SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Sabri v. Harara, 2011 NSSC 196

Date: 20110525
Docket: 1201-061957
Registry: Halifax

Between:

Nada Sabri

Petitioner

v.

Abdullah Harara

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	May 16, 2011
Counsel:	Damien J. Penny, on behalf of Nada Sabri Abdullah Harara, on his own behalf

By the Court:

Introduction

[1] In August 2010, I heard Nada Sabri's application to move to the United Arab Emirates with six year old Saif Harara. Saif is the son of Ms. Sabri and her former husband, Abdullah Harara. I granted Ms. Sabri's application and my decision is reported as *Sabri v. Harara*, 2010 NSSC 329.

[2] At the August 2010 hearing, Mr. Harara was concerned that an access order might not be enforced in the United Arab Emirates. Through her counsel, Ms. Sabri suggested I address Mr. Harara's concern by making her registration of the court order in the United Arab Emirates a pre-condition of Saif's re-location. I adopted this suggestion and directed that until the order which resulted from my decision was registered to have the effect of a court order in the United Arab Emirates, Ms. Sabri and Saif could not move. Once the order was registered, she and Saif could relocate.

[3] In December 2010, Ms. Sabri applied to vary my order. She seeks to have the requirement of registering the order removed. She says she has made every reasonable effort to register the order in the United Arab Emirates, but has been unable to do so. Both she and Mr. Harara tell me that the order can only be registered at the conclusion of a proceeding in the United Arab Emirates where both parents appear and consent to the order's registration. Mr. Harara says he will not co-operate with this.

[4] Once served with Ms. Sabri's application, Mr. Harara applied to vary the amount of his child support payments. He did not apply to vary the order permitting Ms. Sabri to move, though he opposed her request that the restriction be removed and continued to offer reasons why Saif should not be permitted to move.

Approach to custody variation applications

[5] I'm governed by *Gordon v. Goertz*, 1996 CanLII 191 (S.C.C.) in making a decision to vary parenting arrangements. At paragraph 10 of the majority reasons, then-Justice McLachlin instructs me that before I can consider the merits of a variation application, I must be satisfied there has been a material change in Saif's circumstances that has occurred since the last custody order was made.

[6] At paragraph 13, Justice McLachlin was more specific in identifying the three requirements that must be satisfied before I can consider an application to vary a parenting order. The requirements are:

1. there must be a change in the condition, means, needs or circumstances of the child or the ability of the parents to meet the needs of the child;

2. the change must materially affect the child; and

3. the change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[7] Material change is more than a threshold to be crossed before varying a parenting order. All parenting applications, including variation applications, are determined on the basis of a child's best interests. Initially proving that there has been a material change establishes that the current order is no longer in the child's best interests. Then, section 17(5) of the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, instructs me that in making the variation order, I shall consider only the best interests of the child as determined by reference to that change.

[8] Ms. Sabri argues that a material change has occurred. My earlier decision determined it was in Saif’s best interests that he move with his mother. Ms. Sabri says her ability to move has changed: at the hearing in 2010, Mr. Harara wanted assurances that the order for Saif’s access with him would be recognized in the United Arab Emirates. Ms. Sabri was willing to co-operate by registering the order. Now, Mr. Harara admits he will not participate in the steps necessary to ensure recognition of the order in the United Arab Emirates. In this situation, Ms. Sabri’s ability to meet Saif’s needs is impaired by the restriction on her mobility. Given that it was Mr. Harara who sought U.A.E. recognition of the Canadian court order, it was unforeseen that he would stand in the way of making this happen. I am satisfied that a material change in circumstances has occurred which makes it appropriate to consider varying the order. My next task is to consider what sort of order would be appropriate in the circumstances.

[9] The circumstances which existed in August 2010 are little changed. In August 2010 I heard a mobility application and, in such an application, my primary task was to embark on a fresh inquiry of what is in Saif's best interests, considering

all the relevant circumstances relating to his needs and his parents' ability to meet those needs.
[10] In granting Ms. Sabri's initial application to move Saif, I considered Saif's existing custodial arrangement, his existing access arrangement, maximizing Saif's contact with his parents, the disruption in custody that would result if I did not allow Saif to move and the disruption to Saif's family, school and community if I allowed him to move. I did not consider Saif's views: there was no reliable evidence about his views, if any, regarding the proposed move. I reviewed my considerations in paragraphs 8 to 35 of my reasons in *Sabri v. Harara*, 2010 NSSC 329.

The application

[11] Little has changed since I made my decision in 2010. Ms. Sabri remains Saif's primary care-giver as she has been throughout his life. I have uncontradicted evidence that Saif's access with his father has decreased since last August. Saif is older and better able to adjust to having his father at distance and maintaining contact through web camera, Skype visits, email and phone calls. Disrupting Saif's custody continues to be a greater disruption than disrupting his life in Halifax. Saif has not become more closely integrated in the local community since my decision. With each step of having the order processed by the Canadian Department of Foreign Affairs and the U.A.E. Embassy, both in Ottawa and in Dubai, and meeting the requirements dictated by the court in Dubai, Ms. Sabri expected to be closer to leaving Halifax. She and Saif were not putting down further roots in the community: they were preparing to leave.

[12] At the 2010 hearing, I considered Ms. Sabri's reason for her proposed move. As then, Ms. Sabri continues to be unable to find employment which will provide for her son and herself. Mr. Harara had paid no formal child support at the time of the earlier hearing. He made modest monetary gifts to six year old Saif. I ordered child support be paid and my order was registered with the Maintenance Enforcement Program. For the first five months following its registration, Mr. Harara made no payments. The Program then affected a garnishee against Mr. Harara. Payments have followed.

