

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Cleaves v. Cleaves, 2010 NSSC 322

Date: 20100812

Docket: SFHD-052859

Registry: Halifax

Between:

Larry Cleaves

Applicant

v.

Karen Dawn Cleaves (Gates)

Respondent

Judge: The Honourable Associate Chief Justice Robert F. Ferguson

Heard: April 14, 2010, in Halifax, Nova Scotia

Written Decision: August 12, 2010

Counsel: Mary Jane McGinty for the Applicant
Kim Johnson for the Respondent

By the Court:

[1] Larry Cleaves and Karen Gates are the parents of Jayce. Their parenting arrangements are set out in a Corollary Relief Judgment. Mr. Cleaves has applied to vary this Corollary Relief Judgment as it pertains to the parenting provisions and his obligation to provide child support. Ms. Gates does not agree with the particulars of Mr. Cleaves' request for a variance, but concurs that the existing terms of the Corollary Relief Judgment should be modified.

BACKGROUND/HISTORY

[2] Mr. Cleaves and Ms. Gates married on August of 2003. Jayce was born in December of 2004. The couple separated around May of 2006, with Ms. Gates remaining in the matrimonial home with Jayce.

[3] In June of 2006, shortly after the separation, the couple entered into a Separation Agreement which stated in part:

Parenting Plan of Jayce

Karen will have primary care of Jayce. She will be responsible for day-to-day decision making regarding Jayce and will consult Larry on major decisions. Final decisions will be made by Karen. Larry will have reasonable access at reasonable times, on reasonable notice and for reasonable periods of time.

Larry will pay \$400 monthly for child support in accordance with Child Support Guidelines as well as \$182 monthly towards the net cost of childcare for a total of \$582 monthly. The \$582 will be paid by post-dated cheques on the 1st of every month, beginning June 1st, 2006 out of an account that Larry has set up using the money from the sale of the mini home. Karen agrees to advise Larry in any change of child care costs and adjust change in net cost of childcare accordingly.

Larry and Karen will provide each other with a copy of their income tax return completed with all attachments, even if the return is not filed, along with all Notices of Assessment on or before June 1st each year.

[4] In October of 2009 a Corollary Relief Judgment was issued which stated in part:

AND UPON THERE BEING one child of the marriage, Jayce William Cleaves; born December 26, 2004;

AND UPON IT APPEARING that the Petitioner has an annual income of \$55,980 and the Respondent has an annual income of \$44,196;

The following relief under the *Divorce Act*, the *Matrimonial Property Act* and any other applicable legislation is hereby ordered:

Custody and Access

1. Karen Dawn Cleaves shall have primary care of the child, Jayce William Cleaves, born December 26, 2004. She will be responsible for day-to-day decision-making regarding the child and will consult with Larry Dean Cleaves on major decisions. Final decisions will be made by Karen Dawn Cleaves.
2. Larry Dean Cleaves shall have reasonable access at reasonable times upon reasonable notice to Karen Dawn Cleaves.

Child Support

3. Larry Dean Cleaves shall pay child support to Karen Dawn Cleaves in the amount of \$400 per month, payable on the first day of each month.
4. In addition to the table amount set out above, on the first day of each month Larry Dean Cleaves shall pay to Karen Dawn Cleaves the amount of \$182 for his share of child care expenses.

[5] Ms. Gates was, at separation and continues to be, a school teacher. Her working hours are predictable. Mr. Cleaves' employment required him on occasion to work week-ends and extended hours. Mr. Cleaves sought to have Jayce in his care on his days off. Ms. Gates acknowledged this wish.

[6] Unfortunately Mr. Cleaves would not obtain notice of his days off until shortly before they became available to him. This lack of advanced notice to Mr. Cleaves created a problem for him and Ms. Gates in having Jayce available to him on these days.

[7] As time went on it became more and more difficult for Ms. Gates and Mr. Cleaves to interact effectively as Jayce's parents. Mr. Cleaves began another relationship and the couple now reside in a home approximately 20 minutes from the home and/or school of Jayce and Ms. Gates.

[8] In January of 2009 Mr. Cleaves had his solicitor contact Ms. Gates by letter. The letter indicated the couple had created a parenting schedule that resulted in Jayce dividing his time between them on almost an equal basis. It was suggested as a result of such sharing and Ms. Gates' income, that Mr. Cleaves' obligation to provide child support be discontinued.

[9] A short time after this letter was written, Mr. Cleaves and his common-law partner gave birth to a son.

