SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Y.N. v. D.M., 2011 NSSC 81

Date: 20110225
Docket: 1201-054794
Registry: Halifax

Between:

Y. N.

Petitioner

v.

D. M.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Moira C. Legere Sers

Heard: February 15, 2011 in Halifax, Nova Scotia

Counsel: Peter Katsihtis for the petitioner Y. N.
Angela Walker for the respondent D. M.

By the Court:

[1] The parties were married in Dartmouth, Nova Scotia on September 9, 2005. They have one child, P. V. R. M., born September *, 2006.

[2] According to the Petition for Divorce, the parties have lived separate since October 23, 2006. The pre-release document originating from the prison indicates the respondent's prison sentence began on June 28, 2007 while the petitioner's affidavit notes the respondent has been in jail since January 2007; sentenced in July 2007 with an anticipated date of release from a British Columbia penitentiary in July 2011.

[3] The mother commenced this Petition for Divorce on August 23, 2010. The main issue is mobility.

[4] The Divorce Petition was preceded by the respondent's application under the *Maintenance and Custody Act* on August 24, 2009. He sought to have an order for access to his son after his release from prison in British Columbia. At that time his anticipated release date would have been in June 2010.

[5] In her response to his application under the *Maintenance and Custody Act* and in this proceeding, the petitioner asked the court for permission to relocate with her son to Japan. She advised both the court and the respondent that she was opposed to any access due to the respondent's historical involvement in criminal activity, domestic violence and ongoing threatening behaviour toward herself.

[6] On May 21, 2010 counsel for the parties appeared before the court for an organizational pre-trial conference. The respondent was incarcerated in British Columbia.

[7] The trial was scheduled for September 27 and 28, 2010. In anticipation of a hearing, filing deadlines were assigned.

[8] The parties were involved previously in a child protection proceeding under the *Children and Family Services Act.* The parties were obliged to notify the Minister of Community Services if any application to vary the order was made regarding custody and access. Counsel for the Minister of Community Services attended the May pre-trial. They did not attend the divorce hearing.

[9] The matter under the *Maintenance and Custody Act* came before the court on September 10, 2010 with counsel for both parties appearing on behalf of the parties. The father sought an adjournment as he could not be in attendance for the trial.

[10] The father had breached his parole conditions by having illegal contact with the petitioner and was recommitted to prison to complete his sentence up to July of 2011.

[11] However, the petitioner's visa was set to expiry on December 27, 2010.

[12] Her counsel advised the court that if the visa extension was denied, she would be given two months to leave Canada from the date the visa expired. If the extension was denied, she would have to leave the country as soon as possible and make an application from outside the country.

[13] Her lawyer obtained legal advice that it would take three months to process a visa extension. While he was hopeful immigration officials would extend her visa up to a year and a half, there was no certainty that an extension will be granted and no certainty that if she were to apply for permanent residency that she would be entitled to stay in Canada.

[14] The pre-trial conference judge granted an adjournment of the hearing with the clear understanding that the matter would proceed as quickly as possible in the 2011 year.

[15] The matter appeared before me for a divorce hearing on February 15, 2011. With the direction of the pre-trial justice, the respondent was to and did appear by video with his counsel present in court.

[16] The respondent was present through the entire hearing by way of video conference. He had his counsel in court. He was provided the opportunity to be present to obtain information and advice from his lawyer in private, to give his lawyer instructions and to be present while the evidence was presented and the parties were cross-examined.

Issues

[17] There is no possibility of reconciliation. I am satisfied that all jurisdictional elements have been proven with respect to the divorce and hereby grant the divorce based on one year's separation.

[18] In this case, there is no contest with respect to sole custody. The respondent concedes that the petitioner/mother can and has exercised and assumed responsibility for all of the day-to-day and significant long-term decisions relating to the child.

[19] The child shall remain in the sole custody of the mother and as such she has the right to make day-to-day and long-term decisions regarding the child.

[20] The mother is not asking for child support from the father. Counsel acknowledged that the respondent is in no position to pay child support, having been in prison almost exclusively from January 2007 up to and including July 2011, except for his period of release on June 23, 2010, which was short-lived due to his breach of conditions.

