

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Cool v. Cool, 2009 NSSC 48

Date: 20090219

Docket: 1201-061947

Registry: Halifax

Between:

Crystal Dawn Cool

Petitioner

v.

Pierre-Olivier Cool

Respondent

Judge:

The Honourable Justice Mona M. Lynch

Heard:

February 2 & 3, 2009 in Halifax, Nova Scotia

Counsel:

Angela Walker, for the Petitioner
Kim Johnson, for the Respondent

By the Court:

Background:

[1] The mother and father were married on December 23, 2004. The child, a boy, was born on August 1, 2005. Both the mother and the father are in the Canadian Military. The mother is a dental technician and the father is an electrician.

[2] The mother was on maternity leave for the first year of the child's life. The father spent time at sea during the marriage and during the first year of the child's life. The mother was deployed to Afghanistan from January 2007 to July 20, 2007. While the father was at sea and while the mother was in Afghanistan the other parent was the sole caregiver for the child. The parents separated at the time the mother returned from Afghanistan on July 25, 2007. The father moved out of the matrimonial home where the mother and child remained.

[3] There was an interim hearing held on August 29, 2007 which resulted in day to day care of the child being with the mother and the father having the child for regular parenting time on alternate weekends from Friday to Monday and

overnight every Wednesday. The interim order also dealt with vacations and holidays.

[4] The parents reached an agreement on all issues of property and spousal support in February 2008.

[5] In October 2008, the mother applied for an interim order granting her sole custody of the child and requiring the father's access with the child to be supervised. Leave for that application was not granted as the trial dealing with custody was scheduled to begin on February 2, 2009.

[6] Both parents have concerns about the interim parenting arrangement, but those concerns were eclipsed by the mother's acceptance into a two-year dental hygiene program in Toronto, Ontario commencing September 2009.

[7] A trial was held on February 2 and 3, 2009 relating to the divorce and to determine parenting arrangements and child support.

Issues:

- [8]
1. The divorce.
 2. Is it in the child's best interests to move to Toronto with his mother?
 3. What parenting arrangements are in the child's best interests?
 4. Should retroactive child support be ordered?
 5. What child support should be paid on an ongoing basis?

Authorities

[9] The law in relation to the granting of the Divorce is set out in the **Divorce Act**, R.S., 1985, c. 3.

[10] As in all cases involving parenting of a child, the primary and only factor for me to determine is what is in the best interests of the child. The **Divorce Act**, requires the court 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 take into consideration the willingness of the person for whom custody is sought to facilitate such access.

[11] 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? **Gordon v. Goertz** was a variation application. The present case involves an initial custody order under the **Divorce Act**, therefore, there is no need to establish a material change in circumstances. The factors set out in **Gordon v. Goertz** for determining the best interests of the child are still applicable.

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

49 The law can be summarized as follows:

...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.

Analysis:

1. The Divorce.

[13] All of the procedural and jurisdictional requirements have been met to grant a divorce. The grounds for divorce have been established as there has been a breakdown of the marriage in that the parties have been living separate and apart for at least one year and they were living separate and apart at the commencement of this proceeding. There is no possibility of reconciliation. The divorce is granted.

[14] The parties have reached agreement in relation to most corollary matters, with the exception of parenting and child support.

2. Is it in the child's best interests to move to Toronto with his mother?

[15] Both parents provided evidence from family members and friends supporting their parenting plan. Most of this evidence was not very helpful in my determination of the best interests of the child. It was clear that both sides have

loving and supportive family and friends but the evidence from these supporters was not very objective.

[16] Either parent is able to provide for the physical needs of the child. Either parent would provide a good role model for the child. Both parents are interested in the child participating in extracurricular activities. Both parents can financially provide for the child.

