IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Ingraham v. Hendsbee, 2008 NSSC 169

Date: 20080609
Docket: SFHMCA-034653
Registry: Halifax

Between:

Scott James Ingraham

Applicant

v.

Kimberley Ellen Hendsbee

Respondent

Revised decision: The date at the top of the original decision has been corrected on June10, 2008.

Judge: The Honourable Associate Chief Justice Robert F. Ferguson

Heard: May 14 and 15, 2008, in Halifax, Nova Scotia

Written Decision: June 9, 2008

Counsel: Cheryl Arnold, counsel for the Applicant
Judith Schoen, counsel for the Respondent

By the Court:

[1] Scott Ingraham and Kim Hendsbee are the parents of Courtney, age eleven, and Tyson who will be six this coming July.

[2] In November of 2004, the parents entered into a Separation Agreement. The Agreement indicated joint parenting with the children residing primarily with their mother. It also stated their father's "right" to visit the children "frequently," specifically, every second weekend (Friday at 4:30 p.m. to Sunday at 6:30 p.m.) with further times specified during weekdays. The Agreement further provided that the father would pay child support totalling $500.00 per month.

[3] In June of 2006, the father applied to vary the existing parenting provisions and his obligation to pay child support. Prior to this application coming to trial, the parties acknowledged the mother's request to relocate with the children outside of the HRM and that such request is a further issue before the court.

BACKGROUND

[4] The parties resided in a common-law relationship in a home in HRM for a number of years. When their relationship ended Mr. Ingraham's parents were occupying a self-contained apartment in the basement of their home. The separation occurred in February of 2004. Mr. Ingraham left the family home which has remained occupied by Ms. Hendsbee and the children to the present date.

[5] Mr. Ingraham, for a brief period of time, resided outside the neighbourhood of the family home. He has relocated and is occupying a home within a kilometre of his children. His parents, who I believe vacated the family home shortly after their son, are currently occupying an apartment in Mr. Ingraham's home.

[6] The parties entered into the previously mentioned Separation Agreement in November of 2004. In May of 2006, the Agreement was registered with this court and acquired the status of a court order. It would appear at some point Mr. Ingraham's income decreased and he discontinued providing child support as set out in the Agreement. Ms. Hendsbee then took the necessary steps to require the Maintenance Enforcement Program to enforce Mr. Ingraham's support obligation. Soon after Maintenance Enforcement became involved, Mr. Ingraham applied to vary the order.

[7] The court records reveal the following:

- *August 3, 2006 - Conciliation meeting*

Both parties appeared self-represented. The issues were not resolved and an organizational pre-trial was recommended as the next step. It is noted, while Ms. Hendsbee did not introduce her intention to relocate as an issue on this occasion, she sought a clause in any court order that would allow either parent to relocate outside the Province of Nova Scotia on giving the other parent thirty days notice of such intended move.

- *September 29, 2006 - Pre-Trial Conference and Resulting Memorandum*

This gathering resulted in an order setting out the date for the filing of affidavits and position letters

- *November 8, 2006 - Pre-Trial Settlement Conference*

A conference was held and a settlement was not reached.

- *April 25, 2007 - Consent Custody and Access Order*

This order provided for an assessment.

- *August 2, 2007 - Custody and Access Assessment Report Submitted to the Court and Parties*

In this Assessment a recommendation was made as to parenting time. It should be noted the assessor made the following comment at page 4: ". . . the original plan (Ms. Hendsbee's) was to try to relocate to Truro. Kim has stated that this is no longer the plan at present." Accordingly, the Assessment is prepared without addressing the issue of Ms. Hendsbee's current request to relocate to the Truro area.

CURRENT PARENTING INVOLVEMENT

[8] The parents, per their registered Separation Agreement, are joint custodians of their children. Ms. Hendsbee provides the primary care for the children. They are in her care and control when not with Mr. Ingraham.

[9] Mr. Ingraham's current, regular parenting time is not as set out in paragraph 5(b) of their Separation Agreement. As noted in the assessor's report and the parties' evidence, Mr. Ingraham's parenting time rotates on a two-week basis. On week one the children are with him from 4:30 p.m. Tuesday to 8:00 a.m. Wednesday and from Friday at 4:30 p.m. to midnight Saturday. On week two his previous weekend access continues from midnight Saturday to 6:30 p.m. Sunday. Plus Tuesday from 4:30 p.m. to Wednesday at 8:00 a.m. and Thursday from 4:30 p.m. to Friday at 8:00 a.m. This equates to the children spending five nights in their father's care in a two-week period. The Separation Agreement under the term "Special Occasions" speaks to Mr. Ingraham's access to his children on Christmas, Easter, Thanksgiving, March Break and summer vacations. This provision has not been followed to any significant extent.

