

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Seguin v. MacDonald, 2011 NSSC 26

Date: 20110114
Docket: SFHF-13113
Registry: Halifax

Between:

Tabitha Seguin

Petitioner

v.

Ricky MacDonald and Angela MacDonald

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Heard: January 14, 2011

Written Decision: January 26, 2011

Counsel: Tabitha Seguin
Ricky MacDonald and Angela MacDonald

By the Court:

Introduction

[1] Early in the summer of 2010, Tabitha Seguin applied to vary the terms of an order relating to the summer access that she has with her daughter, Jewel MacDonald. Summer access last year was resolved by an emergency application. Ms. Seguin, Ricky MacDonald (Jewel's father) and Angela MacDonald (Jewel's stepmother) participated in a settlement conference where they were able to resolve other matters relating to Jewel's parenting. However, they were unable to resolve the matter of future summer access, so I heard Ms. Seguin's application.

[2] Each of the parties filed more than one affidavit addressing summer access. None of the parties wanted to question anyone about the affidavits that were filed, so the application proceeded on the basis of the filed documents and submissions by Ms. Seguin and by Ms. MacDonald, who spoke on behalf of her husband and herself.

[3] I rendered an oral decision at the conclusion of the hearing. Neither party has counsel and each had questions and comments during my decision. I am providing this written decision to make clear my decision and the reasons for it.

Applying to vary a parenting order

[4] 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 Jewel's circumstances that has occurred since the last custody order was made.

[5] 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.

[6] 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. I note this particularly because of its importance in terms of the case a parent must make when applying to vary a parenting order.

[7] While this application is made pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, as I have noted in *Harrison v. MacKinnon*, 2010 NSSC 445 at paragraph 7, the consideration of best interests mandated by the *Divorce Act* is equally relevant to this application and parents' marital status is no reason to analyse the cases differently: section 18 of the *Maintenance and Custody Act* requires that "[i]n 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."

[8] On her own behalf and on behalf of her husband, Ms. MacDonald argued there has been no material change since the last order relating to summer access was granted. Ms. Seguin says there is a need to change the summer access to be more strictly defined because, while it had been possible in the past to arrange summer access flexibly, this has not occurred in the last few summers with the result that her time with Jewel has been compromised by the need to schedule and re-schedule time at the requests of the MacDonalds. She also described, as did Mr. MacDonald, instances of conflict between the parties that arose because of the scheduling difficulties.

[9] Ms. MacDonald referred me to my own decision in *Giffin v. Lunn*, 2010 NSSC 413 in support of her submission that there was no material change in circumstances. In *Giffin v. Lunn*, 2010 NSSC 413, Mr. Lunn argued that conflict between the adults involved in the girls' lives was a material change. I rejected this and, at paragraph 11 of that decision, said I wasn't persuaded that a single instance of conflict in the presence of the children proved that the girls' needs or the parents' ability to meet them had materially changed.

[10] In contrast with the circumstances in *Giffin v. Lunn*, 2010 NSSC 413, this is a case where the conflict between the parties is sufficient to warrant a change to the current order. The current order requires that the parties, in essence, negotiate the terms of each summer's access within a context of weekly alternation. Even within that context, which would seem to limit the amount of conflict which could arise, conflict does arise. It arises over the exchange time. It arises over the date when an exchange will occur. It arises over where exchanges will occur. It arises in the frequent efforts to change the schedule once it has been set. The level of mistrust is such that even after last summer's access schedule was resolved by this court, Ms. MacDonald twice required the police to visit Ms. Seguin's home last summer to check on Jewel. I am told that the parties cannot communicate openly with each other. This is consistent with my observations in the courtroom, where the parties could not even look at each other, let alone make eye contact. Their animosity is palpable and Jewel ought not be exposed to it.

[11] An additional change which has occurred since the last summer access order was made is that, in the context of her father's household, Jewel is the big sister to Justice and Jaxon. Her younger brothers are, I believe, aged 5 and 1. I was not provided with their birthdates.

Variation of prior order

[12] Having found that there has been a material change since the making of the last order, my task is to put in place a new order which provides for Jewel's best interests in the new circumstances. Those new circumstances are ones of conflict and where Jewel is part of a sibling group.

[13] Where increased parental conflict is a material change, my decision about Jewel's summer access should modify her access so that conflict is minimized or avoided. In the past, the parties had to determine how the summer weeks would be alternated; how to accommodate Mr. MacDonald's birthday; when to schedule exchanges and where to have exchanges.

[14] Ms. Seguin wants an order that will allow Jewel to alternate between homes at intervals of two weeks. She says this will be more convenient for her in transporting Jewel to Enfield where the MacDonalds live because it will require less travelling back and forth.

[15] Ms. MacDonald argues, and I agree, that the amount of back and forth travel during the summer is already far reduced from that which occurs during the school year. This is a matter of Ms. Seguin's convenience. It doesn't relate to Jewel's best interests.

[16] In *Foley*, 1993 CanLII 3400 (NS S.C.) at paragraph 16, Justice Goodfellow outlined a number of factors that may be considered in determining a child's best interests in a parenting application. His list was not exhaustive. While not listed by His Lordship, I consider the presence of other family members, such as step-siblings, to be a relevant factor in determining a child's best interests. Here, Jewel has two younger brothers and I find it to be in Jewel's best interests that she not be absent from their lives for more than one week at a time. At one year old, her younger brother, Jaxon, is rapidly developing new skills and abilities. It is important that Jewel be part of the family's shared experience of watching and helping Jaxon grow. So, I dismiss Ms. Seguin's request that Jewel's summer access alternate at bi-weekly intervals. Weekly alternation shall continue.

[17] To minimize the conflict to which Jewel is exposed I am making a number of directions with regard to her summer access:

1. I order that Ms. Seguin will be responsible for transporting Jewel at the beginning and end of visits.
2. Visits will begin and end at 4:30 on Friday.

3. Jewel will be picked up from and dropped off to her father and step-mother's home in Enfield.
4. Every summer, Jewel's first week of access with her mother will start on the first Friday following the end of school and, if school ends on a Friday, it will start that day.
5. Throughout the summer until the Friday before school resumes, Jewel will alternate weeks between her mother's home and her father and step-mother's home. My calendar review confirms that this should place Jewel with her father on his birthday every year. Mr. MacDonald's birthday is August 21. If school resumes on a Friday, the pattern of weekly alternation shall end at 4:30 p.m. on the previous Friday when, in any event, Jewel shall be with her father and step-mother.

[18] While I was giving my decision I was asked both if each household was to continue to have two, two week periods with Jewel in each of July and August and what if Jewel was in one household for more weeks during the summer than the other. I believe the arrangement I am ordering is one which will continue to provide that Jewel will spend two weeks of each month in her mother's home and in her father and step-mother's home. Depending on when school ends and starts, the division of summer vacation weeks may favour one household or the other in any particular year, but it will generally be roughly equal over time. I do not expect it will be exactly equal over time, but that lack of equality is a price I am prepared to see paid for the reduction of conflict over scheduling. It is acceptable if Jewel spends more time at one household than the other over the summer months as a result of this schedule.

[19] All of the parties have attended the Parent Information Program and I encourage them to consider and employ the knowledge they gained from the Program.

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

Halifax, Nova Scotia