[17] The mother's plan involves the child moving with her to Toronto in September 2009 where they will live for at least the next two years while she studies dental hygiene. The cost of the mother's course as well as her regular salary and benefits will be paid by her employer. The option of having the course paid for by her employer is not available in Nova Scotia. The mother has applied for military housing in Toronto and is expecting to be accepted. The mother has researched child care, school and extra-curricular activities for the child close to where she will be living. The mother has not explored French or French Immersion schools for the child. The mother has family and friends in Toronto who can support her. The mother will have regular hours and will not be deployed for the two years she is taking the course.

[18] The mother proposes extra parenting time for the father prior to her leaving for Toronto. She is suggesting communication between father and son by phone, email, web cam and letters. The mother says she will keep the father informed about the son's education, health, recreation, behaviour and developmental milestones. The mother suggests visits with the child in Nova Scotia provided those visits do not disrupt the child's or her school attendance. The father could visit the child in Toronto. She proposes alternating holidays and March Breaks as well as two to three weeks with the child in the summer. The mother also suggests that she will take the child with her when she flies back to Nova Scotia to visit her parents and other family members.

[19] Initially the mother's position was that if the child was not allowed to move with her she would stay in Halifax. That position changed at trial and the mother will take the course in Toronto in the Fall of 2009 whether the child is able to move with her or not.

[20] The mother wants final say on decisions involving the child because of the parents' inability to communicate effectively.

[21] The father's plan is that he will stay in Halifax with his common-law partner and the child. The child will remain in the same day-care until he starts school.

The father was born and raised in Quebec and French is his first language. The father plans to enroll the child in either a French school or French Immersion. The father will ensure the child has contact with the family of the mother and the father.

The father is due to be posted to a ship in the summer of 2009. If the child is permitted to remain in Halifax, the father will request to remain ashore. If it is not possible to remain ashore the father will request a posting to a ship that will be staying close to Halifax and not one that is away for extended tours. If required to be away for extended periods of time, the father plans to leave the military and work as an electrician in the civilian world.

[22] If the child is allowed to remain in Halifax, the father proposes parenting time with the mother similar to the mother's plan for the father if the child is permitted to move with her.

[23] The parents disagree on whether the mother's views are entitled to great respect as set out in **Gordon v. Goertz**. The mother says that she has been the

primary parent of the child for the majority of his life so her views and her plan are entitled to great respect. The father says that the parenting arrangements currently in place are interim and no great weight should be placed on the mother having primary care on an interim basis. The child was born in 2005 and the mother took maternity leave for the child's first year. The parents disagree as to who was the primary parent for the child prior to separation. The mother says that the father was away for much of the child's early life, a claim the father disputes. The father says the mother worked part-time during her maternity leave. Suffice it to say that it is not entirely clear from the evidence who was the primary parent to the child during his first year.

[24] It is clear that the father was the primary caregiver to the child from January to July 2007 when the mother was in Afghanistan. Since August 2007 the child has been in the primary care of the mother and the father has had parenting time every second weekend, each Wednesday overnight and five weeks during the year.

[25] At the interim hearing the father was seeking shared time with the child. In his decision of August 29, 2007, Justice Campbell noted that the mother's plan was for the child to live with her in the matrimonial home. At that time, the father

planned to have the child live with him at a friend's home. In his decision, Justice Campbell noted that he was making an interim parenting arrangement.

[26] This is not a case where the child has been living primarily with the mother for an extended period of time. The mother has had primary care through an interim order for the last year and one-half. Prior to the interim arrangement the father was the primary caregiver for seven months. The parents have joint custody of the child and both have been very involved in the child's upbringing. I do not find that the mother's views and wishes should be given any greater weight than the father's views and wishes.

[27] There is no doubt that the mother and child have a great bond. I accept the evidence of all of the witnesses that the mother is a very caring and capable mother. The mother has enrolled the child in good and healthy activities such as swimming and soccer. The mother has ensured that the child has spent time with her extended family in the Halifax area.

[28] The father also appears to have a strong and loving bond with the child. The father has participated in soccer and skating with the child. The father and

child are involved in good activities and they spend time with the father's extended family and friends.