[13] With her sister's assistance, Ms. Sabri had found employment in Dubai for a three month probationary term. At the August 2010 hearing, Mr. Harara argued the job offer was a fraud, though he provided no evidence to substantiate this claim. Mr. Harara continues to question whether the job offer was legitimate. This

issue was raised and resolved in August 2010. It is not a new issue which warrants re-consideration of my decision.

[14] I do understand that Mr. Harara loves Saif dearly and is devastated by the prospect that his son will live elsewhere. It remains in Saif's best interests that he remains with his mother, who continues to plan to re-locate to Dubai in the United Arab Emirates. The pre-condition of registering the current order is not being used as a method of securing foreign recognition of the order, but as an obstacle to prevent effect from being given to my order. I grant Ms. Sabri's application to remove this pre-condition to her re-location with Saif. All other terms of my decision relating to parenting and access remain.

Child support

[15] Mr. Harara has applied to vary the amount of child support he pays for Saif, arguing that his income has decreased. As well, Mr. Harara has brought an application pursuant to section 10 of the *Federal Child Support Guidelines*, SOR 97/175, asking that he be permitted to pay an amount lower than that prescribed by section 3, because he is responsible for the support of his wife and another child.

[16] Mr. Harara is married to Hanadi Abu Srour. She gave birth to the couple's son, Ibraheem, on November 4, 2010. Hanadi Abu Srour remains at home with seven month old Ibraheem. She intends to remain at home, caring for Ibraheem.

Approach to child support variation applications

[17] Before I vary a child support order, I must be satisfied that a change in circumstances as provided for in the applicable guidelines has occurred since the last variation order was made. This requirement is found in section 17(4) of the *Divorce Act*.

[18] In 2010 when the last variation order was made, I imputed income to Mr. Harara based on both his failure to provide income information and his intentional under-employment. Mr. Harara works detailing cars. Last August, Mr. Harara testified that his self-employment meant he could work the hours he chose and this enabled him to work as little as two to three hours each day, for three or four days each week and to earn an income equivalent to what he would earn working forty to fifty hours per week at minimum wage employment. He said that his work was limited by the fact that he can only work on one car at a time in his facilities: it was

not limited by the needs of a child or his own reasonable educational or health needs.

[19] Mr. Harara says that he now is present at his workplace five days each week, working from 9 a.m. until 6 p.m. He works on Saturdays by appointment. Mr. Harara says that during the winter months, there is less business, generally two to three hours of work each day. He takes two to three weeks' vacation. He says that the amounts he charges for his services are less than they were last year. He has reduced his charges to encourage business which has been harmed by the economic downturn.

[20] At the time of the last variation order, income of $32,775.00 was imputed to Mr. Harara. Mr. Harara's Statement of Income shows his current income is $16,578.96. Ms. Sabri does not take issue with this figure, Mr. Harara's disclosure or the extent of his employment. The decrease in Mr. Harara's income is a change in circumstances as provided for in the applicable guidelines has occurred since the last variation order was made, so I may vary the child support award.

Undue hardship application

[21] The application before me was to address Ms. Sabri's request to lift the restriction on her mobility. Mr. Harara's variation application was filed on December 30, 2010 and was known to Ms. Sabri's previous counsel at the time of the conference held in mid-March 2011. It was not clear that Mr. Harara's application would be dealt with at this hearing, though Ms. Sabri was willing to do so. To accomplish this, I received information, in submissions, from Ms. Sabri about her income and from Mr. Harara about the composition of his household. Neither party objected to the admissibility of this information. I appreciate the willingness of each to deal with this matter expeditiously, if informally. Additionally, Ms. Sabri agreed that it was appropriate to adjust Mr. Harara's child support amount in light of the expense of travelling to visit with Saif. In light of this consent, I am prepared to award an amount of child support that is different from the amount determined under the *Guidelines*, on the basis that to do otherwise would cause Mr. Harara to suffer undue hardship.

[22] At his current income level, Mr. Harara would pay monthly child support of $142.00 for Saif. Mr. Harara's monthly income is $1,381.58. After making his child support payment, Mr. Harara would pay $600.00 for rent (including heat and electricity), $40.00 for telephone and $450.00 for food. These amounts are reasonable. The food budget must meet the needs of Mr. Harara, his wife and their

baby. This leaves $149.58 to pay all other expenses: household supplies, clothing, transportation and health-related costs.

[23] At the hearing in August 2010, I was told that the cost of travel to visit Saif would be between $800.00 and $1,400.00, depending on how far in advance the tickets are purchased. I now understand the travel cost is greater because there is a new visa fee charged for Canadians travelling to the United Arab Emirates. The evidence indicates that Canadians must pay $250.00 for a thirty day visa to enter that country. A three month visa costs $500.00 and a six month multiple entry visa (which entitles the bearer to visits of no more than fourteen days) costs $1,000.00. Mr. Harara testified that he takes two to three weeks' vacation each year, so the latter two options aren't relevant for him. The visa requirement increases his least expensive travel option by approximately thirty percent.

[24] Until Ms. Sabri and Saif relocate, Mr. Harara shall pay $142.00 each month in child support. This amount is prescribed by section 3 of the *Guidelines*. Once Saif has relocated, Mr. Harara's child support obligation will be reduced to $30.00 each month. In determining this amount, I have deducted the average flight cost ($1,100.00) and the cost of one visa ($250.00) from Mr. Harara's annual child support obligation of $1,704.00 and divided the remaining amount of $354.00 into equal monthly amounts of $30.00.

[25] Payments shall be made through the Maintenance Enforcement Program and Ms. Sabri shall advise the Program in writing when she relocates, so the date when payments are to be adjusted will be known.

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Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia