IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Grandbois v. Napier, 2008 NSSC 156

Date: 20080530
Docket: SFHMCA-39699
Registry: Halifax

Between:

Diana Christine Grandbois (DeCoste)

Applicant

v.

Devin Michael Napier

Respondent

Judge: The Honourable Associate Chief Justice Robert F. Ferguson

Heard: May 1 and 2, 2008, in Halifax, Nova Scotia

Written Decision: May 30, 2008

Counsel: Luke A. Craggs, counsel for the Applicant
Julia E. Cornish, Q.C., counsel for the Respondent

By the Court:

[1] Diana DeCoste, formerly Diana Grandbois, age 26, and Devin Napier, age 25, are the parents of Aurora Kathlynn Grandbois, born August 21, 2004. In July of 2006, Ms. DeCoste applied for a court order that would establish her as the primary caregiver of Aurora and grant her permission to relocate with her to another province. Further, Ms. DeCoste requested the order establish Mr. Napier's parenting time with their child and require him to provide her with child support.

BACKGROUND

[2] In November of 2003, the young couple began dating. Ms. DeCoste became aware of her pregnancy in January of 2004. After the birth of Aurora, Ms. DeCoste lived at home for two months and then moved with Aurora into the home of a female friend who also was caring for children. Her source of income at that time was social assistance. Mr. Napier spent some time sharing accommodations with Ms. DeCoste while she resided at this location. There is a disagreement between the parties as to, if, during this time, they were living as a couple. Mr. Napier proposes they were while Ms. DeCoste acknowledges he stayed overnight intermittently.

[3] By January of 2005, the relationship, whatever it had been, ceased to exist.

[4] In February of 2005, Ms. DeCoste began dating Trevor DeCoste. They began living together in May of 2006. They have married and have a child born on March 1, 2007.

[5] Both Mr. and Mrs. DeCoste are employed in what could be described as entry level positions. Their hours of work do not coincide and, accordingly, they are able to provide most of the child care for their child and Aurora.

[6] Very recently (April 25, 2008), Mr. DeCoste received a conditional offer of enrollment in the training program of the R.C.M.P. He intends to accept this offer. The training program is six months in duration and the indication is that he will be given an opportunity to begin in the "summer of 2008." Upon successful completion of this program, Mr. DeCoste would become a member of the R.C.M.P. and stationed in accordance with his duties. Normally, a new member is not posted to his home province.

[7] Mr. Napier has been, since June of 2007, employed in a business owned by his father. He resides in his parent's home with a younger brother who is a student. The Napiers have an extensive family that is available to Aurora while she resides in this area. There is evidence that there are opportunities – financial and otherwise – that could be made available by the Napier family to Aurora if she was to remain in this area.

[8] Since Mr. Napier and Ms. DeCoste ended their relationship, Mr. Napier has continued to have a relationship with Aurora.

[9] In May of 2005, an Agreement to Pay Maintenance which was registered with the court, required Mr. Napier to pay Ms. DeCoste $113.00 a month child support based on a stated income of $12,700.00 per annum. Subsequent to Ms. DeCoste's current application (July 2006), the parties entered into a Consent Order that stated, in part:

> **NOW UPON MOTION**
>
> The following relief under the Maintenance and Custody Act is hereby ordered:
>
> Paternity
>
> 1. Devin Napier shall be and is hereby declared to be the natural father of the child, Aurora Kathlynn Grandbois, born August 21, 2004,
>
> Parenting Arrangement
>
> 2. Diana Grandbois shall have primary care of the dependent child, Aurora Kathlynn Grandbois, born August 21, 2004.
>
> 3. Devin Napier shall exercise (sic) to Aurora Kathlynn Grandbois as follows:
>
> Regular Access

(i) Every second Saturday from 9:00 a.m. until Monday at 9:00 a.m. If that Monday is a holiday, Devin Napier shall keep Aurora until 6:00 p.m. Monday evening. For 2007, Christmas Eve shall be considered a holiday.

(ii) Every Thursday from 3:00 p.m. to 8:00 p.m.

(iii) On the Monday following Devin Napier's non-access weekend, Devin Napier will have access to Aurora from 3:00 p.m. to 8:00 p.m.

Christmas Access

During Christmas 2007, Devin Napier shall have access to Aurora Kathlynn Grandbois from noon Christmas Day until 4:30 p.m. Christmas Day. Nothing in this clause shall preclude Devin Napier from seeking, in the long-term, to alternate the Christmas access with a view to having Aurora Kathlynn Grandbois for overnight access at some Christmas in the future.

Vacation

Each party will have the right of one week's vacation in 2008, with both parties having the right to stay in communication with Aurora during the vacation period. Each party shall have two non-consecutive weeks with Aurora in 2009. The parties will review vacation access in future years, with the intention of increasing the access and making the vacation periods consecutive.

