SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Vaculik v. Vaculik*, 2015 NSSC 202

Date: 20150714
Docket: *Halifax* No. 1201-066730
Registry: Halifax

Between:

Holly Michelle Vaculik

Applicant

v.

Michael James Vaculik

Respondent

Judge:	The Honourable Justice Mona M. Lynch
Heard:	June 23, 2015, in Halifax, Nova Scotia
Counsel:	Christine Doucet for the Applicant Judith Schoen for the Respondent

By the Court:

Background:

[1] The parties were married in 2005 and have a son who was born in 2009. The parties separated in 2012 and were divorced in 2014.

[2] The father lives in Arkansas and the mother in Nova Scotia with the child.

[3] The Corollary Relief Order (CRO) of August 12, 2014 was as a result of a multi-day trial. The CRO provided that the mother had sole custody of the child and the father had specified parenting time in the United States including four weeks in the summer, every March Break, every U.S. Thanksgiving and every second Christmas. The four weeks of summer parenting were to be exercised in two blocks of approximately two weeks.

[4] The CRO placed conditions on the father's parenting time including requiring proof of a valid driver's license and insurance, sixty days' notice of flights, keeping the mother informed of the child's whereabouts when in the father's care and details of any caregivers for the child. The CRO also provided for Skype calls twice a week, telephone calls twice a week and scheduling through the website "Our Family Wizard".

[5] There was to be no direct communication between the parties except in writing through "Our Family Wizard". The father was not to call, text or email the mother except in case of an emergency involving the child or to facilitate contact between the mother and child while the child was in the father's care.

[6] The CRO also provided for child support and spousal support to be paid by the father. The father is not currently paying child or spousal support and is more than $35,000.00 in arrears. The father failed to pay the costs' award from the divorce proceeding.

[7] The first scheduled parenting time for the father after the CRO was issued was in August 2014. Things did not go well. The child's U.S. passport had expired and the child was going to travel on his Canadian passport. The father did not agree with this and sent endless abusive emails to the mother. The child had been prescribed cream by a doctor and the father would not listen to the instructions. The father, in the child's presence, started taking things out of the child's suitcase at the airport and throwing them on the floor while cursing at the mother. This all occurred before the child left.

[8] A few days prior to the scheduled date for the child to return to Nova Scotia, the father threatened not to return the child unless he was provided with the child's

U.S. passport. The mother obtained an *ex parte* order from the Supreme Court of Nova Scotia allowing the mother to take the child into her care in Arkansas. She also retained a lawyer in Arkansas to register the order in Arkansas. The father did return with the child on the scheduled flight.

[9] There were difficulties scheduling Skype and phone sessions between the mother and child while the child was in the father's care. The father did not provide information about other caregivers for the child while the child was in Arkansas.

[10] Despite the CRO provision on communication, the father continued to communicate directly with the mother and not through "Our Family Wizard". His communications were, at times, threatening, abusive and misogynistic.

[11] On September 29, 2014 the mother applied to vary the order regarding parenting for the father to only permit access to the child in Nova Scotia and an order that all communications go through counsel for the mother.

[12] The matter was before the court on December 22, 2014. On December 18, 2014 the father filed a motion for contempt alleging that the mother was not following the CRO. The father also requested that the child travel to Arkansas for Christmas 2014 as provided for in the CRO.

[13] The motion for contempt was not heard as it was not in the proper form. The court denied the request for the visit in Arkansas for Christmas 2014 and set the application to vary over to April 7, 2015 for a hearing with filing directions.

[14] On April 7, 2015 the father had obtained new counsel and requested an adjournment, which was granted. The matter was heard on June 23, 2015. The father did not appear on that date but his affidavit, filed June 18, 2015, was accepted. The father made himself available for cross-examination by telephone. The father indicated that he could neither afford to appear in person or by video conference.

[15] At the end of the hearing on June 23, 2015 the court gave a brief oral decision with written reasons to follow.

Issues:

1. Has there been a material change in circumstances since the making of the CRO in August 2014?
2. If so, what parenting schedule is in the best interests of the child?
3. Costs?

Positions of the Parties:

[16] The mother seeks a variation of the parenting arrangement for the child which would restrict the father's parenting time to visits in Nova Scotia and she also seeks a restriction on communication by the father directly with her. She asks that the Skype and telephone calls between the father and the child be at her discretion.

