SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Fairfax v. Garland, 2009 NSSC 299

Date: 20090930
Docket: SFHMCA-25946
Registry: Halifax

Between:

Donald Edward Fairfax

Applicant

v.

Cheryl Lee Garland

Respondent

Judge:	The Honourable Justice Deborah Gass
Heard:	September 30, 2009, in Halifax, Nova Scotia
Oral Decision:	September 30, 2009
Written Decision:	October 16, 2009
Counsel:	Sandra L. Barss, for the applicant Janice E. Beaton, for the respondent

By the Court:

[1] This is the decision in a proceeding in a custody application, the applicant being Donald Fairfax, who is the father of the child, Jillian, who is the subject of this proceeding. He has made an interim application for custody of his daughter, who is the child of himself and Cheryl Lee Garland, the respondent.

[2] Briefly, the facts are that this child was born six and a half years ago, the 3rd of March, 2003. She was born after the parties' relationship came to an end, so they have been apart for about seven years and the child, who is now six and a half, has been living primarily in the care of her mother, but with a very active, involved father for the last six and a half years, and the parents have been functioning without any court order.

[3] It is clear, though, from the pattern that the mother has been the child's primary caregiver since her birth and that Dad has been an active and involved parent in the role of an access parent. It does appear that in 2007 the mother moved to Stewiacke, which raised some further challenges in terms of physical access with the child, but that alternating weekend access has continued and the

child was attending school in Truro and Dad was participating as much as possible in activities there.

[4] The mother left Nova Scotia in the summer of 2009 to travel to Ontario and she subsequently took up residence in Toronto with her fiancé and her children. This change to taking up residence was done without the knowledge or consent of Jillian's father, who remains here living and working in Nova Scotia.

[5] Mr. Fairfax has filed for custody and seeks an order for interim custody, which would involve the child's immediate return to Nova Scotia to live with her father in Dartmouth until a full hearing could take place, or the parties could come to an agreement as to the long term parenting arrangements for Jillian.

[6] There is no question about jurisdiction, and that has not been argued. Nova Scotia clearly is the habitual residence of this child. She has lived here since her birth up until travelling to Ontario and the mother taking up residence in Ontario. This is the jurisdiction over the child and the court should and will exercise its jurisdiction in all matters respecting the care of this child.

[7] The court has the benefit of the affidavit of the father and has heard representations and read representations on behalf of both of the parents. The mother was served with notice of this proceeding on September 22nd in accordance with the Rules. She has not had an opportunity to file a responding affidavit to that which was filed by the father.

[8] It is trite to say that cases of this nature are very disturbing and difficult for the court because there is a very significant concern on the part of courts worldwide about children being unilaterally moved by one parent, thereby depriving the other parent of their parental rights and obligations, and the court has to look at these matters very seriously in terms of expressing its disapproval of this kind of behaviour, that not only is it insensitive but it can at times be illegal. Now, in this case the parties don't have a custody order so the mother has not broken any custody order by her move, but she has certainly breached the spirit and intent of the parenting arrangement that the parties have operated under ever since the child was born.

[9] The court has to balance all of that with the primary consideration of what is in the best interests of the child, and that is where the tension exists in these

situations. As has been indicated, this is the court that has jurisdiction and that shall and should exercise its jurisdiction over the matter. The circumstances of Jillian are such that she is the child of a black father and a white mother, and so she is a bi-racial child. She does have significant extended family here and a community in Nova Scotia. While the new partner of the mother is also of African-Canadian origin, he is in the step-parent role and the court is mindful of those considerations.

