

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: LaCroix v. Densmore, 2015 NSSC 299

Date: 2015 - 10 - 23

Docket: SFH-MCA 061972

Registry: Halifax

Between:

Francois LaCroix

Applicant

v.

Margaret Densmore

Respondent

Judge:

The Honourable Justice Elizabeth Jollimore

Heard:

September 15 – 18, 2015

Counsel:

Vanessa L. Jass on behalf of Francois LaCroix
Margaret Densmore on her own behalf

By the Court:**Introduction**

[1] Mr. LaCroix and Ms. Densmore are the parents of eight-year-old Logan. Mr. LaCroix has applied for joint custody of Logan and for an order relating to his parenting time with Logan and outlining his child maintenance obligation. Mr. LaCroix's application is pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160.

Parenting

[2] There are two issues with regard to Logan's parenting: first, the nature of the custodial relationship between Mr. LaCroix and Ms. Densmore; and second, the time Logan should spend with his father.

Custody

[3] Mr. LaCroix wants joint custody. He wants to be an active participant in making decisions about Logan. He acknowledges that his relationship with Ms. Densmore is troubled, but says that when required, they have been able to make decisions together. In support of this, Mr. LaCroix points to the decision to remove Logan from French immersion and the decision to have Logan take part in a psycho-educational assessment.

[4] Ms. Densmore wants sole custody. She disagrees that she and Mr. LaCroix have made decisions consensually. From her perspective, as the primary parent, she has been responsible for initiating all major decisions. She says that Mr. LaCroix has not been actively involved in making decisions, that he has not taken the lead in decisions to be made and he has merely followed her lead, as was the case in removing Logan from French immersion. Ms. Densmore is concerned that Mr. LaCroix has not made decisions promptly. She points to the fact that she has been seeking a psycho-educational assessment for Logan for some time and asking for Mr. LaCroix's financial support of this assessment, which she believed could be funded through Mr. LaCroix's health insurance. She says that Mr. LaCroix refused to agree to the assessment until Logan reached a point where he was eligible to be assessed at the expense of the school board.

[5] In addition to these educational decisions, there may be health decisions required for Logan. When Mr. LaCroix raised concerns about the number of times that Logan is late for school or misses school in the morning, Ms. Densmore explained that she schedules appointments for Logan in the morning. I was not told the nature or number of these appointments: I am speculating that they are appointments for visits to the doctor or dentist, rather than appointments for haircuts, and Logan may have some health need. I am aware that he has had dietary problems in the past.

[6] In *Rivers*, 1994 CanLII 4318 (NS SC) at paragraphs 50 to 53, Justice Stewart identified a series of questions to be considered in determining whether joint custody is in a child's best interests. Her decision was in the context of a corollary relief proceeding under the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, but I believe that the same considerations are relevant to a

determination under the *Maintenance and Custody Act*. I've re-stated Justice Stewart's questions below.

- (a) Has each parent maintained a meaningful relationship with Logan?
- (b) Does each parent have parenting capabilities that are adequate to meet Logan's needs?
- (c) Will the parents be able to make decisions together about Logan?
- (d) Are the parents able to co-parent despite any conflict between them, isolating their feelings about each other from their relationship as parents, and Logan's needs?
- (e) Will Logan be involved in conflict between the adults?
- (f) Will a joint custody arrangement cause disruption and discontinuity to Logan's developmental needs?

[7] Each parent has maintained a meaningful relationship with Logan. In fact, Ms. Densmore identifies Logan's desire to spend more time with his father.

[8] Ms. Densmore is concerned that Logan, who eats a vegan diet at her home, chooses to eat meat on occasion when he is with his father. She is also concerned about Logan's sensitivity to dairy products. Ms. Densmore was earlier ordered to provide Mr. LaCroix with information from a doctor about Logan's dietary sensitivities which show he has no allergies. I'm satisfied from the evidence that Mr. LaCroix appreciates these aspects of Logan's diet. Logan is not forced to eat meat his father's home, but if Logan expresses a desire to taste something that others are eating, he is not prohibited from doing so. This can cause him some physical upset. One of Logan's half-brothers is also sensitive to dairy products and Mr. LaCroix and his wife are diligent about buying and serving non-dairy products to the boys.