[10] In March of 2009, Mr. Cleaves makes an application to vary the Corollary Relief Judgment as it pertains to custody, access and child support. In his affidavit accompanying this application he submits that Ms. Gates has unilaterally drastically reduced his parenting time. He seeks an arrangement where the parents would have their son in their care on an equal basis and further, that his child support obligations would be varied or discontinued in reflection of such a parenting arrangement.

[11] On June 4th 2009, a pre-trial conference was held. Both parties appeared with their current counsel. A Memorandum was issued which stated in part:

The current order provides that Ms. Gates has primary care of Jayce and Mr. Cleaves has reasonable access. Mr. Cleaves alleges that in reality he has had what amounts to shared custody and that is what he is seeking by way of his application. He also seeks a variation of the child support reflective of a shared custody arrangement. Ms. Gates opposes the application and seeks a continuation of the primary care order and child support consistent with that.

Trial dates have been scheduled for **February 3, 4 from 10:00 a.m. to 4:30 p.m.** and **February 5, 2009 from 10:00 a.m. to 12:30 p.m..**

[12] In August of 2009, Ms. Gates contacted Mr. Cleaves and suggested that with their child attending school that his parenting time should be basically every second week-end from Friday at 3:00 p.m. to Sunday at 6:30 p.m.

[13] On September 14th, 2009, Mr. Cleaves made an interim application to provide him with appropriate parenting time with Jayce pending the outcome of the trial already scheduled for February of 2010.

[14] On September 22nd, 2009, a hearing was held with both parties and their counsel in attendance. The court running file indicates as follows:

The matter was before the court on an application for leave to apply for an interim order prior to a variation application which is already set for trial. The court heard argument from both counsel. Discussion was held between counsel and the parties. There was agreement reached that Mr. Cleaves will have parenting time with the child for two weekends every 28 days with not more than two consecutive weekends. Mr. Cleaves shall also have one overnight period with the child per week beginning October 1, 2009 as well as such other such reasonable access as can be arranged between the parties. Matter adjourned for previously scheduled trial dates.

[15] The trial originally scheduled to begin February of 2010 was re-scheduled to April 14th, 2010. Mr. Cleaves and his common-law partner, together with Ms. Gates, testified.

ISSUE

[16] The issue is whether or not the Court should vary the current Order as it pertains to the parenting of Jayce and any resulting variation of child support.

RELATIVE LEGISLATION

The Divorce Act

[17] Section 17, particularly sub-section 17(1) (a) and (b) relating to the authority to vary, rescind or suspend a Court Order.

[18] Section 17, sub-section (4) - factors for child support.

[19] Section 17, sub-section (5) - factors for a Custody Order.

[20] Section 17, sub-section (9) - maximum contact.

[21] Federal Child Support Guidelines, particularly paragraph 3 - presumptive rule, paragraph 7, special or extraordinary expenses and paragraph 9, shared custody.

SUBMISSIONS

Mr. Cleaves' Submission

[22] The parties separated under somewhat amicable circumstances. It was agreed Mr. Cleaves would have Jayce available to him when he was not working, and this was initially the case. However, with job changes, he was unavailable to provide the previous notice he had of his days off. This lack of advance knowledge created difficulties between he and Ms. Gates in arranging for his parenting time. As a result, Ms. Gates did not make Jayce available to him as had previously been the case.

[23] He signed the Separation Agreement which was prepared by Ms. Gates and/or her counsel without getting legal advice believing it would provide that he continue to have the extensive parenting time that had initially been agreed to and was in effect since the separation. Regardless of the wording of the Separation Agreement and the resulting Corollary Relief Judgment, the couple on separation agreed, through an arrangement, that provided him to have the child in his care close to one half the time.

[24] In January of 2009, he had his counsel write to Ms. Gates setting forth his belief as to the existing parental relationship. At the time of writing the letter he had a concern that this letter could impact negatively on his parenting time with Jayce. This concern was realized when it became more difficult for him to arrange to have Jayce in his care.

[25] In late summer of 2009, he was devastated when advised by Ms. Gates that with the beginning of the school year his parenting time would be drastically reduced.

[26] Admittedly, his previous employment created difficulties for all concerned. However, since separation and of late, his ability to provide positively in the life of Jayce has improved.

[27] He has established a new relationship resulting in the birth of a son. He has deliberately moved to an area closer to where Ms. Gates resides and even more recently he has just begun a new job where he expects to work regular hours and to be, in effect, free on the week-ends.