[17] The father is seeking that the order remain unchanged except for a change to allow him to have the child for eight consecutive weeks in the summer. He is also asking that the Skype sessions be at least ten minutes in length.

Analysis:

1. Has there been a material change in circumstances since the making of the CRO in August 2014?

[18] The mother made an application to vary pursuant to s. 17(1)(b) of the *Divorce Act,* R.S., 1985, c. 3. Section 17(5) reads:

> (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.

[19] Before the order can be varied the applicant mother must show that there has been a material change in circumstances since the making of the last order regarding parenting. In **Gordon v. Goertz**, [1996] 2 S.C.R. 27, at paragraph 13 regarding a change in circumstances it says:

> It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) 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; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

More recently in **LMP v. LS,** 2011 SCC 64 the Court said at paragraph 44:

> In sum, it bears repeating that the threshold question under s. 17, whether or not there is an agreement, is the one Sopinka J. described in *Willick*, namely:
>
> > In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation. [p. 688]

[20] While the CRO was made less than one year ago, I have no hesitation finding that there has been a material change in circumstances. The father's threat to not return the child in August of 2014 is a material change in circumstances. At the time of the decision in July 2014, it was hoped that the completion of the court proceedings would result in a decrease in hostility from the father to the mother.

That did not occur. The mother has been subjected to hostile, vile and demeaning communications from the father on a constant basis. This only subsided somewhat when the father retained his new counsel in April 2015. The father's actions and communications have been witnessed and overheard by the child. The father has repeatedly and consistently ignored the CRO in relation to restrictions on communication with the mother. I accept the mother's evidence that the father has spoken directly to the child as to what he thinks about the mother and her parenting. There is a material change that affects the needs of the child which was not foreseen at the time of the CRO.

2. If so, what parenting schedule is in the best interests of the child?

[21] I must then look to the best interests of the child as determined by reference to that change.

[22] The onus is on the mother to show that restrictions on the father's access and the restrictions on communications are in the best interests of the child. Restrictions on access, compromising access or denial of access are not easily done and are only ordered where required by the best interests of a child or children.

[23] In **M. T. v. M. G.**, 2010 NSSC 89 at paragraph 16 Justice Forgeron said:

> In **Abdo v. Abdo**, 1993, 126 N.S.R. (2d) 1 (C.A.), the Nova Scotia Court of Appeal reviewed three legal points relevant to the supervision issue. The three points are as follows:
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> a) The right of a child to know and to be exposed to the influence of each parent is subordinate in principle to the best interests of the child.
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> b) The burden of proof lies with the parent who alleges that access should be supervised or denied, although proof of harm need not be shown in keeping with the decision of **Young v. Young**, 1993, 84 B.C.L.R. (2d) 1 (S.C.C.).
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> c) The court must be slow to compromise or extinguish access, unless the evidence dictates that it is in the best interests of the child to do so.

In **Doncaster v. Field**, 2014 NSCA 39 at paragraph 54 the court said:

> In *Young v. Young*, [1993] 4 S.C.R. 3, the Supreme Court of Canada considered what the "best interests of the child" test in s. 16(8) of the *Divorce Act* requires. McLachlin, J. (as she then was) wrote at pp.116-118:
>
> > Parliament has adopted the "best interests of the child" test as the basis upon which custody and access disputes are to be resolved. Three aspects of the way Parliament has done this merit comment.
> >
> > First, the "best interests of the child" test is the <u>only</u> test. The express wording of s. 16(8) of the *Divorce Act* requires the court to look <u>only</u> at the best interests of the child in making orders of custody and access. This means that parental preferences and "rights" play no role.
> >
> > Second, the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has been left to the judge to decide what is in the "best interests of the child", by reference to the "condition, means, needs and other circumstances" of the child. Nevertheless, the judicial task is not one of pure discretion. By embodying the "best interests" test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all legal tests, it is to be applied according to the evidence in the case viewed objectively. There is no room for the judge's

> personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do.
>
> Third, s. 16(10) provides that in making an order, the court shall give effect "to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child." This is significant. It stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider. By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase "as is consistent with the best interests of the child" means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the bests interests of the child, it may be restricted. But only to that extent. …
>
> ...
>
> I would summarize the effect of the provisions of the *Divorce Act* on matters of access as follows. The ultimate test in all cases is the best interests of the child. This is a positive test, encompassing a wide variety of factors. One of the factors which the judge seeking to determine what is in the best interests of the child must have regard to is the desirability of maximizing contact between the child and each parent. But in the final analysis, decisions on access must reflect what is in the best interests of the child. [McLachlin, J.'s underlining]

And at paragraph 65:

> Certainly, the risk of harm is one of the factors to be considered in deciding custody and access. However, it is not determinative. In *Young*, McLachlin, J. (as she then was) stated at p. 120:
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> > … The judge must consider all factors relevant to determining what is in the child's best interests; a factor which must be considered in all cases is Parliament's view that contact with each parent is to be maximized to the extent that this is compatible with the best interests of the child. The risk of harm to the child, while not the ultimate legal test, may also be a factor to be considered. This is particularly so where the issue is the quality of access — what the access parent may say or do with the child. In such cases, it will generally be relevant to consider whether the

> conduct in question poses a risk of harm to the child which outweighs the benefits of a free and open relationship which permits the child to know the access parent as he or she is. It goes without saying that, as for any other legal test, the judge, in determining what is in the best interests of the child, must act not on his or her personal views, but on the evidence. [Emphasis added]

[24] In this case, the father's behaviour and total disregard for the mother or the current order of the court justify a reduction in his parenting time. On the first parenting time in the U.S. after the order, the father threatened not to return the child until the child was given a U.S. passport. The father failed to see that his actions had caused the child's U.S. passport to expire. The mother asked the father to sign the passport application and the father refused. After the order which gave the mother sole custody, the father's consent was not needed but there was little time to get the passport before the trip. The father used abusive language to suggest that the mother was a bad parent for letting the passport expire, again not seeing that his actions, not the mother's, led to that situation.

[25] The father did not follow the court order with regard to contact between the child and the mother while the child was in his care. The father did not follow the court order with regard to providing details of anyone caring for the child while in his care.

[26] The mother had to appear in court in Nova Scotia and Arkansas to ensure the child was returned, due to the father's threats. The mother, quite reasonably, applied to vary the court order and was not agreeable to the child visiting with the father at Christmas 2014.

[27] The father blames the mother for what he perceives as her "alienating" behaviour. He does not see that it is his own actions, not the mother's, that resulted in restrictions on his access and will result in further restrictions. His abusive and vile communications, threats to not return the child and actions in the child's presence have led to the mother's application to vary.

[28] The father's vile, misogynistic and abusive emails, texts and phone calls to the mother defy logic. Despite a court order to only communicate through "Our Family Wizard", the father chose to let his subscription to the service expire and continued with his barrage of communications with the mother. His justification was that the mother was not putting up photographs on the website, although the CRO did not require the mother to do so. He complained that he was not given medical information but the CRO provides that he has access to medical information on his own and not through the mother. When the mother tried to explain the cream prescribed for the child prior to the visit in August 2014, the father refused to listen and then complained about the cream, again suggesting that

the child's reaction to the cream was due to the mother's poor parenting. He called her both at her home and her office. He used a rerouting service to have his number appear to be a Nova Scotia number. He says he had to use the rerouting service because the mother blocked his number, failing to see that his vile messages were the reason his number was blocked. He blamed the mother because the child heard the angry, abusive voice messages he left on the answering machine, again taking no responsibility for leaving the messages. All of his actions he justified by his view that the mother was harming his relationship with the child. It is his own actions, not the mother's, which are harming his relationship with the child.

[29] The father's text messages, emails and other communications were relentless. Examples of emails include: Your a shity person that's why you don't have anyone in your life that cares for you no guy will even date you because you're a low life living with mommy and daddy and you look like you 40"(sic), August 20, 2014. Yea good question why can't you let me have a good conversation with my son You don't like getting treated the same way you treat me do you ???, August 20, 2014. "Flights are postponed till I get Matthews us passport Please follow the rules and laws", August 26, 2014. "So which is it you stupid bitch thurs or fri or are you smart enough to figure that out", August 29,

2014. "Your a loser and stupid bitch", (sic) September 12, 2014. Examples of Text messages: "Keep ur oversized horse mouth shut when I. Talk to Matthew you stupid slut bitch tel your mom I said for her to fuck off", August 31, 2014. "Your a piece of shit not even with your son not at work your not even a mother just a slut whore" (sic), September 4, 2014. You stupid cunt your not at work or with him you're a shity mother and always will be" (sic), September 4, 2014.

