

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: S.L.D. v. P.D.M., 2008 NSSC 103

Date: 20080408

Docket: 1201-54684

Registry: Halifax

Between:

S.L.D.

Petitioner

v.

P.D.M.

Respondent

Judge: The Honourable Justice Mona M. Lynch

Heard: April 2 & 3, 2008, in Halifax, Nova Scotia

Counsel: B. Lynn Reiersen, Q.C., for the Petitioner
Geoffrey Newton, for the Respondent

By the Court:

Background:

[1] The parties (mother and father) were married on January 17, 1994, separated in February 2000 and divorced in March of 2001. There is one child (the child), born in December 1996. Both parents remarried in 2002. The mother's home includes the mother, the stepfather, two brothers (aged 18 and 20) from the stepfather's previous marriage, the child (aged 11) and a sister (aged 4) from the mother's current marriage. The father's home includes the father, the stepmother and the stepmother's brother. The stepmother has grown, independent children from a previous marriage.

[2] The child has been in the primary care of the mother since the parties' separation in 2000. The father has had parenting time on a consistent basis since the separation, including overnight time beginning in 2004. Currently the father has parenting time with the child every weekend, alternating between one and two overnights per weekend. The father has other contact with the child through the week at sporting activities and by telephone. The father is very involved in the child's sports teams as a coach. This results in contact between the father and son on approximately three occasions per week at practices and games over and above

regular parenting time. The father also has parenting time with the child for four weeks in the summer and for specified time on holidays.

[3] The stepfather of the child, the primary financial contributor to the family, lost his employment in 2007 and began seeking other employment. The stepfather began a search for other employment and found a very good employment prospect in Australia.

[4] The mother wants to move with the child to Australia and has applied to vary the current parenting arrangement to allow the move. The father opposes the mother's plan and wants the child to remain in Nova Scotia either in the primary care of the mother who would remain in Nova Scotia or in the father's care if the mother moves to Australia.

Issues:

[5] Should the child be permitted to move with his mother from the Halifax Regional Municipality to Australia?

The Law:

[6] The **Divorce Act**, R.S., 1985, c. 3 requires the court satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child since the last order and take into consideration only the best interests of the child as determined by reference to that change. The court is also to give effect to the principle that a child should have as much contact with each parent as is consistent with the child's best interests and where the order would grant custody of the child to a parent who does not currently have custody, the court must take into consideration the willingness of that parent to facilitate such contact.

[7] The leading case on mobility is **Gordon v. Goertz**, [1996] 2 S.C.R. 27. There is a two-stage inquiry: (1) Has there been a material change in circumstances? And if so, (2) What is in the best interests of the child?

Material Change in Circumstances:

[8] In **Gordon v. Goertz**, the change in circumstances required is described at paragraph 13 as:

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.

As in **Gordon v. Goertz** the move is not to a neighbouring town – it is about as far from Nova Scotia as you can get in the world. The father is very involved with the child and has a very positive relationship with the child. The move would significantly curtail the contact between the father and the child. This move came up in the last year and was not within the reasonable contemplation of the judge at the time of the Corollary Relief Judgment in 2001 or the Consent Variation Order in 2006. There is no doubt that the move of the mother and child to Australia would constitute a material change in circumstances.

Best Interests of the Child:

[9] In **Gordon v. Goertz** the law is summarized in paragraph 49 and 50:

49 The law can be summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.
7. More particularly the judge should consider, inter alia:
 - (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 custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
 - (f) disruption to the child of a change in custody;
 - (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

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?

While **Gordon v. Goertz** and other cases set out the factors to consider, a determination of whether the move is in the best interests of the child must be made on the particular facts of each case. No two cases are the same.

[10] In relation to the best interests of the child, some preliminary comments are necessary. Both parents have made some allegations about the other parent or stepparent. Both parents have asked me to make some inferences about the other parent or stepparent.

[11] There is no evidence to establish that the mother has been inappropriate with the child in a sexual nature or any other nature. Breastfeeding for a few years or doodling on the child's stomach is not inappropriate conduct. I do not accept that she wrote on the child's body in an inappropriate manner. I do not find that the closeness of the mother and child is inappropriate. I do not find that there is an attachment disorder in the mother-child relationship. I do not find that the closeness of the mother and child can be described as a co-dependency.

[12] The father told the child about the proposed move to Australia before the mother could and without the mother's approval or input. I accept that the father did this at a time when he was reeling from the prospect of losing contact with his son. I do not find that the father did this with any intent to cause emotional harm or upset to the child. I do not find that the father had the mother served at home

with his court application to cause emotional harm or upset to the mother or to the child.