[28] As a father, he has during the marriage and since separation, continued to exhibit an interest in providing in a positive fashion for Jayce and until Ms. Gates intervened he has been responsible for his son at least forty percent of the time. Jayce enjoys being provided for by his father who has exhibited the ability to provide appropriate care.

[29] Basically, Mr. Cleaves' position is two-fold.

[30] First, from the parents' separation until shortly before Jayce's attended school, he provided care and was responsible for him at least forty percent of the time. The child has progressed well and it is in his best interest to have the existing parenting pattern put in the form of a Court Order.

[31] Second, even if it is concluded that he has not historically cared for Jayce forty percent of the time, it is now in his best interest that the parents be designated as joint custodians and share equally the responsibility for caring for their child. This submission is based on Mr. Cleaves' belief that the evidence supports a conclusion he has always shown an interest in providing for Jayce in a positive

manner; that his new lifestyle with a partner and child in a home which he deliberately chose to be close to the current residence of Jayce and his mother supports such a belief. Further, his very new employment with regular days off provide an even better opportunity to arrange a shared parenting Order.

Ms. Gates' Submission

[32] Ms. Gates agrees that on separation an attempt was made to provide Mr. Cleaves with parenting time on his days off. However, with his various changes of employment Mr. Cleaves' ability to provide her with sufficient notice of the days off became more and more difficult; that in spite of her best efforts, given Mr. Cleaves' increasing demands that their son be made available to him on a moment's notice, the parenting relationship deteriorated. Given her responsibilities of providing for the primary care of Jayce, it became impossible to comply with Mr. Cleaves practically instantaneous demands for parenting time.

[33] Mr. Cleaves has not had Jayce in his care up to forty percent of the time, even initially when time was easier to arrange. It is acknowledged that Mr. Cleaves sought increased time with their son. He, however, never sought or

accepted an increase of parenting responsibilities on an equal or shared basis. Since birth, she has been responsible to arrange for Jayce's appointments with doctors and educators and required to take time off from employment to attend such appointments. Mr. Cleaves never sought to assume such responsibility. With school beginning it was her view that the time had come to, in their child's interest, make more structured parenting arrangements. She felt this would have to result in Jayce being primarily located in her home as the parent who had provided his primary care since birth.

ANALYSIS

[34] The Supreme Court of Canada in *Gordon & Goertz*, [1996] 2 S.C.R. 27, has commented on variations applications. The court there stated:

9 The principles which govern an application for a variation of an order relating to custody and access are set out in the Divorce Act. The Act directs a two-stage inquiry. First, the party seeking variation must show a material change in the situation of the child. If this is done, the judge must enter into a consideration of the merits and make the order that best reflects the interests of the child in the new circumstances.

13 It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of

the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[35] I have considered and applied the provisions of the *Divorce Act* and the law as outlined in *Gordon & Goertz, supra*, in this decision.

CHANGE OF CIRCUMSTANCES

[36] In an application such as this the Court is required to initially conclude there has been a change of circumstances such as enunciated in the *Divorce Act*.

[37] I previously noted that not only the Applicant, Mr. Cleaves, but the Respondent, Ms. Gates, agreed that such a change had occurred. In the event that I was incorrect in this conclusion as to Ms. Gates' agreement, I conclude that such a change has occurred for the following reasons:

- (1) The changes in Mr. Cleaves' lifestyle, his marriage, the birth of another child and the relocation to a home relatively close to the residence of the child;

- (2) The evidence that the wording of the current Order relating to parenting has not worked for some time and has become detrimental to the parents and the child;
- (3) The agreement of both parents that a more structured or definite parenting plan is required.

PARENTING PROVISIONS

PAST PARENTING

[38] Both parents provided a staggering amount of documentation detailing the amount of time their child has spent with them since the separation. Mr. Cleaves on being examined as to how he compiled his statistics has had trouble giving an answer. He even went so far as to adopt, to a certain degree, the figures supplied by Ms. Gates.

[39] I do not conclude that Mr. Cleaves established that he had Jayce in his care forty percent of the time from separation to his initiation of court action. If Mr.

Cleaves was seeking to have his child support contribution lessened based on his past involvement continuing he would not have been successful. I find that at separation and continuing Mr. Cleaves wished to have Jayce available to him whenever he was not working. I conclude that Ms. Gates, especially initially, made an effort to comply with this request. I find their agreement was to have Jayce, subject to day care, made available to Mr. Cleaves when he was not at work. This was not an agreement to share the parenting time of their child forty percent or fifty percent of the time.

