmental decision that necessitated both parties being involved in making the decision. A further decision unilaterally made by the Respondent that caused some concern for the court was the Respondent's decision to reach an agreement with her former spouse (not the Applicant) that he would have 50/50 shared parenting time with Noah. This agreement between the Respondent and her former spouse was done without notice and/ or consultation with the Applicant. She has set up an arrangement whereby

Noah has contact with her former partner 50% of the time on a week on/ week off schedule, but only has one supervised visit per week with his father, the Applicant.

[28] Joint custody is not to be taken lightly. The Respondent is not empowered to act unilaterally in making decisions related to Noah without notification and consultation with the Applicant. The Applicant, on the other hand, must be aware that to maintain joint custody means that he bears the responsibilities that flow from that arrangement. He must be present, engaged and actively involved in his son's life. He must offer stability and consistency not only in terms of his visitation with Noah, but also in his overall participation and involvement in Noah's life (including matters of education, health, religion, moral and social upbringing, etc.).

[29] The Applicant is directed to take an active and direct approach to his involvement with Noah. Inconsistency and instability on the part of the Applicant with respect to the schedule as set forth herein and with respect to the performance of his duties and responsibilities as a joint custodial parent may put these matters in issue again in the future. It is hoped, however, that the parties may move forward in a communicative and constructive way for the sake of Noah. He should have the opportunity to learn from and build a relationship with both of his parents.

Chiasson, J.