[30] No one should have to put up with the messages that the father has sent to the mother. He demeans her, he demeans her parents and he threatens to turn the child against her with his "paper trail". He threatens action by child protection, the police and the courts. He suggests that the mother's lawyer is also a "terrible mother". He leaves mocking voice mail messages.

[31] I accept the mother's evidence that the father also says negative things about the mother and her parents during telephone calls and Skype sessions. She has overheard the father tell the child that the mother is a "loser", a "deadbeat" and a "shitty mother". He asked the child to tell the mother how terrible a mother she is and the child refused and became very upset and hung up the phone. The child hugged the mother for an extended period of time. The father tells the child that the mother and her parents are keeping him from the father. The father threatens to call the police on the mother. He questions the child and belittles the child's

activities. All of these things are emotionally damaging to the child. The father places the child directly in the centre of the conflict.

The father did not send the child a Christmas gift, a Christmas card, a birthday gift or a birthday card. The father's actions in the airport last August in throwing things from the child's suitcase on the floor in front of the child and in the middle of a public space shows no regard for the child's feelings. The father has repeatedly violated the CRO by contacting the mother rather than communicating through "Our Family Wizard".

[32] In **Jennings v. Garrett**, 2004 CarswellOnt 2159, Blishen J. says at paragraph 135:

> In considering these cases and others, the factors most commonly considered by the courts in terminating access are the following:
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> > 1. Long term harassment and harmful behaviours towards the custodial parent causing that parent and the child stress and or fear. See *M. (B.P.) v. M. (B.L.D.E.), supra; Stewart v. Bachan*, [2003] O.J. No. 433 (Ont. C.J.); *Studley v. O'Laughlin*, [2000] N.S.J. No. 210 (N.S. Fam. Ct.); *Dixon v. Hinsley*, [2001] O.J. No. 3707 (Ont. C.J.).
> >
> > 2. History of violence; unpredictable, uncontrollable behaviour; alcohol, drug abuse which has been witnessed by the child and/or presents a risk to the child's safety and well being. See *Jafari v. Dadar, supra; Maxwell v. Maxwell*, [1986] N.B.J. No. 769 (N.B. Q.B.); *Abdo v. Abdo* (1993), 126 N.S.R. (2d) 1 (N.S. C.A.); *Studley v. O'Laughlin, supra*.
> >
> > 3. Extreme parental alienation which has resulted in changes of custody and, at times, no access orders to the former custodial parent. See *Tremblay v. Tremblay* (1987), 10 R.F.L. (3d) 166 (Alta. Q.B.); *Reeves v. Reeves*, [2001] O.J. No. 308 (Ont. S.C.J.).

> 4. Ongoing severe denigration of the other parent. See *Frost v. Allen*, [1995] M.J. No. 111 (Man. Q.B.); *Gorgichuk v. Gorgichuk, supra*.
>
> 5. Lack of relationship or attachment between noncustodial parent and child. See *Studley v. O'Laughlin, supra; M. (B.P.) v. M. (B.L.D.E.), supra*.
>
> 6. Neglect or abuse to a child on the access visits. See *Maxwell v. Maxwell, supra*.
>
> 7. Older children's wishes and preferences to terminate access. See *Gorgichuk v. Gorgichuk, supra; Frost v. Allen, supra; Dixon v. Hinsley, supra; Pavao v. Pavao*, [2000] O.J. No. 1010 (Ont. C.J.).

The father has engaged in "long term harassment and harmful behaviours" towards the mother causing the mother and the child stress and or fear. His behaviour has been "unpredictable and uncontrollable" and was witnessed by the child. He has engaged in ongoing "severe denigration of the other parent".

[33] The mother has not requested a denial of access but the father should be aware that if his behaviour continues he runs that risk.

[34] The conflict and hostility displayed by the father to the mother has not subsided after the original court proceeding was completed in the summer of 2014. The mother has tried to promote and facilitate contact between the child and the father but her efforts have been met with hostility, threats and abuse. Her reluctance to continue the current schedule is perfectly understandable both for herself and for the child.

