

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Hollett v. Vessey, 2008 NSSC 199

Date: 20080625

Docket: 1201-55582

Registry: Halifax

Between:

Nancy Laine Hollett

Petitioner

v.

Stephen Roland Vessey

Respondent

Judge: The Honourable Assoc. Chief Justice Robert F. Ferguson

Heard: June 16, 2008, in Halifax, Nova Scotia

Written Decision: June 25, 2008

Counsel: Kim Johnson, counsel for the Petitioner
Jennifer Schofield, counsel for the Respondent

By the Court:

[1] Nancy Hollett and Stephen Vessey are the parents of Kelsea Vessey born August 20, 1999. The parents are divorced and their Corollary Relief Judgment dated July 15, 2005, provides that they are the joint custodians of their daughter with Ms. Hollett providing primary care and Mr. Vessey having detailed and specific parenting time with Kelsea. Ms. Hollett resides in Halifax and Mr. Vessey in the Annapolis Valley

[2] In April of 2008, Ms. Hollett made application to vary the Corollary Relief Judgment as it pertains to the current parenting arrangements.

[3] Ms. Hollett is entering an RCMP training program in Regina, Saskatchewan. The program begins July 20, 2008, and ends January 3, 2009. She anticipates a successful completion of this program, becoming a member of the RCMP and being assigned in a manner that will allow her to return to her current location. She and Mr. Vessey have discussed the parenting of Kelsea during her training in Regina. They have been unable to agree as to such parenting arrangements during this period. Ms. Hollett's application is, in effect, a request that the court confirm Kelsea's current living arrangements remain substantially in effect during her time in Regina. She proposes that Mr. Vessey's usual summer (July and August) access be enhanced. She further proposes that Kelsea remain in her home in the care of her mother and fiancé from September until her return in January of 2009 with Mr. Vessey exercising his usual parenting time. Ms. Hollett expresses the desire to have the disagreement dealt with prior to her departure.

[4] Mr. Vessey's reply to Ms. Hollett's application in effect becomes the application to vary to current court order. He seeks to have Kelsea reside primarily with him while Ms. Hollett is in Regina and then to be returned to Ms. Hollett's care on her return in January of 2009.

BACKGROUND

April 1999 - Marriage of the parties

August 1999 - Birth of Kelsea

November 2000 - Separation of the parents

It would appear that, following the separation, Kelsea, for a time, shared her time with her parents on an almost equal basis.

February 2004 - There was a three-day trial to determine primarily the parenting arrangements.

July 2004 - The issuance of the decision which created the current parenting arrangements which are set out in the Corollary Relief Judgment issued July 15, 2005.

Current Parenting Provisions

[5] The current parenting provisions are specific and detailed. The following paragraphs are particularly relevant:

Parenting

1. Nancy Laine Hollett and Stephen Roland Vessey shall have joint custody of Kelsea Laine vessey, born August 20, 1999 (“Kelsea”).
2. Beginning August 30, 2004, Nancy Laine Hollett shall have primary care of the Kelsea. Except as set out hereinafter or otherwise agreed between the parties, Stephen Roland Vessey shall have care of Kelsea as follows (“the Usual Parenting Schedule”):
 - a. The first two of every three weekends from Friday at 4:30 p.m. until Monday morning when school starts (Nancy Laine Hollett had the weekend beginning September 10, 2004, and Stephen Roland Vessey had the weekend beginning September 17, 2004 and the weekend beginning September 24, 2004);
 - b. Every Wednesday evening from 4:30 p.m. until 7:00 p.m.
3. Notwithstanding the Usual Parenting Schedule, the following exceptions will apply:

...

- g. From the day following the completion of school in June, Kelsea's school summer vacation period shall be shared equally between the parties, with the Usual Parenting Schedule to resume three clear days prior to the commencement of the new school year. Stephen Roland Vessey shall designate his vacation time in writing by April 1 of each year, which shall be the summer vacation unless otherwise agreed by the parties.