[9] Mr. LaCroix does not suggest that Ms. Densmore is incapable of meeting Logan's needs.

[10] I find that each parent has the ability to meet Logan's needs.

[11] Both Mr. LaCroix and Ms. Densmore were able to describe a time when Logan was an infant and toddler, when they were able to co-parent. Mr. LaCroix visited with Logan at Ms. Densmore's home, for example. Unfortunately, over the past number of years, Mr. LaCroix and Ms. Densmore's relationship has deteriorated. An initially positive relationship between Ms. Densmore and Mr. LaCroix's wife has also soured. Ms. Densmore experiences real anguish over the conflict in her relationship with Mr. LaCroix. For his part, Mr. LaCroix has retreated and engages with Ms. Densmore only minimally in an attempt to reduce their conflict however his lack of engagement frustrates Ms. Densmore and creates more conflict.

[12] In making decisions about Logan, I accept Ms. Densmore's characterization of how significant decisions have been made in the past. She has taken the lead in decision-making and Mr. LaCroix has been a less-than-equal partner. Mr. LaCroix's work for the Department of National Defence means he can be away from home for periods of time with the result that he is not always as informed as Ms. Densmore is about Logan's circumstances. As well, the

relationship between Mr. LaCroix and Ms. Densmore does not invite Mr. LaCroix to contact Ms. Densmore for information. Their contact is tense or unpleasant and Mr. LaCroix has tried to avoid this.

[13] In the past, the parents have exposed Logan to their conflict. Most notably, this occurred when Ms. Densmore sought reimbursement for a health expense. Logan was present while Ms. Densmore loudly accused Mr. LaCroix of calling her a thief.

[14] I find the parents are not able to co-parent and I conclude that joint custody is not possible in these circumstances. To ensure that Mr. LaCroix does play a meaningful part in Logan's life, I order that he and Ms. Densmore shall each be entitled to obtain any and all information affecting Logan's health, education, religion and welfare as if he or she was Logan's sole custodian. This shall include the right to obtain all information from treating professionals and the right to authorize medical treatment when required in emergency circumstances. Non-emergency health decisions shall be made by Ms. Densmore.

[15] Ms. Densmore must provide Mr. LaCroix with the name and address of every professional treating Logan. This must be provided in writing, including the full name, address and contact information for the treating professional. Initially, this information must be provided to Mr. LaCroix within seventy-two hours of my decision. Thereafter, Ms. Densmore shall confirm the information is unchanged (if that is the case) on January 30 and July 30 of each year, starting on January 30, 2016. If there are any changes, Ms. Densmore must inform Mr. LaCroix of the change, providing the full name, address and contact information for the treating professional within seventy-two hours of the change occurring.

[16] If Ms. Densmore makes any changes to Logan's class or school, she must inform Mr. LaCroix of this within seventy-two hours of the change being made. Again, the requirement is to provide the full name, address and contact information for anyone who has information with regard to Logan, such as his school and those involved in any extra-curricular activities. Similarly, if Mr. LaCroix involved Logan in organized activities, he must provide this information to Ms. Densmore.

Parenting time

[17] Mr. LaCroix wants regular parenting time with Logan every second weekend starting after school on Friday and continuing until Logan returns to school the following Monday morning. Mr. LaCroix proposes that his time with Logan be suspended while he is at sea.

[18] Ms. Densmore says that this schedule does not provide frequent enough access between Logan and his father. She wants access to occur during the evening for a few hours on weeknights, in addition to time on the weekends.

[19] Mr. LaCroix makes specific proposals for time with Logan at Christmas, during the March break, during the summer, over the Easter weekend and on Mother's Day and Father's Day.

[20] The statutory context for this application is section 18 of the *Maintenance and Custody Act*. According to subsection 18(5), my paramount consideration in determining Logan's parenting time is Logan's best interest.

[21] In determining Logan's best interest, I am required to consider those factors outlined in subsection 18(6) of the *Maintenance and Custody Act*. This means considering his physical, emotional, social and educational needs, including his need for stability and safety, his age and stage of development. I am also to consider each parent's willingness to support the development and maintenance of Logan's relationship with the other parent, and the history of his care. I am to consider the plans each parent offers and Logan's cultural, linguistic, religious and spiritual upbringing and heritage. I am to consider the nature, strength and stability of the relationship between Logan and each of his parents, his grandparents and other significant individuals in his life. I am to consider each parent's ability to communicate and cooperate on issues affecting Logan.

[22] The evidence particularly highlights Logan's educational needs, the history of his care, his cultural and linguistic background, and the relationships he has with other significant individuals in his life. As noted above, the evidence also highlights the conflict between Logan's parents.

[23] Ms. Densmore has a sporadic employment history. Her education was interrupted by her pregnancy and Logan's birth. She has provided Logan's primary home throughout his life which, at times, has been her parents' home. In addition to hearing from Ms. Densmore, I heard testimony from her mother. Ms. Densmore's family has a genuine love and concern for Logan.

[24] Mr. LaCroix has married. He and his wife have two sons, Logan's younger half-brothers. Logan's stepmother is a teacher. Logan's father is Francophone.

[25] The home that Ms. Densmore offers Logan and the home that Mr. LaCroix offers Logan are quite different, however they are identical in the love and support they offer Logan. Logan is a fortunate boy.

[26] It's expected that Logan will soon complete the psycho-educational assessment. While Ms. Densmore believes Logan may have particular educational needs, Mr. LaCroix believes that the difficulties Logan has experienced at school stem from his tardiness or absenteeism. It seems that Logan's greatest difficulties are in the class he most frequently misses at the start of the day when he attends scheduled appointments.

[27] Whatever is the basis of Logan's difficulties at school, the more stable his schedule is, the better it will be for his education.

[28] The brief mid-week visits that Ms. Densmore suggests don't provide Mr. LaCroix with much opportunity to assist Logan with his school work and they may disrupt Logan's bedtime routine.

[29] Mr. LaCroix said that the mid-week visits proposed by Ms. Densmore would typically require the parents to communicate with each other and this creates the opportunity for conflict between them. As well, they would require Ms. Densmore's home to be one of Logan's transfer points at the end of access visits. While Mr. LaCroix would like time with Logan, he says it will engender more conflict and, for that reason, he disagrees with having mid-week evening contact.

[30] I accept Mr. LaCroix's position. Having seen the parties interact and reviewed their written communications, I am satisfied that conflict between them is almost unavoidable. For

example, when Mr. LaCroix returned from sea duty in May 2015, he sent Ms. Densmore a brief and polite email suggesting when he could spend time with Logan. Ms. Densmore describes herself as “honest” and says that she cannot be silent when someone says something that isn’t true. For example, Ms. Densmore was upset that Mr. LaCroix didn’t seek an immediate visit with Logan and that he wanted only a weekend, though he had been at sea for months. She responded to Mr. LaCroix’s email with a lengthy email in which she called him obscene names, resurrected historic conflicts and failed to confirm any access with Logan. This exchange is unfortunately emblematic of their relationship. Similarly, Ms. Densmore was unable to resist commenting on Mr. LaCroix’s testimony during his re-examination by his counsel.

[31] Since Justice Williams granted an access order in 2013, conflict has arisen when the parties have had to attempt to work out additional or unspecified access. Knowing this, I want to define access to avoid conflict. Defining access will mean that it is restricted and inflexible, unfortunately. However, both Ms. Densmore and Mr. LaCroix know the price of unrestricted and flexible access is conflict and neither wants this. With regard to Justice Williams’ order, it contained various provisions relating to the logistics of Logan’s transportation for time with his father, travel and mobility. These have served Logan well and I order that they continue.