[21] Considering the respondent's current financial circumstances, no child support will be ordered.

[22] There are no outstanding property matters or division of pension issues.

[23] Thus, the sole issue in contention is mobility and the effect of a mobility decision on the relationship between the father and his son. The father asks the court to deny the mother’s request to return to Japan and is seeking to have contact between himself and his son reestablished on his release.

[24] The petitioner wishes to return to Japan with her son to be with her family and to raise her child in familiar surroundings. The petitioner's request to permanently remove the child from Canada to go to Japan was made known to the parties as early as May of 2010.

Facts

[25] The petitioner/mother was born in Tokyo, Japan on July 10, 1978; the respondent/father in A., Nova Scotia on November 1, 1970.

[26] The mother arrived in Halifax in 1997 to go to school and to learn English as a second language. After completing this course in late 1990, she returned to Japan. She re-entered Canada by way of Halifax in 2001 to go to * and successfully completed a * in 2003. She returned to Japan in 2004.

[27] During a break in her employment in Japan she decided to return to Halifax where she had a friend with whom she attended * . She was introduced to the respondent through her friend's boyfriend who was incarcerated at the same time with the respondent.

[28] The parties began to contact each other by phone. They first met in person in 2002. They began dating in 2003 and 2004 although this was interrupted when the respondent had to return to jail periodically.

[29] The petitioner decided to stay in Canada. Unable to obtain a temporary work permit, she returned to Japan and once again returned to Canada in 2005. She became re-involved with the respondent and on September 5, 2005 they were married.

[30] Their child was born on September *, 2006. Shortly thereafter the respondent was incarcerated and has remained incarcerated to date except for a brief period in 2010. His anticipated release date is July 2011.

[31] The parties differ as to how frequent and significant the father's contact with his child was during those three initial months after their son's birth.

[32] There is no dispute that the respondent has not had physical contact with his son since his incarceration in September/October of 2007.

[33] The petitioner had knowledge that the respondent was involved in drugs and criminal activity before she married and had a child with him. She believed he would settle down and straighten his life out if they were married.

[34] The petitioner was not allowed to work in Canada. Finances became an issue between the parties. She could not apply for financial help.

[35] It was then and continues to be her parents in Japan who send her money in order for her and her child to continue to survive on a daily basis in Canada.

[36] The petitioner also acknowledges that the respondent's mother would occasionally give her money from his welfare cheque, although the respondent would demand the mother give it back.

[37] The evidence of both parties confirms the relationship between the parties was not peaceful. The respondent was jealous of any association or discussions the petitioner had with any other male individuals.

[38] There is ample evidence of domestic violence and harassment in the mother's testimony and the supporting prison documents.

[39] There is further evidence that the respondent spent much of their married life in jail, first in Springhill, Nova Scotia and, since September of 2007 up to his anticipated release date in July of 2011, in British Columbia.

Child Protection Proceedings

[40] After the child's birth on September 26, 2006 while the mother remained in hospital, a child protection worker attended at the hospital and advised the mother that she was not to provide or facilitate contact between the respondent and his son except through the services of the agency.

[41] Child Protection opened a file and commenced an application pursuant to the *Children and Family Act.* The matter went to court on October 13, 2006 to address the domestic issues which resulted in an identifiable risk to the welfare of the child.

[42] The court found that there were reasonable and probable grounds to believe that the child was in need of protective services resulting from contact with the father.

[43] A supervision order resulted from the five-day hearing on October 13, 2006. Both parties received notice of the application. The father did not attend.

[44] The child was placed in the care and custody of the mother subject to the supervision of the Children's Aid Society of Halifax, pursuant to Section 34(4)(b) of the *Children and Family Services Act.*

[45] The relevant terms and conditions of this interim order of supervision were as follows:

> 2. The terms and conditions of this Interim Order of Supervision shall be the following:
>
> (a) The Respondent, D. M., shall not reside with or contact or associate in any way with the child except as authorized by the Applicant, the Children's Aid Society of Halifax, for purposes of supervised access.
>
> (b) Counselling, parent education, and other rehabilitative services shall be made available to the Respondents, Y. N. and D. M., as authorized and arranged by the Applicant, the Children's Aid Society of Halifax, with all costs associated with such services to form part of the costs of this proceeding.
>
> (c) The Respondent, D. M., shall self-refer to the New Start Program for counselling with respect to domestic violence and shall provide a release to allow the Applicant Agency to obtain verbal and written updates of his attendance and progress.