POSITIONS

[10] Mr. Ingraham began his application some two years ago seeking that the parents share time with their children equally on a weekly basis. At trial, he indicates while still adhering to his original position he would be accepting the Assessment recommendation which stated:

> **THAT**, the children be in the care of their father Mr. Scott Ingraham as follows:
>
> 1) Week 1 and 3 - from Wednesday at 6:00 p.m. until Friday at 6:00 p.m.
>
> 2) Week 2 and 4 - from Wednesday at 6:00 p.m. until Sunday at 6:00 p.m.

[11] The assessor's recommendation also recommended that the parents share March Break, Christmas holidays and each would have two weeks of interrupted parenting time in the summer.

[12] In the event Ms. Hendsbee relocates to the Truro area, Mr. Ingraham seeks to become the primary caregiver of his children with access made available to Ms. Hendsbee. Mr. Ingraham has entered into a relationship with a woman who has children and her own accommodation. Mr. Ingraham has just recently

completed a trade. He expects to become a union member and obtain employment through that union. He expects such employment will be available to him in the Halifax area. His child care would be provided primarily by his mother who, as earlier indicated, resides in his home.

[13] Ms. Hendsbee seeks to relocate with the children this fall to the Truro area. She has begun a relationship with a man who is employed in Truro. They have a child born in July of 2007 who resides with Ms. Hendsbee. Ms. Hendsbee's fiancé has a home outside of Truro that is not suggested as Ms. Hendsbee's intended place of relocation. Ms. Hendsbee's fiancé, while retaining his current residence, currently spends considerable time at the residence of Ms. Hendsbee.

[14] Ms. Hendsbee has recently obtained employment with a bank in Truro. She wishes to begin a relationship with her fiancé in the Truro area where they are both employed. She is satisfied she can find appropriate housing and child care in that area. Ms. Hendsbee has stated she will not relocate to Truro without her children. In the event her request is not court ordered, she proposes she retains primary care of the children and that Mr. Ingraham's parenting time remains similar to the current arrangement with a reduction in the weekday overnight access.

[15] On the point of the parent only relocating if the application is successful, Ingram J., in *Drury v. Drury* [2006] P/J/ No 833, stated:

> **42** Sometimes a parent is asked if he or she would move even if the children were ordered to remain. Ms. Drury did indicate that she would not move without her children. This option might provide a quick solution, however the existing problems would not disappear and such an approach does not follow the guidelines set out in Gordon v. Goertz, supra. In a recent decision, Spencer v. Spencer (2005) 14 R.F.L. (6th) 460 (Sask. C.A.), Paperny J.A. outlines at p. 224 the dilemma faced by a parent in being asked to make such a choice:
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> > Specifically we are reminded in Gordon at para. 50, of the following:
> >
> > > 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 interest of the child in all the circumstances, old as well as new?

> In conducting this inquiry, it is problematic to rely on representations by the custodial parent that he or she will not move without the children should the application to relocate be denied. The effect of such an inquiry places the parent seeking to relocate in a classic double bind. If the answer is that the parent is not willing to remain behind with the children, he or she raises the prospect of being regarded as self-interested and discounting the children's best interests in favour of his or her own. On the other hand, advising the court that the parent is prepared to forgo the requested move if unsuccessful, undermines the submissions in favour of relocation by suggesting that such a move is not critical to the parent's well-being or to that of the children. If a judge mistakenly relies on a parent's willingness to stay behind "for the sake of the children," the status quo becomes an attractive option for a judge to favour because it avoids the difficult decision the application presents.

43 I concur with this observation.

THE LAW

[16] Subsection 37(1) of the ***Maintenance and Custody Act***, reads:

> 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.

Sub-section 18(5) of the ***Act*** states:

> In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration.

[17] The leading case on parental mobility rights remains the Supreme Court of Canada decision in ***Gordon v. Goertz,*** [1996] S.C.J. No. 522. The Supreme Court in paragraph 49 summarized the law 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?

[18] The parties concur that Kimberley Hendsbee's plan to move to Truro constitutes a material change of circumstances. I agree. This move will create a change in the circumstances of their two children who, at this time, can interact with both parents on a weekly basis. This is a change that will materially affect them. Further, it is not a change that was foreseen or could have reasonably been contemplated by the judge who made the existing order. It is appropriate to hear the applications to vary the existing order.