Mother's Day

If Mother's Day falls on Devin Napier's access weekend, Devin Napier will arrange for Aurora Kathlynn Grandbois to spend a few hours with Diana Grandbois.

Father's Day

If Father's Day does not fall on Devin Napier's access weekend, Devin Napier shall have a few hours of access with Aurora Kathlynn Grandbois on this day. If Father's Day falls on Devin Napier's access weekend, Diana Grandbois shall be entitled to have a few hours of access to Aurora Kathlynn Grandbois.

Special Events or Other Holidays and Occasions

Either party can, upon providing 48 hours' notice to the other party, seek extra time with Aurora if there is a special event taking place.

4. Diana Grandbois shall consult with Devin Napier and keep him informed with respect to major issues relating to the child, Aurora Kathlynn Grandbois, including those relating to health, education and religion. Both parties shall participate in major decisions regarding Aurora Kathlynn Grandbois. Diana Grandbois and Devin Napier will (sic) reasonable efforts to share any information regarding the child, Aurora Kathlynn Grandbois, including information concerning her health, education, recreational activities, etc.

5. Devin Napier shall be entitled to consult directly with all third party professionals who are involved in the care of Aurora and, specifically, Devin Napier shall be entitled to receive information such as report cards, medical records, and information regarding recreational activities. Devin Napier shall be entitled to attend any functions and meetings relating to Aurora Kathlynn Grandbois that parents are normally entitled to attend, such as school related events, medical and dental appointments, recreational activities, concerts, and the like.

Child Maintenance

6. Devin Napier shall pay child maintenance to Diana Grandbois pursuant to the Federal Child Maintenance Guidelines and in accordance with the Nova Scotia table, the amount of $144.00 per month, payable on the first day of each month, and commencing on January 1, 2008.

Section 7 Expenses

7. The parties shall consult with each other in relation to Section 7 expenses that may arise, with a view to sharing these expenses. The parties acknowledge that Aurora Kathlynn Grandbois will be attending pre-school in September of 2008.

. . .

Mobility

> 11. This matter shall be adjourned for a trial on the issue of mobility to May 1 and 2, 2008, and for a Settlement Conference on March 26, 2008 from 10:00 a.m. to 12:30 p.m.

[10] The Consent Order does not designate either party as the "custodial" parent. It does indicate clearly that Ms. DeCoste shall provide the primary care for Aurora. The wording of the Order (see particularly paragraphs 4 and 5 and to a lesser degree 7) creates a joint custody situation. The parties do not wish to revisit this issue. The parties also agree that the payment of child support remains as stated in the Consent Order.

ISSUES

[11] The main issue at this point is the request of Ms. DeCoste to move from the Province of Nova Scotia while retaining her status as the primary caregiver for Aurora.

[12] Mr. Napier contests Ms. DeCoste's request. Ms. DeCoste indicated that she would not leave Nova Scotia unless allowed to take Aurora with her. Mr. Napier testifies that he does not request Aurora be removed from the primary care of her mother if she remains in this area. It has been suggested that, given the foregoing, the issue to be decided is not which parent should provide for the primary care of Aurora but whether or not Ms. DeCoste be allowed to relocate to another province.

[13] Ms. DeCoste's plan of care for Aurora is to relocate upon Mr. DeCoste acquiring employment with the R.C.M.P. She anticipates Mr. DeCoste's income will enable her, for a period, to remain at home with both children. Eventually, she intends to once again become employed outside the home. Mr. Napier's plan of care was set forth in his affidavit. He would continue to live at the home of his parents in what would appear to be appropriate quarters for both he and Aurora. His employment takes him out of the home on a daily basis and child care would be provided in a preschool setting. In his testimony, his plan of care was not canvassed to any extent. A reason for this was Mr. Napier's belief that Ms. DeCoste's indication she will not relocate without her daughter narrows the issue before the court to the granting or not granting of her request to relocate.

[14] On this point, Ingram J., in *Drury v. Drury* [2006] O.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:

> 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.

POSITIONS

[15] Mr. DeCoste anticipates getting the request to report to the R.C.M.P. in the “summer of 08.” Ms. DeCoste would then move to Monastery to the home of Mr. DeCoste’s parents with the two children to await Mr. DeCoste’s successful

completion of his program and posting. Upon Mr. DeCoste receiving his posting, she would then relocate with the children to the area of Mr. DeCoste's employment. This interim move to Monastery is necessitated by Mr. DeCoste having to give up his current employment and the inability of the DeCoste family to maintain their present apartment in Dartmouth and provide for child care without Mr. DeCoste's income and presence. Ms. DeCoste proposes, while living in Monastery, to make Aurora available to Mr. Napier every fifth week for the entire week. Her intention as to providing Mr. Napier with parenting time when posted in another province is less developed. When questioned as to this suggested deficiency she replied that Mr. Napier has been no more precise with his request as to parenting time should such a move take place. It should be stated that Ms. DeCoste's request to relocate outside the Province of Nova Scotia with Aurora is predicated on Mr. DeCoste's successful admission into the R.C.M.P. and subsequent posting.