[10] The court has to look at, in an interim hearing, the fact that it is operating with very little information, or very superficial information. There is no opportunity to cross-examine on the affidavits, we only have one affidavit. There is a fundamental principal of the right to hear both sides and to consider evidence put forward by both sides and to have that evidence tested. There is as well a balancing of the short term issues with regard to Jillian and her best interests and the long term issues. In this affidavit that was filed by Mr. Fairfax, which again Ms. Garland has not had an opportunity to respond to in any way except through representations, there are some other concerns besides the move, however some of those concerns do go back to May of 2008 and it does not appear that at any time any application was made by Mr. Fairfax to change custody and the arrangement

that had existed throughout the child's entire life. There is no question that Jillian does have close long-standing relationships here in Nova Scotia with both extended family, community and schools and that has been seriously affected as a result of the move of the mother. The courts are not anxious to reward a parent who behaves inappropriately by removing a child in the manner that the mother has done and does not condone this kind of behaviour. At the same time, the remedy of removing a child in order to punish the parent is not necessarily what is in the best interests of the child, particularly on an interim basis. Any move that is made by a parent does disrupt the parent/child relationship and the court has to decide whether that move, with the limited information that is before it, is enough to support an order that would significantly change the status quo and change parental custody on a temporary basis.

[11] The evidence that the court has before it would certainly indicate that Jillian would be just fine in the care of her father and well cared for by her father, but the question is whether or not that is a short term issue or a long term issue and whether the court should make that kind of significant determination changing the status quo without a full hearing and the opportunity to fully hear both sides.

[12] It does appear, as has been indicated and it is not disputed, that the parents are substantially in a joint custodial role and they have actually functioned in a joint custodial since the child was born. The actual physical time the child currently spends with her father is approximately alternating weekends and such other times as can be worked out, and as well Dad's involvement in the school, etc. and the everyday telephone contact. It does appear on the evidence that the child has not resided with her father on a long term basis, although there have been extended periods of time with Dad, and it is also clear from the evidence that these parents never actually co-parented as parents together with Jillian. Dad has significant family support here in the community, but at the same time he does work full-time and it appears that Mom, at the present time, is home and is an at home parent.

[13] Interim orders which have the effect of changing custody, which is what I'm being asked to do today, are orders that are only made in the most serious of circumstances where the health and safety of a child is at risk in the care of the other parent, or there is the likelihood of a parent absconding and depriving the other parent of a full hearing in this matter.

[14] This is a situation where it is acknowledged that this is the court that will have to make this final decision, and it is the acknowledgement of the mother that she is going to have to come back here for the hearing of this matter.

[15] In terms of looking at the whole issue and the concern that the courts have about not condoning conduct that the mother has undertaken here, and balancing that with the best interests of the child, the most significant and paramount consideration is that of the best interests of the child and that trumps any punitive or rewarding aspect of the decision that the court has to make, and so the best interests of the child comes first and then the dealing with the parental behaviour is secondary.

[16] So, on the basis of what limited material I have before me today, I am not satisfied that it would be in the best interests of the child to, on a very interim basis, with the very limited information that I have, order that the child be returned to Nova Scotia to reside in the primary care of Dad until the matter can be fully heard. The outcome of this is by no means clear. Certainly there are very significant balancing factors in this situation that work in both directions, so it is not a situation where the court can clearly say that I will make this interim order

now and that will result in a final order being very similar to what the interim order is because it is by no means that clear.

[17] The court is, therefore, going to grant interim primary care to the mother, with the father not being required to pay any child support in order to offset some of the costs of travel. It appears there will be some access in Ontario in October. I will also, if the matter does not get to a hearing, put into place some interim arrangements in the event that we don't get the matter fully heard and a decision made in the meantime, that the first half of the Christmas break will be spent with Dad in Nova Scotia and as well the full March Break will be spent with Dad in Nova Scotia. The mother will advise the father forthwith of the school schedule for the child so that any long weekends that come up the child will be made available to have parenting time with Dad either in Nova Scotia or in Ontario and the mother will bear the costs of either the Christmas or the March Break travel for the child.

[18] We will set the matter for an organizational pre-trial conference, at which time counsel would come with their list of witnesses and we will determine how much time we are going to need for a hearing of this matter, whether there is any

benefit of a settlement conference or not, we will look at it in more detail at the organizational pre-trial.

[19] So, it is an interim without prejudice order. The court's jurisdiction will be maintained here. It will be a joint custodial order, with primary care remaining with mom at the present time but access with Dad as spelled out, and such other access as may be agreed upon from time to time either in Nova Scotia or in Ontario until the matter can be fully heard or the parties can come to a global agreement.

J.