[32] Accordingly, I order that when Mr. LaCroix is not at sea and commencing on the first weekend following Mr. LaCroix’s time away, Logan shall have access with Mr. LaCroix on alternate weekends from after school on Friday until school resumes on Monday morning. Mr. LaCroix will collect Logan from school on Friday and return him to school on Monday. When there is a statutory holiday or school holiday on Friday or Monday, Logan’s weekend with his father will be extended to include this additional day.

[33] If Mother’s Day falls on a weekend when Logan is with his father, Logan will spend time with his mother from 9 AM until 5 PM on that day. If Father’s Day falls on a weekend when Logan is with his mother, Logan will spend time with his father from 9 AM until 5 PM on that day.

[34] A routine has developed with regard to Christmas vacation based on the 2013 access order and I order that this continue. In 2017 and in odd-numbered years, Logan will be with his father from December 18 at the end of school until December 25 at 2 PM. During these years, Logan will be with his mother for the remainder of the Christmas break. In 2016 and in even-numbered years, Logan will be with his mother from December 18 until December 25 at 2 PM and Logan will be with his father for the remainder of the Christmas break. From December 18 until Logan returns to school in January, Logan’s alternate weekend access with his father will be suspended.

[35] The schedule I’ve referred to in paragraph 34 means that Logan will not spend Christmas day with Mr. LaCroix until 2017. Ms. Densmore’s father has a close relationship with Logan and is, sadly, terminally ill. Mr. LaCroix has said that Logan may spend this year with his maternal grandfather.

[36] I order that Logan alternate spending the school March break with each parent. In 2016 and even-numbered years, Logan will be with his mother from the end of school on the Friday before the March break for the entire break until school resumes the following Monday. In 2017 and in odd-numbered years, Logan will be with his father during this time.

[37] During the months of July and August, Logan shall spend two uninterrupted weeks with each of his parents. Mr. LaCroix shall identify which two weeks he wants by April 30 of each year. He must notify Ms. Densmore of his chosen dates by email. Ms. Densmore must notify Mr. LaCroix of the two weeks she wants by email by May 15 each year.

[38] The Easter holiday weekend will also be alternated annually. In 2016 and in even-numbered years, Logan will be with Mr. LaCroix from the end of school on Thursday until school resumes on Tuesday morning. Logan will be with Ms. Densmore during this time period in 2017 and in odd-numbered years.

[39] At all times noted in paragraphs 34 (Christmas), 36 (March break), 37 (block summer access and 38 (Easter), Logan's regular schedule of alternate weekend access with his father will be suspended. When access resumes, the weekend will be with the parent who has not just had access with Logan. So, for example, in 2016, Logan will be with his mother on the weekend following Easter.

[40] Logan's access with Mr. LaCroix will be suspended while Mr. LaCroix is at sea. When Mr. LaCroix returns from sea, his access will in any event resume on the first weekend following his return. This means that Logan will spend time with his father on the first weekend following his father's return unless the Christmas, March break or Easter schedule applies to that weekend.

Child maintenance

[41] Ms. Densmore says she wants child support calculated retroactively from Logan's birth in February 2007 to date. There is, of course, the additional claim for prospective child maintenance. Mr. LaCroix's ability to satisfy a retroactive award can only be assessed after their prospective obligation is known so I must first determine Mr. LaCroix's current obligation to pay child maintenance for Logan.

Prospective child maintenance

Section 3

[42] I have been provided with three 2015 paystubs for Mr. LaCroix. The most recent paystub shows his total income at the end of July was \$61,235.35. He is paid twice each month, so this amount is roughly equal to seven-twelfths of his 2015 income. Mr. LaCroix receives different allowances depending on whether he is posted to a ship or at sea so I cannot perfectly predict his 2015 income. The best I can do is to extrapolate his annual income from the most current information I have. Doing this calculation, I estimate Mr. LaCroix's total income for 2015 will be \$104,974.88.

[43] According to his paystubs, Mr. LaCroix receives both taxable allowances and non-taxable allowances. Mr. LaCroix testified that all of his income is reported on his tax return and that none is tax-free. This is not consistent with the amounts shown on his paystubs as non-taxable allowances. According to his final July paystub, he had received non-taxable allowances of \$12,910.75. Extrapolating this to an annual amount calculates to \$22,132.71.