PROPOSALS

[6] Ms. Hollett suggests Mr. Vessey have Kelsea in his care in excess of his usual and prescribed summer (July and August) parenting time. Further, that when school starts in September, Kelsea be returned to her home to the care of her maternal grandmother and Ms. Hollett's fiancé. She stresses the importance of Kelsea remaining in the same home, community and school she has for most of her life. She suggests this is the preference of this almost ten year old. She voices concern as to Kelsea having to move to the Annapolis Valley and change schools in September only to return in January.

[7] Mr. Vessey requests the current order be varied, basically on an interim basis, to allow Kelsea to be in his primary care and reside with him between September of 2008 to the beginning of January of 2009. He acknowledges this change would create a move from the Halifax area to the valley area. He acknowledges this would create a change in Kelsea's 2008/2009 schooling. He submits that Kelsea, because of the current access schedule, is familiar with his home, community and has friends in this area. He also stresses the importance of Kelsea having enhanced time with her half-sister and half-brother who currently reside in Mr. Vessey's home. He submits this change of schedule for Kelsea would not be as dramatic as suggested by Ms. Hollett. He submits, in a situation where Ms. Hollett is not able to provide the primary care for Kelsea, he, as the other parent, given the current arrangements, should be the obvious choice to provide such care. He further voiced concerns, albeit to a limited degree, as to the care to be provided for Kelsea by her maternal grandmother and/or Ms. Hollett's fiancé.

RELEVANT LEGISLATION

[8] Sections 16 and 17 of the *Divorce Act*:

Order for custody

16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

...

Factors

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

...

Maximum contact

(10) In making an order under this section, 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 and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

...

Order for variation, rescission or suspension

17.(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

...

(b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

...

Factors for custody order

(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.

CHANGE OF CIRCUMSTANCES

[9] Ms. Hollett, the primary caregiver, being unavailable to Kelsea from late July of 2007 to January of 2008, creates a change in the means and needs of Kelsea.

ANALYSIS AND CONCLUSION

[10] When this application began Ms. Hollett was aware of her acceptance into the RCMP training program but not the exact time the program would begin and end. We now know. As previously stated, Ms. Hollett will be away from July 20, 2008, to January 3, 2009.

[11] As for July and August, the parents historically share this time on an equal basis depending on their work schedules and vacation time. This year's tentative schedule was made available to the court. Ms. Hollett has suggested enhancing Mr. Vessey's summer schedule. I presume this meant after her date of departure. There was a further agreement that they would switch the weeks in July beginning on July 13th and 20th. Mr. Vessey also agrees to make Kelsea available to visit Ms. Hollett in Regina. Mr. Vessey also agreed to make Kelsea available to Ms. Hollett's family for a number of family events over the summer.

[12] The issue really narrows to where should Kelsea primarily reside for the months of September, October, November and December. As previously noted, Ms. Hollett submits that Kelsea remain in her current home with her mother and fiancé with Mr. Vessey exercising his current parenting time. Mr. Vessey acknowledges that it is imperative that Kelsea maintain her current friends in her current community. In his testimony he mentioned ,if Kelsea were to reside with him, he would make her available to spend some weekends at her current home.

Therefore, his plan would be somewhat similar to he and Ms. Hollett's family exchanging their current parental role and responsibilities.

[13] This is somewhat of a unique application. It cannot be characterized as an interim application but rather an application to have Kelsea relocated for an interim period of time.

[14] All of the adults involved – Ms. Hollett's fiancé, the maternal grandmother, Mr. Vessey and his wife – are all familiar with and have a history of providing care for Kelsea.

[15] If Ms. Hollett was being forced to leave the area indefinitely and was unable to provide for Kelsea, the obvious choice in this instance would be to place Kelsea with her father. However, the question remains: is it in Kelsea's best interest for a period of four months to enter a new school system, reside in a different community knowing she will be returning to her current school system in January of 2009? Is it in her interest to disturb her current living pattern for this four-month period? It should be noted that this current pattern includes for her to spend most of her free weekend time with her father.

[16] Ms. Hollett stresses the dangers of tinkering with a working plan. Here we have a child of separated parents who, on balance, appears to be handling her current living arrangements very well. She is completing her schooling, has friends in her community and is in Guiding. She spends a considerable amount of her weekend time with her father, his wife and their family. She functions well in that setting. Should this living pattern be changed for a four-month period requiring Kelsea to briefly enter a new school system, acquire new friends and then return in January and have to re-connect with her school and the people of that area? Mr. Vessey, on the other hand, views this four-month period for Kelsea as an opportunity; an opportunity to get to better know her other parent and his family. He suggests the change of schools as requested in his proposal as something quite common in this day and age. He also stresses that Kelsea already knows children in his area.

[17] In *Marshall v. Marshall*, 1998 CarswellNS 183 (N.S.C.A.), the Nova Scotia Court of Appeal dealt with the question of interim custody applications. This, as earlier stated, is not such an application, but it has the same effect in that it deals with the interim placement of a child.

[18] In *Marshall v. Marshall*, supra, the court approved the test of Judge Daley in his decision in *W.(L.S.) V. W. (I.E.)*, 1989 CarswellNS 410 (N.S.Fam.Ct.) in which he stated at paragraph 6:

Given the focus on the welfare of the child at this point, the test to be applied on an application for an interim custody order is: what temporary living arrangements are the least disruptive, most supportive and most protective for the child. In short, the status quo of the child, the living arrangements with which the child is most familiar, should be maintained as closely as possible. With this in mind, the following question require consideration.

- (1) Where and with whom is the child residing at this time,
- (2) Where and with whom has the child been residing in the immediate past; if the residence of the child is different than #1, why and what were the considerations for the change in residence.
- (3) The short term needs of the child including:
 - a) age, educational and/or pre-school needs;
 - b) basic needs and any special needs,
 - c) the relationship of the child with the competing parties,
 - d) the daily routine of the child,
- (4) Is the current residence of the child a suitable temporary residence for the child taking into consideration the short term needs of the child and
 - a) the person(s) with whom the child would be residing;
 - b) the physical surrounding including the type of living and sleeping arrangements, closeness to the immediate community and health,
 - c) proximity to the pre-school or school faculty at which the child usually attends,

d) availability of access to the child by the non-custodial parent and/or family members;

(5) Is the child in danger of physical, emotional or psychological harm if the child were left temporarily in the care of the present custodian and in the present home.

[19] Mr. Vessey has acknowledged that there is an apparent reluctance on the part of Kelsea to change her current living conditions. He has also appropriately noted that, given her age, such a decision should not be left to her.

[20] Mr. Vessey's parenting skills and ability to provide for his daughter, Kelsea, is recognized, but I remain concerned as to the changing of what is a working lifestyle for an interim period of four months. I am also mindful of the extensive weekend time that is currently available to Kelsea and her father; time when they are neither working or attending school; time that would not be as available to them if she spent her school time in the valley and returned to her current accommodations most weekends.

[21] This child faces some uncertainty as to her ongoing relationship with her parents. Her father is a couple of years away from facing a different posting. Kelsea, however, will still be a relatively young child if and when such change occurs. Her mother's situation brings forward some more immediate uncertainty. First, she must succeed in becoming a member of the RCMP. Secondly, she must as she anticipates secure a posting that will allow her to return to the area where Kelsea is attending school.

[22] I conclude, at this time, it is in Kelsea's best interest that her current parental relationship remain in place. I come to such a conclusion with the caveat that Kelsea will spend most of the month of August in her father's care as Ms. Hollett will be unavailable at that time.

[23] I ask counsel for the applicant to prepare the order.

J.