[35] The maximum contact principle in section 16(10) of the **Divorce Act** must give way in this case to the best interests of the child. There is a significant risk that the child will suffer emotional harm from the father's behaviour. It is in the child's best interest to reduce access and contact with the father.

Disposition:

[36] The Corollary Relief Order dated August12, 2014 is hereby varied to replace paragraphs 4 and 5 with the following:

> The Respondent is entitled to two non-consecutive weeks of parenting time with the child each calendar year, to be exercised within the Province of Nova Scotia. Such parenting time shall occur during the child's March Break in odd-numbered years and/or during summer vacation from school or such other time as agreed upon by the Applicant. Summer access is subject to the Applicant's consent based on prior plans that she has made with the child. Such consent shall not be unreasonably withheld.
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> The Respondent shall provide the Applicant with no less than 60 days' notice of such request for parenting time.

The Respondent shall keep the Applicant informed of the child's whereabouts while he is in the care of the Respondent, including the address and phone number of any hotels or other accommodations where he is staying with the child. The Respondent shall also provide the names and phone numbers of anyone who will be staying with him and the child and/or caring for the child during the Respondent's parenting time.

The Respondent shall have valid automobile insurance and a valid driver's license in place each time he exercises parenting time with the child. No more than seven (7) days prior to his parenting time with the child, the Respondent shall provide the Applicant's counsel with updated proof of car insurance and driver's license effective during the dates of the parenting time.

The Respondent shall ensure that the child uses a certified car seat or booster seat while in a vehicle and other life-saving devices such as a life jacket when swimming or boating.

Paragraphs 6 to 10 of the Corollary Relief Order will be replaced with:

The Applicant shall not be required to facilitate Skype and/or telephone contact between the Respondent and the child but may do so at her

discretion. The Respondent shall not initiate any contact with the child through email, text message, video link, Our Family Wizard, Skype, telephone or any manner whatsoever.

When the child is in the care of the Respondent, the Respondent shall facilitate communication between the child and the Applicant by telephone, Skype or other face to face means each day at 9:00 a.m. Nova Scotia time.

The Respondent shall not contact or attempt to contact the Applicant by email, text message, video link, Our Family Wizard, Skype, telephone or any manner whatsoever. Any communication shall be through the Applicant's counsel of record, MDW Law of Halifax, Nova Scotia. Neither party shall be required to use the Our Family Wizard website.

Costs:

[37] The mother requests an order for costs. There is no doubt that she is the successful party to this application. In **Armoyan v. Armoyan**, 2013 NSCA 136, Fichaud, J.A. reviewed the award of costs in family matters and reiterates that the recovery of costs should represent a substantial contribution which is more than fifty percent and less than one hundred percent of a lawyer's reasonable bill (para 16). He contrasts the use of the Tariff under the Rules with a lump sum award and

finds: the use of the tariffs delivers the benefit of predictability by limiting the use of subjective discretion (para 17); some cases bear no resemblance to the tariffs' assumptions (para 18); and when subjectivity exceeds a critical level the tariff may be more distracting than useful and the judge should channel his/her discretion to the principled calculation of a lump sum (para 18).

[38] This case bears no resemblance to the tariffs' assumptions as it is about parenting and there is no monetary amount. Parenting is a complex matter. *Civil Procedure Rule* 77 provides me with the discretion to make any order that I am satisfied will do justice between the parties.

[39] The mother's legal fees for the variation application total $11,137.74. The mother also incurred fees for the *ex parte* motion for the return of the child in August 2014 and the registration of the order in Arkansas of $7,000.00.

[40] This matter was necessary due to the behaviour and actions of the father after a multi-day trial which ended in the summer of 2014. The father's behaviours, including threatening to not return the child, necessitated an *ex parte* application to the Nova Scotia Supreme Court and registration of the order in Arkansas. The continued abusive behaviour made it necessary for the mother to seek to vary the parenting provisions of the CRO. The father requested and was

granted an adjournment of the hearing scheduled for April 7, 2014. The father did not inform the court or the mother until several days before the June 23, 2015 hearing that he would not be attending the hearing. His affidavit was filed late. The father has not paid the child support, spousal support or previous costs award.

[41] In all of the circumstances, I find it is appropriate to award a lump sum of $10,000.00 in costs.

Lynch, J.