[46] A breach of any one of these conditions could result in a reapprehension.

[47] The petitioner was permitted to continue to be responsible for the care and custody of her child. She was provided parenting resources through Children's Aid Society, information on domestic abuse and information regarding immigration services through Bryony House, a local transition house for women and children.

[48] Attached to the order was a report from a * regarding the conviction and sentence of the respondent with respect to his charges that resulted in the respondent’s lengthy incarceration.

[49] The report confirms that which is not denied in these proceedings. The respondent plead guilty to trafficking in cocaine and was convicted of robbery, kidnapping and possession of a weapon. He was handed a five year sentence.

[50] At that time in 2007 the sentencing justice warned the respondent that he should change his ways or risk losing what little relationship he has with his son. His pre-sentence report referred to his addiction to drugs at an early age.

[51] The Learned Justice was quoted as referring to the respondent's lengthy criminal record and indicating as follows:

> You are now 36 years old. You have a child. This is your, probably your final opportunity to turn your life around.

[52] The * noted that the respondent's lawyer informed the court that his client had done federal time previously, had taken part in a substance abuse program but had not been able to kick his affair with cocaine.

[53] The respondent in these proceedings acknowledges that he did take a substance abuse program in Springhill in 2008.

[54] The circumstances of his offences leading up to his most recent incarceration are contained in the evidence before the court. He received five years for eight convictions, 18 months for trafficking and 3 ½ years for the robbery-related charges.

[55] The court heard from an agent for the Children's Aid Society of Halifax who had submitted an affidavit before the court on December 12, 2006, a copy of which has been tendered in this proceeding. This witness was the social worker responsible for the child protection file shortly after the child's birth on September *, 2006.

[56] The affidavit relates to a period of time when the respondent was on release and living with the mother prior to the birth. With child protection's directions, the mother left the hospital to go to Bryony House with the child, returning to her apartment on November 23, 2010. The respondent was on an undertaking to have no contact with the mother. The lease had been varied to remove him as an occupant.

[57] The affidavit notes that the child continued to thrive in the mother's care although the mother was isolated with no family support. The affidavit noted that the father's family had been supportive.

[58] The respondent continued to visit his mother's home. The mother sometimes relied on the paternal grandmother to provide child care. This created a real risk of continued contact between the respondent and the mother.

[59] The agency allowed the child to continue in the mother's care. They believed the mother was committed to remaining separate from the respondent in parenting the child on her own. They were unable to establish any contact with the respondent. He did not appear or participate in the proceedings.

Pre-Release Decision Sheet

[60] This court has had access to a pre-release decision sheet for June 2010 regarding the respondent's behavior before and during incarceration.

[61] Special conditions were included in the respondent's release in June 2010 including a requirement that he reside at a halfway house in British Columbia for six months after his release. He was to follow a treatment plan and participate in community-based counselling and/or a program to address substance abuse and violence.

[62] He was to report all intimate relationships and friendships with women to his parole supervisor and he was not to associate with any person known to him to have been involved in criminal activity or substance abuse.

[63] Most relevant to this proceeding, he was to have no direct or indirect contact with the victim of the domestic violence without prior written permission of his parole officer.

[64] The reasons outlined in the report for the residential requirement that he reside in a half way house upon his release and the special conditions are contained in the report. The parole board considered that he would be an undue risk to society by committing an offence before the expiration of his sentence. They wrote as follows:

> At 39 years of age he was serving his third federal sentence of four years and six months from June 28, 2007 for traffic in Schedule I-II Substance, Robbery, Kidnap - Unlawful Confine, Obstruct Peace Officer, Fail to comply with Recognizance (x2), Possession of a Weapon for Dangerous Purpose, Assault - Threats of Violence, Fail to Comply with Probation Orders, Assault - Use of Force and Utter Threats to Cause Death or Harm.