[29] Family members of the mother have criticized the father's care of the child. They criticize the father for taking the child with him when he played hockey and floor hockey. They indicate that the father had problems with the child's behaviour and was expressing frustration. They expressed concern that the child was up too late in the father's care. Most of the criticism was focussed on the time when the mother was in Afghanistan and the father was the sole caregiver. I accept the father's explanations for the concerns expressed by the mother's family. I do not have a concern that the father took the child to hockey or to floor hockey, as the child was supervised by friends. The behaviours described by the mother's family are not unusual for a child approaching the age of two years. Frustration expressed by the sole care-giver of a toddler is also to be expected. The father did not always answer the phone at night and the mother's family may have thought he was not home and out late with the child.

[30] One of the biggest concerns was that the father did not take the child's head banging behaviour seriously. The father appears to have dealt with the child's

head banging appropriately during the time he was the sole caregiver. The head banging did not continue when the child was in the care of the father but did when the child was in the care of the mother. The mother sought advice about the head banging and it appears that it has been resolved.

[31] The father acknowledges that the mother is a very good mother but he expresses concern over her unwillingness to maximize his contact with the child and he does not agree with her criticism of his actions.

[32] In October 2008 the mother applied for a change in the interim parenting to provide her with sole custody and to require the access between father and son to be supervised. The concerns expressed by the mother in her affidavit of October 2008 did not come close to justifying a change to sole custody and the concerns would not in any way justify supervised access. The reasons provided for the mother's request raise more concern about the mother's judgment than they do about the father's behaviour.

[33] The mother was concerned that the father had made a medical appointment for the child but did not inform her and the appointment was with a doctor who

was not the child's regular doctor. The mother felt that the father was being deceitful about the medical appointment for the child. I accept the father's explanation that he booked the appointment in good faith for a regular check-up and took the opportunity to raise a concern about a medical condition in his family. The regular doctor was not available. There is no concern raised by the child seeing a duty doctor when the regular doctor was not available. All of the appointments were made at the same clinic and it is apparent from the evidence that the child has one chart to which all of the doctors have access. There were no continuity of care concerns raised on the evidence.

[34] The mother has complained that the father took the child for haircuts although he knew that she had made appointments for the child's hair to be cut by the regular hair stylist. She characterized these haircuts as the father deliberately ignoring her requests and as damaging to the child. The father's explanation is that he was teaching a course and was trying to provide a good example for his subordinates by getting his hair trimmed every two weeks. When the child was in his care, the child accompanied the father to the barber and the barber cut the child's hair. These haircuts appear to have been a nice activity for the father and son and a good bonding opportunity. It was very concerning that the mother

painted these haircuts in such a negative light. There was no evidence of damage to the child.

[35] The mother expressed concern about the father enrolling the child in activities on the weekend without consulting her. However, the mother agreed that she had enrolled the child in activities on the weekend without consulting the father. The mother appeared to believe that it was acceptable for her not to consult but not acceptable for the father.

[36] The mother also criticized the father for not taking the child to all of the swimming classes she enrolled the child in after he was informed of the schedule. The father provided very valid reasons for missing some of the classes. On the weekends she had the child, the mother chose not to take the child to any of the skating classes in which the father had enrolled the child. Again, the mother complained about the father's behaviour but felt it was acceptable for her to do the same thing.

[37] The mother expressed concern that when the child was in her care the father's attendance at swimming or soccer was disruptive to the child. I do not

accept that the father showing an interest in his son by attending the child's activities was disruptive.