[19] There is no presumption in favour of either party although the Supreme Court has directed that the custodial parent's views are entitled "to great respect". As stated in paragraph 48:

> While a legal presumption in favour of the custodial parent must be rejected, the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability.

[20] ***Gordon v. Goertz***, *supra*, lists seven considerations to be taken into account when assessing what is in the best interests of the child.

(a) The existing custody arrangement and the relationship between the child and the custodial parent;

(b) The existing access arrangement and the relationship between the child and the access parent;

[21] The assessment, when referring directly to the children, stated, in part:

> **TYSON** is five years old as of July 15, 2007 and he has developed normally in all aspects. This past year he attended pre-school at the local elementary school and he will start primary in September of 2007 at Hillside Elementary School. He had

> a successful year at pre-school and is playing soccer this summer. In view of his age, Tyson was not interviewed for this assessment.
>
> **COURTNEY** is 10 years old as of February 9, 2007 and she is entering Grade five at Hillside Elementary School. She is a capable student with all of her marks either "A's" or "B's". This past year she took part in the school dinner theatre and she was a peer mediator. Both parents describe her as a good student, well adjusted and well behaved.
>
> . . .
>
> In essence, Courtney indicated a strong positive attachment to both parents, as well as no concerns with respect to any adults in her life.

[22] In spite of the almost constant movement between the parent's homes, the children appear to be coping well. The assessor does not speak of any present or perceived concerns to how they are progressing in their current living situation. Apart from Tyson, on the occasion when he is with his father, wishing to return to the home of his mother, there is no evidence from any party as to the current parenting provisions creating problems for the children. Both parents voiced concern as to maintaining the current arrangements.

(c) The desirability of maximizing contact between the child and both parents;

[23] The evidence, including the assessment, supports a conclusion the children have a strong and positive attachment to both parents. At the moment, there is nothing to support a conclusion the children should not continue their current frequent involvement with both parents.

(d) The views of the child;

[24] Given their ages, it was appropriate that neither the parents or the assessor sought to directly illicit from the children their views as to their continued involvement with their parents.

(e) The custodial parent's reason for moving, <u>only</u> in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;

[25] Ms. Hendsbee has acquired a position that offers more security of income and long-term prospects of advancement. She wishes to enter into a relationship with the father of her youngest child who is employed in Truro. I find her current employment and personal relationship are relevant to her needs for all her children.

(f) Disruption to the child of a change in custody;

[26] Despite the frequency and amount of time the children have their father, him becoming the primary caregiver would create a disruption in their lives – lives they have spent primarily in the care of their mother where they have a younger step-sister that is now part of their day-to-day living.

(g) Disruption to the child consequent on removal from family schools, and the community he or she has come to know;

[27] As previously noted, the children would appear to be prospering in their current community. A removal from the community would obviously be a disruption for them ,at the very least, on a short-term basis.

OTHER CONSIDERATIONS

Uncertainty as to the proposed plans of care of the parents

[28] The parenting plans of both parents are recent and, as such, there is uncertainty.

[29] Mr. Ingraham's parenting plans do not call for him to be a full-time or at-home parent. His being employed and providing financially for his children is a component of his plan. I do not conclude his completing of training in his trade guarantees him entry into his intended union. Further, becoming a member of such union does not guarantee he employment in the Halifax area to the extent he would be available to his children on a daily basis.

[30] Ms. Hendsbee has just completed her internship in her new position. While her current employment is more secure than that of Mr. Ingraham, the location of that employment, by her own evidence, is not as certain. Further, her evidence is that she and her fiancé have not yet begun to live together on a full-time basis.

CONCLUSION

[31] The parents testified as to the difficulties they encountered as they attempt to co-parent. Their complaints are not unique; in fact, somewhat normal in these situations. Ms. Hendsbee has, on occasion, not conferred with Mr. Ingraham in some instances where it was required of co-parents. This sometimes happens when the primary parent enters into a new relationship. Ms. Hendsbee will have to be more vigilant in acknowledging Mr. Ingraham's ongoing relationship with his children.

[32] Mr. Ingraham, on the other hand, presented as demanding and confrontational. He characterized his parental involvement more as his right than his responsibility. He emphasizes Ms. Hendsbee's non-compliance with his child care privileges while down playing his responsibility to provide monetarily for the children.

[33] Children profit from being aware that both parents wish to retain responsibility for their well being. It, accordingly, falls to the parents to make every effort for such co-parenting to work.