[65] The specifics of the offence which put him in prison for 50 months as stated in the extract from the * attached to the affidavit of the applicant are also the same circumstances that are included on page 3 of the Pre-Release Decision Sheet, outlining the kidnapping of a known victim (*not the mother*) at a bus station, the robbery and events subsequent to that.

[66] There is also in the report information regarding the domestic abuse and the repeated harassment and threat against the mother. The report noted as follows: "Some of the physical abuse was caught on the surveillance camera in the building where the two of you resided".

[67] The details of this incident as described in the Pre-Release Sheet, that the respondent grabbed the mother by the hair, took a pair of scissors and threatened to cut her throat if it ever happened again, were denied by the respondent.

[68] The respondent was assessed for risk of sexual offending and was found to pose a moderate risk for future sexual offending.

[69] Because of his current offences including domestic violence, they recommended that the respondent participate in moderate intensity programs to address family violence and sex offending along with a violent offender program.

[70] As of June 2010, they noted the following: "Current actuarial measures indicate that you pose a moderate to high risk for future violent offending and a high risk for general offending".

[71] The report further stated at page 4:

> A psychological assessment completed on May 20, 2009 notes your personal, community and criminal history. A psychologist noted areas of concern from personality testing the included strong self-involvement and anti-social values, and difficulties with substance abuse and anxiety management. The psychologist recommended that you participate in programs to address your risk areas of substance abuse, domestic and general violence, as well as sexual offending prior to any conditional releases. In addition it was recommended that when released, you have very close supervision, participate in program and live in a highly structured environment.

[72] An addendum to this assessment was completed on June 4, 2009 wherein the psychologist addressed the respondent's concerns about his first report, specifically the fact that he claimed to not have seriously injured any person and did not understand why his offences were considered violent.

[73] And further in the report:

> You currently reside in a maximum security institution; this is your second involuntary transfer. Reports indicate that you have been involved in several physical altercations with other offenders, found in possession of weapons and have been generally disrespectful toward staff.

[74] The report noted that supervision for the respondent's release in 2010 was not accepted in the Nova Scotia area. He was therefore screened for acceptance in British Columbia. They confirmed that the reports indicate he is a high risk, high needs offender and would be subject to eight face-to-face meetings with a parole officer per month.

[75] The board reviewed his file and noted a lengthy criminal history including violence against strangers and his intimate partner.

[76] At that point in June of 2010, the board indicated they were satisfied that in the absence of a residency condition, the respondent would present an undue risk to society by committing an offence listed in Schedule 1 of the *Corrections and Conditional Release Act* before the expiry of his sentence. They noted that his crime cycle was directly linked to his misuse of drugs and association with negative peers and further noted that absence from drugs and avoidance of negative associates would greatly reduce his risk of re-offence.

[77] Mostly notably they advised that of as of June 2010, the key risk factors that placed him at risk for criminal behaviour, namely substance abuse and violent tendencies, had not been addressed.

[78] They advised him that he had to participate in community programs to mitigate these risk issues.

[79] They noted that he perpetuated violence against his female partner (the petitioner) and thus the probation officer must know all intimate relations.

[80] In conclusion, they felt that the conditions attached to his release in June were reasonable and necessary to protect society and assist in his reintegration as a law-abiding citizen.

[81] The petitioner's affidavit contains allegations of abuse. For the most part, the respondent denies these allegations. He acknowledges on one occasion pushing the petitioner into their apartment to take their fight out of the apartment hallway into more private quarters.

Continued Contact

[82] There are phone calls exchanged between the prison and the petitioner and photographs of the child, provided by the petitioner to the respondent's mother, in the respondent's possession in prison.

[83] The respondent indicates that he received cards and letters from the petitioner during his time in prison.

[84] The respondent testified there was an oral agreement between he and the petitioner. He advises that the petitioner promised to give him one more chance to straighten out after his release from prison; one more chance to have contact with his son on his release from prison. In return he agreed that if he engaged in any further criminal activity he would voluntarily withdraw absolutely from his son's life.

[85] The petitioner denies this. She has pursued this petition for divorce, maintaining with consistency in her documentation that she wishes to return to Japan with her son. She understands that one of the consequences of her return with her child will be to terminate the relationship and reduce, if not eradicate, the occasion for access between the father and son.