[38] In her affidavit of October 2008 the mother stated that the father was taking the child to soccer although she had enrolled the child and the father had failed to keep her up to date about events such as team pictures and fun day. The mother went to the soccer field on the day the team picture was to be taken and asked the father why he did not inform her of the event. The father's response was that the mother received the same email he did about the event, and he did not see a need to inform her. When asked why she would confront the father about not providing her with information that she already had, the mother responded that she did not know that the father knew she received the information. The mother had the information about the team photo but confronted the father, in the presence of the child, about not providing her the information. The mother was picking a fight with the father although she had the information she was accusing him of not providing. This incident shows a lack of child focus by the mother.

[39] The mother expressed concern about the father dating a person who worked in the day-care the child attended. The mother found out about this relationship in

a manner that was not foreseeable by the father. I accept the father's explanation that he and the day-care worker had only had a few dates and did not know where the relationship was heading at the time that the mother was informed of the relationship.

[40] The mother has implied that the father is responsible for the child not wanting to talk to his maternal grandfather on the phone. That was not supported by the evidence. The mother has implied that the father and his partner have told the child he has two mothers. I accept that when the father was informed that the child was saying he had two mommies the father took steps to clarify with the child that he had only one mother. The mother also implied that the father tried to break into her home with a crowbar and again there is absolutely no foundation for that accusation.

[41] The mother expressed concern that the child was "removed from the province without permission or notice" by the father during his parenting time. The mother's concern included that "in the case of an emergency (the child) was unreachable". The father took the child three hours away to an amusement park and was gone less than 24 hours. This concern by the mother is blown way out of

proportion and seems more about the mother wanting to be in control of the child. There is nothing concerning about this trip. The father and child could have been further away but still in the province.

[42] It is very clear that the parents do not communicate well and both parents need to work to solve that problem. The mother expressed concern about a bruise the child suffered from a fall at day-care. The father was informed of the fall by the day-care. The father did not pass along the information to the mother. He should have told the mother about the fall and the bruise.

[43] While the father has failed to communicate well at times, I have much greater concern about the mother's communication with the father. There are examples in emails attached to affidavits where the mother was very unhelpful to communication. On March 13, 2008, the father asked the mother about the child's recent doctor's appointment. The mother's response on March 15, 2008 was that the child had a routine doctor's appointment and, "... I am not required to fill you in on the details according to the Court Order, I am to simply inform you which I did in the last email". This was a highly inappropriate response to a request for information about the child's medical appointment.

[44] It is apparent from the emails that the mother asked the father not to call her unless there was an emergency and she characterized the father's calls as harassment and stalking. The mother also demanded that the father not email her unless it is relevant to the health or welfare of the child. This demand was made when the father was asking about access.

[45] More concerning to the court than the communication problem between the parents has been the mother's unwillingness to maximize the father's parenting time with the child. According to the interim order, the parents were to have the child with them on their birthdays. The father's 30th birthday was in January 2008 and the mother would not allow the father to have the child on that day. Her excuse was that the order had not been signed. The mother's response was not child focussed.

[46] Also concerning was the mother's denial of the father's request to have the child for a week in November. The email on this subject clearly shows that the mother thought it was entirely her decision whether the father could have the child that week. She demanded a letter from the father saying he would not take any

more vacation with the child until April 2009 and, “No letter, then that means no Nov leave”. Later, in relation to his request she writes, “This leaves you with the option to take leave in Sep, OR Nov. I am not letting you take 5 weeks and then fight for a 6 week, so this it”(sic). Later, in relation to the week in November, she writes, “If you want to be difficult then I will Will (sic) be taking Christmas again this year and you can have 29dec-05jan”. When asked about not allowing the father to take another week with the child the mother said that it would not be fair for the father to have six weeks if she could only have five weeks of leave with the child.

[47] The mother was very concerned about the time allotment being fair to her. The child was in the mother’s primary care and she had more time with the child than the father. I was left wondering about the mother’s use of the word “fair”. I believe it would have been very fair to the child to allow him a week with his father instead of a week in day-care. This again shows a lack of a child focus.