[34] Mr. Ingraham and Ms. Hendsbee, pursuant to their current registered Agreement, have joint custody of their children. The Agreement goes to considerable lengths to define what they mean by joint parenting [see paragraph 5, particularly subsections (d), (e) and (f)]. There is to be no change in this status.

Request of Ms. Hendsbee to Relocate

[35] Justice Dellapinna, in ***Paquet v. Clarke***, 2004 NSSF 94, speaking to this issue, stated at paragraphs 57 and 58:

> [57] We live in a mobile society. Moving from city to city, province to province and even from one country to another is often desirable and in some cases necessary in order for one to obtain the education that one wants to have, to further one's career, to be with family or to pursue new relationships.
>
> [58] Living in an age of free trade, downsizing and the like, the need for individuals and families to relocate happens with increasing frequency. When a so-called traditional family of two parents with children are faced with a decision

> of whether to move from one locale to the other, they weigh all of the benefits against any disadvantages and make a decision based on what they think is best for the family, including their children. When parents are separated and one of those parents is faced with that decision, they go through a similar decision making process, but that process is further complicated by the reality that one parent is likely staying behind and the children will be living predominately with one parent and spending relatively little time with the other. It is understandable in such cases for the non-custodial parent to want to block the move rather than lose contact with their children. This often necessitates the court's intervention.

[36] Ms. Hendsbee's current position with her new employer and her ongoing relationship with her fiancé appear to be positive steps and relevant to her ability to meet the needs of her children. However, the steps are recent and, as such, contain uncertainty. Further, I conclude Ms. Hendsbee is in a position to maintain her current position and relationship without having to move with her children. To remain where she is currently located will create the necessity for she and her fiancé to travel to their respective employment. The time of such travel has been estimated at approximately forty-five minutes -- not a lengthy commute in this day and age. The inconvenience of such time spent travelling to and from work is acknowledged. It pales when compared to the disruption the requested relocation would cause in the children's lives.

[37] Ms. Hendsbee's request to relocate with her children at this time is denied. She is currently in a position to maintain her employment and relationship while allowing the children to remain in a situation that is in their best interest.

Variation in Parenting Time Requested by Parents

[38] Mr. Ingraham, by his request for equal parenting time or the implementation of the assessor's recommendation, seeks a distinct change in the children's current schedule.

[39] Likewise, Ms. Hendsbee's request that Mr. Ingraham's overnight weekday access be curtailed would also be a distinct change in the children's current living pattern.

[40] I do not find there is evidence to support a conclusion a distinct change of the nature requested by either parent would, at this stage, be beneficial to their children.

[41] I do agree with the observation by the assessor that lessening the children's movement while maintaining their contact with their parents would be beneficial

and in the children's best interests. In this regard, I order a change in Mr. Ingraham's "second week" parenting time. Currently, he has the children in his care on Tuesdays from 6:30 p.m. to Wednesday at 8:00 a.m. and Thursday from 6:30 p.m. to Friday at 8:00 a.m. I order such parenting time varied to the following: From Tuesday at 6:30 p.m. to Thursday at 8:00 a.m. Further, that, during the school term, Mr. Ingraham is responsible for delivering the children to their school rather than the home of Ms. Hendsbee.

[42] Subsection (b) of paragraph 5 of the Separation Agreement is deleted and replaced by the following:

> Scott shall have such access to Courtney and Tyson as agreed by their parents. Such access shall include parenting time rotating on a two-week basis. On week one the children are to be with him from 4:30 p.m. Tuesday to 8:00 a.m. Wednesday and from Friday at 4:30 p.m. to midnight Saturday. On week two his previous week's access continues from midnight Saturday to 6:30 p.m. on Sunday and from Tuesday at 6:30 p.m. to Thursday at 8:00 a.m. During the school term when Scott's access ends at 8:00 a.m. he shall be responsible for delivering the children to their school.

Variation in Child Support Payments

[43] Currently, pursuant to the 2006 Separation Agreement, Mr. Ingraham is required to pay child support in the amount of $500.00 a month. There is evidence Mr. Ingraham lost his job since assuming this obligation. There is evidence the parties agreed, on a without prejudice basis, to a reduction in the amount of monthly support. Mr. Ingraham has not, as of yet, found employment and the income provided to allow him to pursue his trade is about to end.

[44] The parties have indicated they have made efforts to resolve the child support issue, both on a retroactive and prospective basis. I presume the issues of relocation and variation of parenting time stifled these efforts.

[45] For the aforementioned reasons, I conclude I am not in a position to deal with the issue of child support at this time. I will retain jurisdiction in the event the parties are not able to resolve the issue.

[46] I request that counsel for the applicant prepare the order.

J.