[13] There is absolutely no evidence that the stepfather of the child is mentally unstable or otherwise mentally unwell. The stepfather's testimony and his conduct in the last year show that he is a caring, thoughtful, considerate and appropriate stepfather.

[14] The stepmother is on a waiting list for a hip-replacement. The uncontradicted evidence from the stepmother is that her hip has been improving steadily to the point where she has given up her scheduled surgery slot to another person. I accept that the stepmother is healthy enough and more than capable of providing for all of the child's needs if he lived in her home.

[15] The evidence before me is that this child is lucky enough to have two very caring, loving, capable, and committed parents. He is also a very lucky child to have two loving stepparents. The child is described as well-adjusted, likeable and having a wonderful personality. The child does well in school. The child does well in sports. The child has many good relationships with other people. The move to

Australia will significantly affect the child's relationship with both of his parents. The child's reliance on and involvement with one parent in day to day life will be significantly reduced. The child's involvement with and reliance on the other parent in day to day life will be significantly increased. Either way there will be a significant adjustment for the child.

[16] Either home would be more than suitable to look after the child's physical care, medical care and educational needs.

[17] The mother has been the primary caregiver for the child since his birth. By all accounts the mother and child have a very close relationship. The mother's views are entitled to great respect. The mother has been the primary parent involved in the child's health, education and general well-being. The mother has had the primary role regarding all of the other mundane affairs of the child as described in **Burns v. Burns**, [2000] NSCA 1. The mother's decision to move with the stepfather and her family to Australia is entitled to respect. There is no improper motive in her decision to move.

[18] The parents separated when the child was three years old. The child has lived primarily with the mother since that time. Since 2002 the child has also lived with the stepfather and his brothers and sister from the stepfather's first marriage. The sister from the stepfather's previous marriage has moved out on her own. Since 2003 the child has lived with his sister from his mother and stepfather's relationship. The evidence is that this family unit enjoys a close relationship despite the age differences. The older brothers enjoy spending time with their younger siblings. The child and his little sister like spending time with their older brothers and with each other.

[19] The stepfather plays an important role in the child's life. The stepfather is respectful of the child's relationship with the father and does not try to take over the role of the father in the child's life. The stepfather encourages the child to spend and enjoy time with his father. However, the stepfather does play a parenting role in the child's life. The stepfather attends medical appointments for the child, backs the mother on discipline matters, helps the child with homework, and is the primary head massager for the child's headaches.

[20] The existing parenting time with the father is extensive. The father coaches two sporting teams for the child which cover the bulk of the calendar year. This allows the father and child to share time and a love of sports. The father and son share a love of fishing and motorcycles. The father and son went on a vacation last summer in which they shared their interest in motorcycles and sports. This was a special bonding time for father and son.

[21] The father and son's love of sports involves not just the son's activities with the father coaching. It also includes following sports teams and collecting sports cards. The father and child are together for overnights every weekend. The father and child relationship is a close and loving relationship. There is a strong bond.

[22] The father has not been involved in the child's health care appointments. I accept the father's explanation that he and the mother do not get along well and it is not good for the child to feel the discomfort and tension when all three are in a room. The father has chosen to not attend the medical appointments as he believes that is in the child's best interests. The father has corresponded with and sought information from medical providers for the child.

[23] The stepmother also has her own special relationship with the child. The stepmother is the homemaker in the father's home. She does all of the cooking and cleaning for the child when he is in her home. The stepmother does not try to replace the mother in the child's life and she also respects that the father and child need time together without her present.

[24] The father is a very involved parent. He is not an every other weekend father. If the child moves to Australia there is no parenting arrangement which will allow the quality and degree of contact that the father and son currently share. Phone calls, video conferencing, email, exchange of photographs and other methods of long distance communication are possible but will not make up for not being involved in the child's daily life. The mother's proposal of the child spending six weeks with the father during the child's school break in December and January would allow the child to spend Christmas with the father each year. While this would not be the same as spending time together most days a week, it is a significant period of uninterrupted time for father and child. The mother also proposes that the father come to visit the child in Australia for three weeks. This would depend on the father's availability and financial resources. The mother has

proposed that all child support payable by the father for the child be put in a fund to be used for the child's travel to spend time with the father. With the distance between the two homes if the move is allowed, the measures proposed would maximize the time between father and child.

[25] The little that is known about the child's views would indicate that the child does not want to move to Australia. The child is eleven and in most cases the child's views would be entitled to some weight. In this case, however, the circumstances of the child learning about the move must be considered as well as the extent of the child's knowledge about the move.