[48] The mother testified that she felt it was as important for the child to spend time with her extended family as it was for the child to spend time with his father. She has been unwilling to allow the father time with the child. The mother has

acted as if the child's time was hers to divide and decisions about the child were hers to make. The mother used the expression that she had "given" the father extra time, as if the child's time was hers to give.

[49] I have absolutely no confidence that the mother would cooperate in maximizing the father's time with the child if she was allowed to move to Toronto with the child. Her past behaviour has shown that she is not flexible and does not value the father's role in the child's life. She was requesting supervised access for the father as recently as October 2008.

[50] The mother expressed concern that the father had discussed with a social worker the best way to introduce the child to his new girlfriend without telling the mother about this discussion. The mother met with a psychologist to discuss the child's head banging but did not share that information with the father. The mother expressed concern that the father was taking the child to church. The mother was placing the child on waiting lists for day-care centres in various places across Canada without telling the father. Whenever the father made decisions about the child, whether to get the child's hair cut or to enroll the child in skating,

the mother complained about his lack of consultation. At the same time she was not consulting the father.

[51] While the mother said that she would be happy for the child to understand his French heritage and speak the French language, her testimony on this subject did not leave me with the impression that she would make this a priority. She did not look for a French school in Toronto and suggested that the child could meet a friend who spoke French in Toronto and learn the French language.

[52] The mother's reason for moving is very valid. She has a wonderful opportunity for advancement in her career. She is very fortunate to be offered this opportunity at no cost to her. The mother's move is not necessarily a move for two years. The mother has indicated that she may not return to Nova Scotia after the two years. She said that she would like to be close to Nova Scotia but she also testified that she may ask to remain in Toronto. It is uncertain where the mother will be living after the two years. While this is a wonderful opportunity for the mother, the mother's best interests are not my focus.

[53] There is no doubt that there would be a disruption to the child if he was not allowed to move with the mother and custody was changed to the father. The child has a significant bond with the mother. Whether the child is allowed to remain with the father in Halifax or to go with the mother to Toronto, the child will suffer a significant loss of time and relationship with a parent.

[54] The child also has a good bond and relationship with the father. The loss the child will suffer from the mother moving to Ontario without him will be somewhat offset by the relative stability in his day to day living. The father's plan to keep the child in the same neighbourhood, in the same day-care and with continued contact with extended family and friends will help to minimize the disruption in the child's life. I trust that the father will continue to foster the child's relationship with the mother's extended family in Nova Scotia.

[55] The mother has not fostered and encouraged the father-child relationship and I do not believe allowing the child to move with her would change her attitude. I have more confidence that the father will foster and encourage the mother-child relationship.

[56] It is not in the best interests of the child to allow him to move to Toronto with the mother.

3. What parenting arrangements are in the child's best interests?

[57] Until the mother leaves for Toronto, the parents will share custody of the child. The parents will have the child in their care on a weekly basis from Friday when the parent picks up the child at day-care until the next Friday morning when the parent drops off the child at day-care. To ensure that the child does not go too long without seeing the other parent, the child will be in the other parent's care from the pick up at day-care on Monday until the drop off at day-care on Tuesday morning. There are no restrictions on picking up the child early from day-care. It is a good thing if the child can spend some extra time with one of his parents.

[58] Both parents expressed concern regarding communication between the parents. Most communication between the parents should be by email. If the matter is urgent communication can be by telephone.

[59] The child will be in the joint custody of the parents with primary care to the father. The father will consult the mother on all decisions regarding the child's health, education and overall welfare but he will have final decision making authority in case of a disagreement between the parents.

[60] The child will be with the mother for five weeks during the year for her annual leave. The mother will have the child in her care for any weekends that she is able to travel from Toronto to Halifax. The father will provide unlimited access for the mother to the child by phone, email, web cam and letters. The father will keep the mother informed with regard to the child's education, recreation, health, and overall well being.

[61] In addition to other parenting time, the mother will have the child for three weeks in July of 2009. She is to inform the father of the weeks she is requesting on or before May 15, 2009.