[16] Mr. Napier's parenting plan, as previously noted, is set out in his affidavit which, on this point, states in part:

> 53. If Diana is not willing to remain in Nova Scotia, then I propose to have primary care of Aurora. The following is my proposed parenting plan for Aurora. I believe that my family and I have a great deal to offer Aurora and she would miss out on having close relationships with myself, my parents, my extended family, as well as Diana's family if she were to move. I have no difficulty maintaining Aurora's contact with Trevor's family if requested to do so.
>
> 54. I currently live with my parents, Michael Napier and Adrienne Thomas, at 26 Harbour Drive in Dartmouth. . .
>
> 55. If Aurora were to come in to my care full-time, we would move down to the bottom floor in a private, spacious, newly constructed two-bedroom apartment which has (sic) large living room, kitchen and full bath. . .
>
> 56. Because I work, if Aurora were living with me in September 2008, she would start attending pre-school, preferably at YMCA of Greater Halifax/Dartmouth on Waverly Road in Dartmouth. The amount of time Aurora would spend at Pre-School would depend on how she responds to it. Since my mother works from home, she is always available as backup.

> 57. My current address lies in the South Woodside Elementary. By September of 2009, I would like to have a house in Dartmouth in the Creighton (sic) Park Elementary school district. This would then follow to the Bicentennial Junior High School, and then on to Dartmouth High School. I would also consider private School – I attended Shambala school myself. Once Aurora is older and her needs and abilities become clearer, this decision will become easier to make. Of course, I will consult with Diana and I would want to make any final decision together with her. If the decision is private school, my parents will help us pay.

THE LAW

[17] 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.

[18] When this application began there was no existing court order dealing with the custody of Aurora. It could be stated the issue is not of variation but of establishing an initial order as to the parenting of Aurora.

[19] Both parties have dealt with this issue as a request to vary. I agree with their conclusion. In *Rafuse of Handspiker* (2001) 190 N.S.R. (2d) 64, the Nova Scotia Court of Appeal spoke to this issue. Justice Oland stated:

> [11] The respondent pointed out that in this case, no court had granted an earlier custody order and that the application for custody was the original proceeding and not an application to vary. He submitted that accordingly, Gordon v. Goertz does not apply. With respect, I am unable to agree.
>
> [12] The parties had voluntarily entered into an agreement in 1993 which reflected their decision as parents on the matters of custody, access and

> maintenance. Each of them honoured its terms. Neither the appellant's day-to-day care nor the respondent's enjoyment of access was challenged or disturbed for some six years following their agreement. While there was no indication that it had ever been made a court order, the agreement was long-standing and respected. In these circumstances, the absence of a formal court order does not have the effect of excluding the application of the principles in Gordon v. Goertz.

[20] In this case, at the date of application, the parents (the parties to this application) had entered into an agreement that reflected their decision as parents on the matter of custody and access.

[21] 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;
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> (c) the desirability of maximizing contact between the child and both parents;
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> (d) the views of the child;
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> (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;
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> (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?

ANALYSIS

[22] The parties concur that Ms. DeCoste's plan to move constitutes a material change in circumstances. I agree. This move would create a change in the circumstances of Aurora who, at this time, can interact with both parents on a weekly basis. This is a change that would materially affect her. Further, it was not a change that was foreseen or could have reasonably been contemplated at the time the parties entered into their existing parenting arrangements. It is appropriate to hear the application to vary the existing circumstances.

[23] Having been satisfied that a material change in circumstances has occurred, the court must "embark on a fresh inquiry as to 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."

[24] There is no presumption in favour of either party although the Supreme Court has , in *Gordon v. Goertz, supra,* 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.

[25] *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;

[26] Ms. DeCoste has assumed the responsibility of being the primary care giver for Aurora since her birth. Initially, as a single mother and, latterly, as a wife with a husband and other child. All of the evidence and submissions indicate that she has, under sometimes difficult financial circumstances, maintained her responsibility. There is no reason for concern for Aurora in the current custodial circumstance other than the ability of Ms. DeCoste and her partner to maintain their current employment and provide economically for the children.

[27] Mr. Napier's parenting time has been set forth in the recent court order of February of 2008 and noted earlier in this decision. It would appear Aurora's involvement with her father and his family is a positive factor in her life.

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

[28] Initially, Ms. DeCoste indicated Mr. Napier did not appear to be interested in accepting the responsibilities of a parent from a financial or emotional perspective.

[29] Initially, Mr. Napier indicated Ms. DeCoste was inclined to deny him any meaningful ongoing involvement with his daughter.