[86] The petitioner acknowledged that although she continued to receive phone calls from the respondent since his incarceration in July 2007, she did not report all of the phone calls he was making in part due to her concern about maintaining a friendly relationship with his family and between his family and her son.

[87] She did acknowledge that some of these conversations were very negative, threatening in nature, with name calling. In her words, "nasty" or "bad" conversations took place. While she acknowledged that he may not threaten her directly, she testified he would say things like, "You're not going to get away so easily"; "You know what's stopping me from what I'll do to you, my family, and I'll do something".

[88] She struggled with deciding whether or not to sever all contact with the respondent given that she struggled with the belief that, ideally, her son should have contact with his father. In essence, she was willing to continue the contact in order to preserve what might be the future possibility of a relationship between her son and his father.

[89] I am summarizing her evidence and the words that I am using are my conclusions based on the evidence and not her exact wording.

[90] The March 8, 2010 call from the respondent is discussed in paragraph 36 of the mother's affidavit. The respondent left a message which said, "I don't think you're out, but I think somebody is there with you". He called seven more times, leaving similar kinds of messages.

[91] He continued to call; she refused further contact.

[92] The mother then found out where he was in prison and had her name and number removed from his "permission to call" list.

[93] After that and as a result of a report made by the respondent in British Columbia, the police attended at her apartment in Nova Scotia and informed her that the respondent had called the police because he had heard his son screaming on the phone and somebody pounding at the door. The respondent alleged he felt his son was in jeopardy.

[94] The petitioner called the child protection informant in British Columbia, who would have been a person responsible in the British Columbia prison for initiating the call to the police and subsequently to child protection.

[95] This administrative individual in the British Columbia prison asked the mother to fax out a statement regarding the phone calls that had been going on from the prison to her home. She later received a phone call from a parole officer.

[96] As a result of that conversation, the respondent's parole was revoked.

[97] In or about April 2010, the petitioner confirmed in an affidavit that she no longer wanted to stay in Canada and wanted to return to Japan with her parents.

[98] She has come to a realization finally that the respondent's behavior is not likely to change, that his history of involvement with drugs and criminal activity, his offences of violence and physical and verbal abuse will not likely change.

[99] She wishes to go home to care for her son in proximity to her family, essentially her principle support network. She wishes to protect her son and provide for him in Japan.

[100] From the father's perspective, he admits he has not seen the child since he left for prison in 2007. He believes that he had much more significant involvement in the early three or four months of the child's birth than the mother indicates.

[101] He argues that the mother knew of his criminal behavior, accepted it and agreed to give him another chance.

[102] He also argues that the mother supported his relationship with the child by sending pictures and writing to him about their son, encouraging contact between the two.

[103] He denies much of the domestic violence that has been recorded.

[104] He argues that the mother is responsible for continuing to communicate with him, leading him to believe that there was an ongoing relationship between the two. He alleges she then arbitrarily cut off contact in approximately a year and a half prior to the proceedings and reported his contact with her, resulting in the extension of his incarceration to the end of his release date in July of 2011.

[105] He argues that his child is African-Nova Scotian and his family has significant involvement with this child. He argues that his family has been an

active player in the child's life, assisting the child with school registration and visiting with the child on a semi-regular basis.

[106] He argues that if he were to make an application for access and the child were to remain in Nova Scotia, he would likely be successful in obtaining at least supervised contact providing he was crime and drug free.

[107] He alleges that the mother is responsible for the revocation of his parole and the requirement that he serve his full sentence, resulting in his absence from his son's life.

[108] He advises that he has taken a substance abuse program in 2008 and subsequently completed an anger management - domestic violence course in the summer of 2010. There is no information concerning those courses before the court to determine whether they in fact addressed the risk. Nor do I know what, if any, recommendations have been made and/or followed with respect to his participation.

[109] The respondent's counsel argues that there is no plan before the court with respect to the mother's removal of the child from Canada to Japan and thus, no ability for the court to judge whether this plan is in the best interests of the child.

[110] She finally argues that Japan is not a signatory to the Hague Convention, making enforcement of any future possibility of access improbable.