[44] As a tax-free amount, this must be grossed up to reflect the amount that would otherwise appear on his tax return. Specifically, pursuant to clause 19(1)(b) of the *Nova Scotia Child*

Maintenance Guidelines, NS Reg. 53/98, I am imputing an additional \$9,500.00 in income to Mr. LaCroix. This amount is forty-three percent of the amount I have calculated as Mr. LaCroix's annual tax-free allowance. I have used forty-three percent because this is the approximate marginal tax rate Mr. LaCroix would pay on the non-taxable allowance as the last dollars of his income if it was taxed.

[45] Having estimated Mr. LaCroix's total 2015 income at \$114,474.88, I order Mr. LaCroix to pay monthly child maintenance of \$951.00. This amount should have been paid beginning in January 2015.

[46] Because Mr. LaCroix receives non-taxable allowance which aren't disclosed on his tax return, I order that his annual income disclosure include both his T-4 slip and his final paystub for the associated calendar year. This disclosure must be provided by March 15 each year. By May 15 of each year, he must provide Ms. Densmore with his completed income tax return (including all schedules and attachments), whether he files his tax return or not.

Section 7 expenses – clause 7(1)(a) child care

[47] Ms. Densmore wants an order made so that, if she finds work and requires child care for Logan, Mr. LaCroix will be required to contribute to its cost.

[48] Ms. Densmore is not currently working. Logan does not attend child care. She has no estimate for the cost of child care that might be required because she does not know the type of work she might find and the child care requirements it would create.

[49] Clause 7(1)(a) of the *Child Maintenance Guidelines* provides that I may order an amount to cover all or any portion of certain expenses. These expenses include "child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment".

[50] At present, there are no expenses for child care for Logan. I cannot order a contribution in the absence of the expense existing. As well, if I tried to estimate the amount of the contribution, I would be thwarted by the lack of information about Ms. Densmore's income. Subsection 7(2) of the *Guidelines* says that the guiding principle in determining the amount of an expense is that the expense is shared between parents in proportion to their respective incomes. Without information about Ms. Densmore's income, this calculation cannot be made.

[51] I appreciate Ms. Densmore's desire to have an order in place to address child care costs when she finds employment. I particularly appreciate this in light of the conflict I have described between Ms. Densmore and Mr. LaCroix. However, there is too little information for me to make an order of the sharing of child care expenses at this point. Similarly, I have insufficient information to order a contribution to Logan's child care expenses this past spring: Ms. Densmore has not provided proof of the income she earned during that time nor of the expenses that she incurred.

[52] Mr. LaCroix's aware of his duty to contribute a proportionate share to the after-tax cost of Logan's child care. I decline to order a contribution to prospective child care costs at this

time. When Ms. Densmore finds employment and incurs child care costs a variation application may be filed.

Retroactive child maintenance

[53] Ms. Densmore seeks child maintenance for Logan retroactive to the date of his birth in February, 2007.

[54] The law with regard to retroactive awards of child maintenance is outlined in the reasons of Justice Bastarache in *DBS v. SRG, LJW v. TAR, Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37, a decision of the Supreme Court of Canada.

[55] In deciding whether to make a retroactive award, I am to balance the competing principles of certainty and flexibility, while respecting the core principles of child maintenance. Those core principles are: child maintenance is the right of child; the child's right to maintenance survives the breakdown of the relationship between the child's parents; child maintenance should, as much as possible, perpetuate the standard of living the child experienced before the parents' relationship ended; and the amount of child maintenance varies, based upon the parent's income.

[56] In deciding if a retroactive award is appropriate, I am to consider: the reason for Ms. Densmore's delay in claiming maintenance; Mr. LaCroix's conduct; Logan's past and present circumstances; and whether a retroactive award would result in hardship. All of these factors must be considered and none, on its own, dictates what I should do, according to Justice Bastarache at paragraph 99 in *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37.