PRESENT OR ONGOING PARENTING

[40] At separation Mr. Cleaves wished to have Jayce available to him on his days off. Ms. Gates essentially agreed. This was an appropriate arrangement in the circumstances. It provided for Jayce to have time with both parents. Mr. Cleaves' numerous jobs, indefinite hours and short notice as to his days off made it difficult to provide for the working of the couple's agreement. While this difficulty was not deliberately created by Mr. Cleaves, he showed little knowledge of the trouble it was creating for Ms. Gates and her parenting role. While he was adamant in having his son in his care on his days off, he did not exhibit the same

exuberance to assume ongoing normal parent responsibilities left to Ms. Gates.

Mr. Cleaves admitted to a number of occasions he was unable to be present or make himself available for gatherings related to his son's interests. The reason he gave was that he had to work. Ms. Gates facing the same responsibilities took time off work.

[41] In this situation, we have two parents who love their child and are capable of meeting his needs.

[42] As previously mentioned, Mr. Cleaves is seeking a decision that the parents become joint custodians sharing custody on an approximate equal basis and that as a result, no child support be provided from one to the other.

SHARED CUSTODY

[43] This is a term that arises primarily from the Federal and Provincial Child support Guidelines having to do with the time a child is cared for and under the supervision of each parent. Mr. Cleaves submits that in a situation where both parents are capable of providing for the child, one should first look to the

possibility of a child shared custody arrangement. A number of court decisions which Mr. Cleaves felt to be supportive of this point were provided to the Court.

[44] Ms. Gates on the other hand provided the Court with decisions indicating reluctance to order shared custody when it was obvious the parents were having difficulties in communicating.

[45] I find this is not a situation where an Order for shared custody would be consistent with the best interests of the child. I find the parents currently find themselves in a position where they have trouble communicating even when it comes to the parenting of their son. This is a reason to be hesitant about ordering shared custody. In this instance, it is only one of a number of concerns.

[46] Mr. Cleaves has just obtained new employment. Given his record of obtaining and keeping employment, there is concern as to it being permanent. Mr. Cleaves' employment, his hours and days of work have probably been the main reason for the animosity between the parents.

[47] Mr. Cleaves has exhibited a great desire to have Jayce in his care and exposed to his new partner and son. He has not, as I previously stated, exhibited the same determination to be involved in the important and mundane matters that make up Jayce's day. He has been quite prepared to leave those to Ms. Gates. She has adapted her life to these ongoing obligations.

[48] While Mr. Cleaves should be credited for deliberating moving closer to the home of Jayce and Ms. Gates, he does not live "right around the corner". He is not residing in the same school district. There is evidence that Jayce may initially have some education and medical challenges. Having concluded it was not appropriate to award shared parenting, I agree with Mr. Cleaves that the proposal presented to him as Jayce was about to begin school vastly changed his relationship as a father and was definitely not in Jayce's best interest. I order that Mr. Cleaves have the following parenting time with his son, Jayce: week one from Friday after school to Monday morning when he is to be returned to school. Week two Wednesday after school to Friday morning at school. Further, that the other non-school times, summer school vacation, March break, etc. would be divided equally between the parents. It is hoped that they with their counsel can make the appropriate arrangement without me having to be more specific.

JOINT CUSTODY

[49] I find that given the interest that Mr. Cleaves has shown and continues to show in being a part of Jayce's life and the amount of time I have just ordered that Jayce be available to be with him, that he should be considered a joint custodian of Jayce. I further believe that more clearly defining the times that Jayce will spend between his parents will, to a degree, lessen the current problems with regard to communication. The Order when drafted should contain the normal clauses that accompany a joint custodial Order. Specifically, it should be noted that the parties would have a meaningful discussion as to any major changes in Jayce's life and that in the event they are unable to agree, that Ms. Gates, as the parent providing the primary care, would make the ultimate decision.

CHILD SUPPORT

[50] From the evidence available, particularly noting Mr. Cleaves very recent change of positions, I conclude for the purposes of determining child support that Mr. Cleaves' income would be \$37,000.00 and Ms. Gates' income would be

\$63,000.00. This would require an Order that beginning September 1st 2010, Mr. Cleaves would make a payment in accordance with the Child Support Guidelines of \$311.00 a month. With regard to the established Section 7 expenses, it would be required that Mr. Cleaves contribute on a monthly basis to Ms. Gates thirty seven percent of the cost of those established expenses on an after tax basis. I will ask counsel for the Applicant to prepare the Order.

J.