[111] In support of his proposition that the petitioner's credibility has been damaged and her position inconsistent, the respondent refers to the community assessment that was completed by the Springhill Institution June 16, 2008, in which assessment he refers to the petitioner's comments to the assessor as follows at page 2:

> 3. "OFFENDER'S RELATIONSHIP WITH THE CONTACT AND SIGNIFICANT OTHERS":
>
> ... Mrs. M. stated her relationship has had its good and bad times like everyone else and she added that it is exceptionally difficult to maintain a healthy relationship with subject due to his addictions to crack cocaine and his incarcerations. Contact reported she plans to stay in the relationship with subject

> and will support him 100% with whatever he needs as long as he is able to straighten out his life.
>
> Y. M. advised writer she will continue to accept D. M.'s telephone calls and she plans to visit him while he is incarcerated. Collateral was very cooperative during the PSCA interview.

[112] Under the category "MARITAL/FAMILY", it is noted as follows:

> ... As previously noted in this report, Y. and D. M. share a relationship with good and bad times... Collateral reported she and the offender have the offender have a 1 ½ year old son (P.) who was born just before the subject's incarceration and he was able to briefly establish a bond with his son but it is difficult to maintain a bond when Mr. D. is incarcerated. Mrs. M. advised writer she is the sole provider and care giver for their son... Marital/Family does not appear to be a contributing factor.

[113] Under "FAMILY VIOLENCE":

> Mrs. M. indicated she charged the offender with assault 2 ½ years ago, an incident where D. M. hit his wife and threatened her. Contact stated there are no other incidences of family violence to report.

[114] It is clear that the conversations with the community assessor for the June 2008 report do not in fully correspond to the circumstances put forward by the petitioner in her affidavit respecting her relationship with the respondent.

[115] The totality and weight of the evidence suggest that some of her answers to the community assessment are false. She testified that the respondent continually called her from prison to persuade her to provide a positive assessment in 2008 to facilitate his release from prison. According to her, he continued to demand she say things that would put him in a positive light and to refrain from saying things that would put him in a negative light; she complied.

[116] The reason she complied she confirmed was to "get it over with". She had been contacted on numerous occasions and refused to return the calls to the assessor and had been contacted on numerous occasions by the respondent from prison. Subsequently, when the connection was made, she responded to the questions in accordance with the respondent's request to place him and the relationship in a positive light.

[117] The bulk of the evidence points to the fact that what she told the community assessment officer was not in fact the reality occurring in her relationship with the respondent.

[118] It is also clear in 2008 that she was still of two minds as to whether to pursue the relationship to ensure that she preserved an opportunity for her son to have to have contact with the father.

[119] It is equally clear that she has finally decided to terminate the relationship completely, to return to Japan to live with her family until she can re-establish herself.

[120] It is equally clear and uncontested that the sole source of consistent support for the petitioner and the son has been and continues to be her parents who send money from Japan.

[121] The mother acknowledges with appreciation the support she has received from the respondent's mother (now deceased) and his relatives. This support, while positive, is not sufficient to sustain her and her son in Nova Scotia.

[122] Certainly, she is the sole support for her son and has been since birth. Without her parents' financial resources, she would be unable to meet the daily needs of her child to supply him and her with food, clothing, and shelter in Nova Scotia.

The Law

[123] The respondent's counsel has argued strongly for the respondent. The respondent wants one final opportunity to change. He asks the court to recognize that if the petitioner is allowed to leave Canada and to return to Japan it effectively terminates forever the possibility that he will, at some point in time, reunite with his son.

[124] I do not have any plan from the respondent or any verifying documentation regarding his progress since the June 2010 report from prison authorities.

[125] I have his affidavit, his presence in court via video conference and the answers to the direct and cross examinations. No further witnesses were called on his behalf, including no family members.

[126] Neither do I have a detailed plan from the petitioner regarding the circumstances in which the child will find himself in Japan.

[127] What I do know is that the mother and her family have provided almost exclusively full financial, emotional and physical support for the child who is the subject matter of this proceeding.

[128] I also know that the father has had no contact with his child since his incarceration in June of 2007.