[26] In the Fall of 2007 the stepfather informed the father that he was pursuing an employment prospect in Australia. In early December 2007, the stepfather informed the father that he had accepted a position in Australia. The father was told that the mother and stepfather would be seeking court permission to move to Australia with the child. The father was and still is opposed to the child moving to Australia. I am sure that the father's world tilted as a result of that conversation. Despite the stepfather's assurance that he and the mother would not be taking the child out of the country until there was a court application and the explanation that

the child could not be taken out of the country without the necessary passport or visa, the father took some drastic action. The father contacted the police. The father wrote a letter to Passport Canada alleging a risk of abduction of the child and that the stepfather was not well mentally. This letter was also given to the child's school.

[27] The mother and stepfather had decided not to tell the child about the stepfather seeking employment in Australia and did not tell the child that the stepfather had obtained employment in Australia. The father knew that the child did not know about the plans for Australia.

[28] Two days after learning of the proposed move, the father told the child that the stepfather had lost his job in Halifax, had accepted a job in Australia and planned to move the child to Australia. It was made clear to the child that the father was against the move and would do all in his power to prevent the child's move. The father went further, he told the child that if his mother or stepfather suddenly announced that they were taking the child on a trip that the child should go to a neighbour's house to call the police and the father. The father's manner of informing the child about the proposed move was a serious lapse in judgment.

[29] While I accept that the father did this at a time when he was extremely upset and without intent to upset the child, the effect has been to upset the child. The child was angry at the stepfather and has spoken negatively about the move. The child has expressed concern about the family finances as a result of the stepfather's loss of employment. The mother has not discussed the proposed move with the child.

[30] Because of the manner in which the child was told of the proposed move, I cannot consider the child's views. I can only speculate as to what the child's view of the move would be if he was told about it in a balanced, caring and thoughtful manner.

[31] The reason for moving must be considered as it is relevant to the mother's ability to meet the needs of the child. The stepfather was and will continue to be the primary financial contributor to the family. I accept the evidence of the stepfather that he was unable to obtain employment in North America equivalent to his former job or to the job in Australia. The stepfather's qualifications are not fully accepted in North America. I accept that employment in Nova Scotia is not

possible. Employment in North America either is not available or would require that the stepfather obtain further credentials taking up to three years.

[32] It is not a decision but a necessity that the mother's family leave Halifax. If it was simply a choice or a whim, a court could say that the mother's family must make a decision that is less harmful to the relationship between the father and the child. The evidence shows that this was not a move that was sought. The stepfather lost his employment and had to seek other employment. The stepfather was quite clear that he wanted to stay in Halifax but could not.

[33] The stepfather does not just support the child and the mother. The stepfather supports his four other children. The stepfather's employment is absolutely necessary for the financial security of his family. The child has been part of this blended family for six years. This is not a move by the mother to enter a new, unknown and untested relationship.

[34] The father says that the child does not adapt well to change. The father points to the child's change in schools to support this position. There is no doubt that the child's transition from one school to another was a tough one. However,

the change was made and the child has done well in the new school. The child is described in glowing terms despite many major changes in his life. The child has lived through the break up of his parents' relationship; the new relationships of both parents; new siblings that came at the start of new relationships; living with some of the new siblings; the birth of his sister which displaced him from being the "baby"; and a change in his school. I do not find that the child has difficulty adapting to change. I do not find that the child is at an age when change is more difficult than it would be earlier or later in his life.

[35] The child's school, sports teams and community have always been in Halifax. The child will lose friends and teammates if he moves to Australia. This will be disruptive to the child. The loss of extended family is not a consideration in this case as neither parent's extended family live in Nova Scotia.

[36] The child has strong bonds with his siblings despite the age differences. I would never suggest that the bonds and relationships with his siblings are more important to the child than the bonds with his father. However, the child would suffer from the loss of the daily relationship with his siblings if he did not move with the family.

[37] The father has asked me to consider the necessity of maintaining the relationship between father and son at the child's vulnerable age. This was presented as it would be different if the child was female as then she would need her mother but a boy needs his father. I found this assertion to be somewhat old-fashioned and simplistic. Children need their parents no matter the gender of the parent or the child. Without evidence, I do not accept as fact that fathers are more necessary to their sons and mothers are more necessary to their daughters.

[38] The father has also asked me to find that the child is likely to be bullied in Australia as he will be different. It would be pure speculation to find that the child is likely to be bullied. It seems equally possible that the child will attract positive attention for his differences.

[39] There will be many disruptions to the child as a result of the move. There will also be many opportunities. The child will have the opportunity to live in a different part of the world and he will have new and exciting experiences. The father and son will have extended periods of time together to bond and maintain their close relationship.