[30] The wording of the recent court order should, to some degree, alleviate these concerns. However, the evidence presented does, to some extent, support Ms. DeCoste's concern that the long-term interests in Aurora are more pronounced in the paternal grandparents than the father. The evidence presented also supports Mr. Napier's concern as to Ms. Decoste not recognizing his rights and responsibilities as a father. It is obvious Ms. DeCoste wishes to solidify her current family unit. In doing so, if she is not careful, she could intrude on Aurora's right to have a positive and continuing relationship with her father.

(d) The views of the child;

[31] Aurora is currently not in the position to have a view as to the issue before the court.

(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;

[32] Ms. DeCoste's reason for requesting to move her family, including Aurora, outside of Nova Scotia is because she believes her husband will secure employment with the R.C.M.P. The securing of such employment is relevant to Ms. DeCoste's ability, as a parent, to meet the needs of Aurora. As previously noted, she and her husband are currently employed in entry level positions that offer little opportunity for advancement. If her husband obtains employment with the R.C.M.P., it will provide the family with an income and security level not easily attainable by she or her husband in their current employment.

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

[33] Ms. DeCoste has been Aurora's primary care giver for all of her life. Aurora has been properly cared for by her mother and would appear to be prospering in this setting. In spite of Mr. Napier's willingness, if necessary, to assume the custodial role, any change of custody, even given Mr. Napier's family support, would be a disruption to her life.

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

[34] Given Aurora's age, I find the only real disruption to her on a removal from her current community would be the loss of her regular access with her father and his family.

OTHER CONSIDERATIONS

Uncertainty as to the Proposed Plans of Care of the Parents

[35] Mr. Napier does not have a history of being a primary care giver. Both his parents currently live full and active daily lives.

[36] As to Ms. DeCoste, there is no uncertainty as to Mr. DeCoste obtaining employment with the R.C.M.P. If he does not, the request is abandoned. The uncertainty in Ms. DeCoste's plan is where they will be eventually posted. Ms. DeCoste has shown an ability to provide for Aurora in her family's current situation. I find she would provide appropriately for Aurora where ever her husband is posted.

CONCLUSION

[37] 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.

[38] Courts have decided, on many occasions, the issue of a parent requesting to relocate with his/her child to an area that, primarily because of distance, lessens the other parent's ability to maintain an existing relationship with the child.

[39] In most cases, the request to relocate comes from what is often termed the "custodial" parent. Often, the "custodial" parent indicates he/she will not relocate without the child.

[40] Often, the "access" parent while willing to take on the responsibility of the "custodial" parent indicates, if the "custodial" parent does not move, there would be no objection to the applicant retaining primary responsibility for the child.

[41] The foregoing portrays the relocation issue before me.

[42] The reasons submitted by Mr. Napier as to his request that Ms. DeCoste be denied the opportunity to relocate are often the reasons given by courts who decline such applications.

[43] Mr. Napier stresses the uncertainty of Ms. DeCoste's proposal from the prospective of where the DeCoste family could ultimately be required to live. He further submits the DeCostes are currently both employed and providing appropriately for their family and relocation is not required nor in Aurora's interest.

[44] As to the "fresh inquiry," I find it would be contrary to Aurora's best interests to remove her mother as the custodial parent or primary care giver.

[45] I further find it is in Aurora's best interest to allow her mother, and primary care giver, to relocate on the condition her husband obtains employment as a member of the R.C.M.P. The granting of the request on this condition removes much of the uncertainty. This is not a request to relocate to an area with more employment opportunities or the hope of finding employment. The ultimate posting may be unknown but that does not equate to a lack of planning or unpredictable result.

[46] I am unable to agree with the assertion that the DeCoste's current situation is stable and appropriate from the perspective of sufficient income and security of employment. Mr. DeCoste becoming a member of the R.C.M.P. provides an opportunity to the DeCoste family, including Aurora, that greatly exceeds what has been available to them in the past.

PARENTING TIME OF MR. NAPIER

[47] I am not satisfied the parties have provided the court with sufficient information to specify Mr. Napier's parenting time in the event Aurora relocates outside of Nova Scotia.

[48] I will retain jurisdiction with regard to finalizing the specifics of what parenting time would be appropriate in the event there is no agreement.

[49] The following may help the parties and their counsel in coming to a conclusion with regard to Mr. Napier's parenting time:

1) The parents, regardless of the wording used, are to be joint custodians of Aurora;

2) If Ms. DeCoste relocates temporarily to Monastery, Mr. Napier is to have parenting time with Aurora every third week – not every fifth week as suggested by Ms. DeCoste;

3) Mr. Napier should have parenting time with Aurora on any occasion he attends at the location of the DeCoste family;

4) Mr. Napier should have the opportunity for block parenting time with Aurora on the usual occasions: summer vacation, Christmas, March Break and Easter.

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

J.