[129] I have evidence of a lengthy criminal history with significant drug abuse problems, anger management problems and domestic violence problems. I have no evidence to support that these have been adequately addressed such that the risk to the mother and thus to the child is mitigated as a result of a change in the respondent's comportment.

[130] The Supreme Court of Canada said in **K.(K.) v. L.(G.)**, SCC 1985 Carswell NWT 58:

> The welfare of the child must be decided on the consideration of all relevant factors, including the general psychological, spiritual and emotional welfare of the child. The Court must choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. **Parental claims must be seriously considered but must be set aside where the welfare of the chid requires it.**

[130]In **Young v. Young**, SCC 1993 Carswell B.C. 264, McLachlin J. wrote in reference to Section 8 of the *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.) that provides that a court shall abide by the following matters in deciding questions of custody and access:

> 16(8) In making an order under this section, the court shall take into consideration **only the best interests of the child of the marriage as**

> **determined by reference to the condition, means, needs and other circumstances of the child.**
>
> **…**
>
> In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[130]McLaughlin J. noted that:

> Parliament has adopted the "best interests of the child" test as the basis upon which custody and access disputes are to be resolved. Three aspects of the way Parliament has done this merit comment.
>
> First, the "best interests of the child" test is the only test... This means that parental preferences and "rights" play no role.
>
> Second, the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that pre-determined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has been left to the judge to decide what is in the "best interests of the child", by reference to the "condition, means, needs and other circumstances" of the child...The judge's duty is to apply the law...
>
> Third... the court shall give effect "to the principle that a child of the marriage shall have as much contact with each spouse as is consistent with the best interests of the child."...The modifying phrase "as is consistent with the best interests of the child" means that the goal of maximum contact of each parent with the child is not absolute. **To the extent that contact conflicts with the best interests of the child, it may be restricted. But only to that extent.**
>
> ... But in the final analysis, decisions on access must reflect that is in the best interests of the child.
>
> It is clear the court has also indicated that the "custodial parent's wishes are not the ultimate criterion for limitations on access".
>
> ... Again, a judge might conclude that it is in best interests of the child that he or she move with the custodial parent to a distant location, notwithstanding that this

> will limit the access of the other parent. Optimum access may simply not be in the best interests of the child for a variety of circumstances.
>
> ... in some cases the risk of harm may be a factor to be considered in determining that is in the child's best interests... the question of harm may become highly relevant.

[131] In this situation, there was and continues to be a risk to the mother and therefore to the child as the result of the failure of the respondent to address the circumstances of his criminal and addiction history.

[132] It is clear from the documentation from the prison that as of June 2010 this risk to the community, to society and to the respondent had not been satisfactorily addressed.

[133] I have no evidence before me, other than the respondent's uncorroborated statements, that he has adequately addressed these risks.

[134] In **Gordon v. Goertz**, [1996] 2 S.C.R. 27 we are reminded as judges that the court has a limited capacity to manage the day-to-day child rearing decisions or indeed the efficacy of maintaining a watching brief on a family's day-to-day living.

[135] The court noted as follows:

> As Goldstein, Freud and Solnit stress, an important function of the law on divorce or separation is to reinforce the remainder of the family unit so that children may get on with their lives with as little disruption as possible. Courts are not in the position, nor do they presume to be able, to make the necessary day-to-day decisions which affect the best interests of the children. That task must rest with the custodial parent as he or she is the person best placed to assess the needs of the child and all its dimensions... Once a court has determined who is the appropriate custodial parent, it must, indeed it can do no more than, presume that that parent will act in the best interests of the child.

[135]The mother does not dispute that she has received some assistance from the respondent's family and indeed, the evidence supports that she appreciates the efforts that they have made.

[136] However, she and her parents have absorbed all of the financial, emotional, physical and day-to-day responsibilities respecting the upbringing of this child.

Her parents' support has been unconditional. She has not been permitted to bring her child to Japan as the respondent has refused to allow her to obtain a passport for their son. Her parents continue to support her and her son even in the absence of having met this child.

[137] The respondent has, by omission, invested in the mother and her parents all responsibility for the care of the child. He does not question her ability to make correct decisions respecting the child.