[40] The child will be hurt no matter what decision the court makes. Either way the child loses. There are risks to the child no matter which decision is made. There is no doubt the child will suffer disruption from the diminished time and relationship with his father. There is also no doubt that the child has always lived with the mother and that she is the primary parent to the child. The mother has been the person the child has sought comfort from in times of need and she has been the primary guardian of the child's physical, emotional and psychological well-being. The mother has been the facilitator of the child's education, health care and social life. While the father and child are close, the disruption to the child of taking him out of the mother's care would be absolutely devastating.

Conclusion:

[41] I find that a change in custody would be more devastating and harmful to the child than the loss occasioned by the move to Australia. It is in the child's best interests to allow the move. The child is permitted to move with the mother and her family to Australia.

[42] After seeing the love all four adults have for the child, I am sure that they will all work together to do everything in their power to foster and maintain the relationship between the father and the child. Although the mother and father do not get along, they have done an exemplary job of putting their personal feelings aside in the best interests of the child. I trust that will continue.

[43] The mother's proposal for contact between father and son is reasonable in the circumstances.

[44] The provisions of the Corollary Relief Judgment and the Consent Variation Order will remain in place except to the extent varied by this decision. That being said, it will be less confusing to all if the provisions regarding parenting and child support are consolidated into a new order. This will save confusion by the parties and will eliminate the need to look through three documents to determine the current provisions. With the child likely to be travelling internationally, it will also make it easier to provide proof of the current parenting arrangements to Officials who require such information.

[45] The parenting arrangements for the father must be adhered to and respected. The mother's obligation is to ensure that the father and child have all the parenting time described. The mother and father will present a positive attitude and message about the child's move to Australia. This will be a difficult time for the child and his emotional well-being is of primary importance. The adults are to protect the child from emotional disturbance to the extent possible in the circumstances. All discussion about the other parent and about the stepparents will be positive and respectful. The mother will inform the child about the decision and will inform the father when this has been done.

[46] The child shall have parenting time with the father for six weeks during his school break in the months of December to February. The child will travel to Halifax for this visit and will spend each Christmas with his father. The father and child may travel to other places during parenting time. The father will keep the mother informed of any travel plans during his parenting time including contact information for the child.

[47] The child will be accompanied by a parent, stepparent or other agreed upon responsible adult during his travel between Australia and North America until such time as both parents agree he can travel as an unaccompanied minor.

[48] The child support otherwise payable by the father to the mother will be paid into a fund administered by the father to pay for travel expenses incurred for parenting time between father and child. The cost of the child's travel and the travel of the adult accompanying the child during the trip to and from Australia for the six-week visit during December - February will be paid out of the fund. The cost of the travel will include costs for meals, hotels and ground transportation required for the accompanying adult. If there is a further round trip to and from Australia for the accompanying adult, the travel expenses for that further trip will be paid by the mother.

[49] The parents will make all travel arrangements at least three months prior to travel. The travel expenses will be the most cost-effective available. The father will pay the costs directly to the airline for the travel expenses for the child and accompanying adult. Any other travel expenses incurred on behalf of the child

and accompanying adult will be reimbursed by the father upon presentation of a receipt for the expense.

[50] The father will be entitled to spend three weeks of parenting time with the child by travelling to Australia and visiting or taking the child on a trip. This three-week period is to be scheduled around the child's school breaks other than the December - February break. The father is to provide the mother with three months' notice of the details of the parenting time. The travel expenses incurred by the father for this trip are to be paid from the fund otherwise due as child support.

[51] The father shall have unlimited telephone, email, and Skype access to the child at all reasonable times. The mother is to ensure that the child has access to the technology to maintain daily contact with the father through these means.

[52] The mother is to provide the father information regarding the child's education, health, extracurricular activities, social and intellectual development. The mother shall provide the father with all report cards for the child when received. The mother shall provide photographs of the child on a regular basis.

[53] In calculating the father's income for child support purposes, the limit on deduction for travel expenses paid by the father through his business will not include any travel expenses to Australia which may be deductible by the father. The mother and stepfather may deduct for business or personal taxes any travel expenses to accompany the child to and from parenting time with his father.

[54] The father shall provide the mother with an accounting on or before June 30th of each year of all travel expenses paid from the fund otherwise due as child support according to the Nova Scotia tables. Any funds not used for the above travel expenses for the child to have parenting time with the father shall be paid by the father to the mother on or before July 31st of each year. If travel expenses in a year exceed the amount in the fund as of June 30th, those expenses may be carried over and deducted from child support for the following year.

J.