[62] The parents will alternate Christmas, March Break and Easter. For 2009, the father will have the child for March Break, the mother will have the child for Easter and the mother will have the child in her care from December 24, 2009 until

December 28, 2009. The parents will share the child's birthday if both are in the same city.

[63] In the event either parent requires child care exceeding 48 hours, the other parent will be offered the opportunity to parent the child before alternate child care arrangements are made.

4. Should retroactive child support be ordered?

[64] There has been a change in the father's income effective April 1, 2008 but the amount of child support has not changed. Effective April 1, 2008 the father will pay child support based on what I understand his income was for 2008 – \$78,900.00. Also, effective April 1, 2008 the parents are to share the after tax cost of child care for the child in proportion to their incomes of \$78,900.00 for the father and \$66,108.00 for the mother. Fifty-four percent of the after tax cost of child care will be paid by the father and 46% by the mother.

5. What child support should be paid on an ongoing basis?

[65] Until the mother leaves for Toronto, the amount of child support will be a set-off between what each parent would pay for child support. Based on the incomes above the father will pay child support in the amount of \$104.00 per month commencing March 1, 2009.

[66] Until the mother moves to Toronto, the parents will continue to share the after tax amount of child care proportionate to their incomes.

[67] The father's position was that after the mother moved to Toronto he would accept the mother's contribution to the child care expenses and he did not request the table amount of child support. For the mother not to pay the table amount of child support she would have to show undue hardship. There was no evidence presented to support such a claim. Beginning September 1, 2009, the mother will pay child support in the amount of \$575.00 a month. In recognition of the mother's increased access costs, there will be no order for child care costs as of September 1, 2009.

[68] The parents will exchange income tax returns whether or not they have been filed, including any attachments, along with notices of assessment or reassessment on or before June 15 each year.

[69] The mother unilaterally closed the joint trust account for the child and placed the money in an RESP account to which the father does not have access. The mother will ensure that the father is placed jointly on the RESP account with all of the same rights and responsibilities to the account as she enjoys.

CONCLUSION

- [70] (a) It is not in the child's best interests to move to Toronto with his mother.
- (b) Until the mother moves to Toronto, the parents will share custody of the child on a week-on/week-off basis commencing on Fridays with the exception of Monday from after day-care until Tuesday at commencement of day-care when the other parent will have the child. Pick-up and drop-off will be at the day-care.

- (c) The child will be in the primary care of the father and the father will consult with the mother on all decisions regarding the child's health, education and overall well-being. In the event of a disagreement the father has final decision-making authority.
- (d) Each parent will have the child for five weeks leave per year.
- (e) In addition, the mother will have the child in her care for three weeks in July 2009 prior to her departure.
- (f) The father will keep the mother up to date regarding the child's education, health and overall well being. The father will provide unlimited access between the mother and child via telephone, email, web cam and letters.
- (g) The parents will alternate Christmas, March Break and Easter;
- (h) Other holidays will be included in the weekend of the parent who has care of the child on that weekend.
- (I) In the event either parent requires child care exceeding 48 hours, the other parent will be offered the opportunity to parent the child before alternate child care arrangements are made.

- (j) The father will ensure that the child spends time with the mother's extended family in Nova Scotia, in particular the child's maternal grandparents and maternal aunt.
- (k) The father will pay retroactive child support commencing April 1, 2008.
- (l) The father will pay the correct proportionate share of the after tax cost of child care commencing April 1, 2008.
- (m) Commencing March 1, 2009 the father will pay child support to the mother in the set-off amount of \$104.00 per month.
- (n) Commencing September 1, 2009, the mother will pay to the father child support in the amount of \$575.00 per month.
- (o) Commencing September 1, 2009, there will be no order for child care costs to be paid by the mother.
- (p) The mother will immediately ensure that the father is placed jointly on the RESP account with all of the same rights and responsibilities to the account as she enjoys.