[138] Child Protection Agency in 2006 reviewed the materials in front of them and were satisfied that the child was not at risk with the mother. They were further satisfied that she should remain the custodial parent.

[139] They were also satisfied that contact with the father was not to take place until such time as he had addressed the risk issues identified in their proceedings. There is no evidence that he participated at all in those proceedings or satisfactorily addressed the risks which brought his family and his son to the attention of child protection.

[140] I have due regard for the 17 factors enumerated in **Foley v. Foley**, [1993] N.S.J. No. 347 in reviewing custody and access matters.

[141] I do not have two plans before me that can be assessed in the usual manner. What I can conclude is that the child's best interests in this case are addressed by the mother's plan which is to place herself in familiar surroundings within close proximity to her parents and family where she can work and support her son.

[142] There is an agreement that the mother is the appropriate custodial parent. She is providing for the physical needs; she has provided the role model; she has been present physically to the child and addressed all of the needs related to those factors.

[143] This child is a child of a Japanese mother and an African-Nova Scotian father. The mother suggests that in Japan she will be in a position to provide the child with knowledge of his heritage.

[144] She has by her conduct continued association with the paternal grandmother and the father's family, for whom she expressed her gratitude and affection. She

has shown no resistance to the appropriate inclusive cultural development of her child. She came to the decision reluctantly to return to Japan and sever the relationship between father and son.

[145] She continued to be willing to foster a relationship for many years throughout her life with the respondent. She finally made a decision and is unequivocal. She believes no contact is the most appropriate order of the court.

[146] The respondent, due to his own conduct, has not been in a position and continues to be unable to support this child in any manner to address his needs.

[147] On the totality of the evidence, it is clear that the mother shall be the sole custodial parent. In Nova Scotia, her contacts are limited to those individuals with whom she currently associates, none of whom have been able to assist her in a significant way in addressing her child's needs.

[148] The bulk of her support, both financial and emotional, rests with her family. They have shown their dedication to her and her son by continuing to be the principal supporter of the mother during her stay in Nova Scotia.

[149] The mother's status in Canada is not certain nor guaranteed. If I were to require her to stay, it could bring into play an arbitrary separation between her and her son, as happened when she returned to Japan to visit her parents. She was required to leave the child here as there has been no consent to allow her to apply for a passport and she has been the child's only primary care taker.

[150] The mother currently has no prospects of employment. Her life and her son's life have been held in abeyance pending the father’s incarceration.

[151] It is time to make a final decision to allow the mother to work with the resources that she has in accordance with her historic ability to provide for her son and to place herself in a position where she can access the best of her family and support system. In the mother's view, currently she could achieve a better life for her son in Japan with her family.

[152] As sole custodian, she shall have all rights and responsibilities inherent therein, including the right to apply for a passport without need of any other signatures and the right to determining the child's place and country of residence.

[153] Whether she wishes to return to Canada at some future time is entirely her decision as custodial parent.

[154] Therefore, the mother shall be entitled under her own signature to apply for a passport in the name of her son and to leave Canada and return to Japan, should that be her wish, as the custodial parent, in order to re-establish herself with her family.

[155] She will be required to provide to the respondent's family twice yearly a letter outlining the particulars of her son's progress in school, his health and information concerning his then current age and stage of development in order to ensure that the father has access to some information about his son.

[156] She is to keep his family updated on information concerning her place of residence.

[157] I will not make an order as to contact given that contact has been prohibited in the past. I have no evidence that there has been a sufficient change in circumstances to justify or allow contact.

[158] Should contact between the father and the mother be restricted by another court order, undertaking or recognizance, she shall not be obliged to write directly or indirectly to the father without further court order. This is to ensure she is not in a position of breaching any court order or placing the respondent in a position of breaching a court order.

[159] She shall keep the father's family notified of a change in address, location or country with respect to the child. She shall advise them should she return to Canada and to continue to keep them advised of the child's whereabouts.

[160] Any contact between the father and the child shall occur only with the consent of the mother as agreed upon by the mother or as determined by court order.

[161] The mother’s counsel shall draft the order.

Legere Sers, J.

Halifax, Nova Scotia
February 25, 2011