Ms. Densmore's delay

[57] My first consideration is the reason for Ms. Densmore's delay in pursuing maintenance. She has a positive duty to seek child maintenance. According to Justice Bastarache at paragraph 103 of *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37: "Recipient parents must act promptly and responsibly in monitoring the amount of child support paid".

[58] The initial application was commenced by Mr. LaCroix in 2008. He sought an order dictating the terms of his maintenance for Logan. Ms. Densmore filed a response only five years later, in March 2013, seeking child maintenance. There was a lull during the proceedings when the parties' differences were, apparently, resolved to their satisfaction. At other times, when the court was engaged, there were delays attributable to both parties. Delays resulted from Mr. LaCroix's work schedule and from Ms. Densmore's lack of counsel and her ill health.

[59] Ms. Densmore has not diligently pursued her claim for retroactive maintenance.

Mr. LaCroix's conduct

[60] My second consideration is Mr. LaCroix's conduct and whether it is blameworthy. Blameworthy conduct promotes a retroactive award and the absence of blameworthy conduct militates against one. Blameworthy conduct is an act or omission that puts the payor's interests before the child's right to an appropriate amount of support.

[61] Mr. LaCroix acknowledged that he has an obligation to pay child maintenance. Mr. LaCroix has provided disclosure of his income (by way of tax returns, T4 slips, Notices of Assessment) at every stage throughout the litigation. He has also paid child maintenance.

[62] Ms. Densmore argues that Mr. LaCroix has not adequately met his obligation to contribute to child care costs. However, in December 2013, Justice Williams ordered that Mr. LaCroix was not required to contribute to child care expenses.

[63] His Lordship was explicit in telling Ms. Densmore at an earlier hearing that she must provide details of her employment and child care to Mr. LaCroix in order for him to contribute to child care expenses. It is extremely unfortunate that Ms. Densmore's employer in the spring of 2015 would not provide the required information. This created difficulty between Ms. Densmore and Mr. LaCroix and in the provincial employment program which supported Ms. Densmore's employment. Only with the testimony of Andrew McGann during this hearing would Mr. LaCroix have had satisfactory proof that Ms. Densmore was indeed employed in the spring of this year.

[64] I find that Mr. LaCroix's conduct has not been blameworthy.

Logan's past and present circumstances

[65] My third consideration is Logan's past and present circumstances. These include his needs at the time maintenance should have been paid. If needs were met and his lifestyle was comfortable (even without the maintenance which ought to have been paid), then it may not be appropriate to make a retroactive maintenance award.

[66] There was no evidence that Logan's needs were unmet. Mr. LaCroix has provided maintenance for Logan.

Creation of hardship by a retroactive award

[67] My final consideration is whether a retroactive award would result in hardship. I am to consider whether Mr. LaCroix is able to satisfy a retroactive award. "Hardship" is to be considered broadly, not within the technical confines of section 10 of the *Guidelines*.

[68] Mr. LaCroix and his wife have two sons. His wife is employed as a teacher, so there are two incomes in their household. Mr. LaCroix says that his income is stretched meeting all his family's expenses, but this is no more than one might expect for a family with three young children and two working parents.

[69] Based on all the considerations outlined in *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37, I find that it is not appropriate to award child maintenance on a retroactive basis. Ms. Densmore's delay, Mr. LaCroix's past payment of child maintenance and the absence of unmet need persuade me that Mr. LaCroix's interest in certainty should prevail.

Conclusion

[70] Ms. Densmore shall have sole custody of Logan and Logan shall have his primary residence with her.

[71] Mr. LaCroix's access with Logan will be on specified terms that have been described and it shall be suspended during times when Mr. LaCroix is at sea.

[72] Mr. LaCroix will pay monthly child maintenance of \$951.00 for Logan commencing January 2015. Mr. LaCroix shall not, at this time, be required to contribute to expenses for child care.

[73] I order that Mr. LaCroix provide Ms. Densmore with a military dependent card for Logan so that she may access programs or benefits to which Logan is eligible as the child of a member of the Armed Forces.

[74] I dismiss Ms. Densmore's claim for retroactive child maintenance.

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia