IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *D.M.M. v. T.C.M.*, 2011 NSSC 261

Date: 20110628
Docket: 1205-002847
Registry: Pictou

Between:

D.M.M.

Applicant/Respondent

v

.

T.C.M.

Respondent/Petitioner

Judge:	The Honourable Justice N.M. (Nick) Scaravelli
Heard:	June 27, 2011, in Pictou, Nova Scotia
Oral Decision:	June 28, 2011
Counsel:	Peggy Power, for the Applicant/Respondent B. Lynn Reierson, Q.C., for the Respondent/Petitioner

By the Court (Orally):

[1] This is an application by D.M.M. to vary the provisions of a Corollary Relief Judgment issued at the time of their divorce in June 2010. The main issue before the court is one of mobility. D.M.M. seeks permission to move two of the children of the marriage from New Glasgow, Nova Scotia, to Fall River, Nova Scotia. The oldest child currently attends post-secondary education in Ontario. Calculation of appropriate child support is also in issue.

[2] The application was filed in November 2010. A hearing was scheduled for March 2011. As a move would require a change of schools for the two younger children midterm, the parties agreed to adjourn the hearing until the completion of the current school year.

[3] As can be expected in cases of this nature, the disagreement between parents on moving the children is an emotional issue for children who have great love and affections for both parents, as in the present case. For this reason, I am giving a summary oral decision so there will be closure on the issue of mobility and the children will be able to spend their summer vacation knowing what is in store for them

in the fall when school begins. I reserve the right to edit and expand my decision, including references to any authorities herein.

[4] By way of background, the parties were married on February 17th, 1996, at New Glasgow, Nova Scotia, after living together since 1992. They have three children, a son , T.M., born September 16th, 1992 (18 years), a daughter, R.M., born November 26th, 1996 (14 years), and a daughter, K.M., born June 16th, 2000 (11 years).

[5] The parties separated in November of 2007. At that time they entered into a shared parenting arrangement with the parties equally sharing the matrimonial home. Each party would move out of the home during their non-parenting time. This continued until D.M.M. purchased her own home in New Glasgow in March of 2008, after which shared parenting continued in both homes.

[6] The parties executed Minutes of Settlement in 2008, which set out extensive parenting terms that had the children spending equal time with each party. The day-to-day care and decision-making duties were equally shared by the parties. At the time, D.M.M. was employed in New Glasgow, earning approximately $60,000 per year. T.C.M.'s employment earnings were $113,000. Child support was paid by

T.C.M. on a set-off basis. An Amending Agreement was executed in 2009. This came about as a result of a temporary job offer by T.C.M.'s current employer to relocate to the Province of Ontario. The offer included a significant increase in salary. The Amended Agreement provided for a parenting plan while T.C.M. worked and resided in Ontario. This plan was to revert to the original agreement of equal shared parenting upon his return to New Glasgow. While in Ontario, T.C.M. was to have access every second weekend, March Break, every long weekend, generous periods of time over summer vacation, as well as other holidays. Child support was adjusted to reflect his increase in salary, as well as costs of exercising access and debt payments being made by T.C.M.

[7] The parties were divorced in June 2010. The Corollary Relief Judgment incorporated the terms of the Minutes of Settlement, as amended. There is a mobility clause in the Corollary Relief Judgment, with conditions that neither party would take the children out of Nova Scotia for a period exceeding three days, without prior written consent of the other parent. Neither parent is permitted to move the children outside of Pictou County without the consent of the other, or an order of the court.

[8] In July 2010, D.M.M. notified T.C.M. that her partner, a member of the R.C.M.P., was being transferred to Bedford, and that she would be looking for work in Halifax. D.M.M. subsequently sold her house in New Glasgow, in November 2010. She sought his permission to move the children. In response to D.M.M.'s decision to relocate, T.C.M. returned to New Glasgow in November 2010 to work out of his local office in Stellarton and sought to return to the equal parenting arrangement. T.C.M. and D.M.M. could not agree on the terms of a shared parenting plan. Eventually, through mediation in January of 2011, the parties agreed to a parenting plan on a week-on, week-off basis. During his employment transition back to New Glasgow, T.C.M. returned from Ontario for his weekly access period with the children in the former matrimonial home, which he now owns. After the move to HRM, D.M.M. returned to her parents' home to exercise her weekly access.

[9] The oldest child, T.M., moved to Ontario in September 2010 to reside in a condominium with his father for the purpose of attending a private recording arts school. He remains residing in the condominium in Ontario and visits his home in New Glasgow for short periods during summer break.

[10] D.M.M. and her partner purchased a home in Fall River, where they wish to reside with the children.

[11] Both parties referred to the seminal decision of *Gordon v. Goertz*, Supreme Court of Canada, where principles and determination of mobility applications were established. The inquiry involves two stages. First the applicant must show a material change in the circumstances of the children. If this condition is satisfied, the court must consider the application in the best interests of the children under the new circumstances.

[12] To make a finding of a material change, the court must be satisfied of:

> (1) a change in the condition, means, needs or circumstances of the children and/or the ability of the parents to meet their needs;
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> (2) which materially affects the children; and
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> (3) which was either not foreseen or could not have been reasonably contemplated by the court-sanctioned Agreement between the parties.

[13] I am satisfied there has been a material change in circumstances following the court-sanctioned Agreement. Following the separation of the parties in 2007, they have always contemplated and agreed to an arrangement whereby they shared primary care of the children. They initially moved in and out of the family home during the week to effect this purpose. Their subsequent Separation Agreement/Minutes of Settlement detailed a shared parenting regime with joint rights and responsibilities. Except for the period T.C.M. worked in Ontario, the children effectively lived with both parents. The Amending Agreement contemplated T.C.M.'s return to New Glasgow. It was always intended that the parties would reside in the same community in order to continue shared parenting responsibilities.

[14] The children have a positive relationship with both parents. They have a close relationship with extended family on both sides in the New Glasgow area. Moving the children to the Halifax area to reside with their mother would remove the shared parenting regime they now have with their father and the regular available contact with extended family.

[15] Although the parties were aware that D.M.M.'s partner was a member of the R.C.M.P. and subject to transfer, a move out of the area by D.M.M. in these

circumstances was not contemplated in the court-sanctioned Separation Agreement, initially signed in 2008.

[16] I am now required to embark on a fresh enquiry as to what is in the best interest of the children under these circumstances. Under *Gordon v. Goertz*, the court should include in its consideration the following:

> (a) the existing custody arrangement and relationship between the child and the custodial parent;
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> (b) the existing access arrangement and the relationship between the child and the access parent;
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> (c) the desirability of maximizing contact between the child and both parents;
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> (d) the views of the child;
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> (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
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> (f) disruption to the child of a change in custody; and
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> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

[17] Both parties submitted extensive affidavits dealing with the history of the marriage and their relationship with the children. The mother and father testified in court. Affidavits were also filed on behalf of both parties, from extended family, neighbours and friends.

[18] Both parents have moved onto new relationships. D.M.M. began a relationship with her current partner in 2007. As stated, her partner is a member of the R.C.M.P. They moved into D.M.M.'s home together in March 2009. D.M.M.'s partner has established a positive relationship with the children. She accepted a transfer with the R.C.M.P. to the Bedford Detachment which was preferable, as she was subject to transfer anywhere in Canada. Her employment commenced in November 2010. At this time, D.M.M. sold her home and they purchased a house in Fall River.

[19] T.C.M.'s partner is employed as a school psychologist with the Chignecto Central Regional School Board on a permanent basis. She has two children, a daughter 10 year's old. She owns her own home in New Glasgow where she resides with her children. She began her relationship with T.C.M. in April 2010. Her daughter and T.C.M.'s daughter, K.M., are the same age and have known each other since 2006. They have played club soccer and hockey together, and have taken

horseback riding lessons together over these years. T.C.M.'s partner acknowledged that the older daughter, R.M., had difficulty initially with their relationship. This has improved over time through regular contact at home, as well as at school and on family trips. She and T.C.M. plan to eventually move in together and possibly marry, but are waiting until T.C.M.'s girls get through this transition period.

D.M.M.'s Plan

[20] D.M.M.'s plan is for the children to reside in her home in Fall River with her partner. Each child would have their own bedroom. They would be registered for school in the Halifax school district and would travel by school bus. The girls would initially be attending separate schools by separate school buses. They both would eventually attend the same high school. The girls have been spending weekends at their mother's home in Fall River when in D.M.M.'s care. D.M.M. acknowledges that continued involvement with extended family is important for the girls, and she will continue to encourage this as she has in the past. She is also in favour of granting liberal access to T.C.M. She proposes every second weekend, as well as holidays and extended periods of time during summer vacation, as was the case during the period of time T.C.M. temporarily resided and worked in Ontario. In the event the court

determined it in the best interests of the girls, she would be prepared to agree to more access, including three weekends per month, from Friday after school until Sunday at 6:00 p.m. Any of the girls weekend activities in HRM would continue. D.M.M. would agree to pick up the girls each Sunday they are in New Glasgow. T.C.M. would have the girls March Break and six out of ten weeks in the summer. In the event T.C.M. moved to the children's school district, shared parenting would be on a week-on, week-off basis.

[21] Regarding child support, D.M.M. agrees to continue with T.C.M. paying child support on a set-off basis pursuant to Section 9 of the Guidelines. In the event the children remain in New Glasgow with their father, D.M.M. submits she should not be obligated to pay child support as a result of increased costs relating to access costs and parenting times with the children.

T.C.M.'s Plan

[22] T.C.M. plans to have the children continue to reside in the former matrimonial home in New Glasgow, where they live in close proximity to their school, extended family and their friends. They will be able to continue their involvement in their

school and church activities. T.C.M. and his partner plan to remain together permanently. Their children have established a positive relationship. They are withholding moving in together until T.C.M.'s children have closure on the mobility issue.

[23] T.C.M. is willing to continue the current shared parenting on a week-on, week-off basis if D.M.M. moves back to New Glasgow within the next two years. He would contribute $5,000 to the cost of relocation. He would still agree to shared parenting if she moved back outside of the two-year period.

[24] In the event D.M.M. chooses to remain in Fall River, he proposes the children be with her every second weekend. Utilizing her Friday earned day off program, she could have the children commencing on Thursday after school until Sunday at 6:00 p.m. They would have to stay in New Glasgow Thursday evening, unless there is no school on Friday. The original parenting plan for Christmas and Easter and other special dates would remain as per the existing Agreement. T.C.M. would adjust the schedule in order that D.M.M. could have the children on the extended weekends of Victoria Day, Canada Day and Labour Day. She would have the children two out of

every three March Breaks, as well as six out of ten weeks in the summer. T.C.M. would drop the girls off and pick them up every third weekend.

[25] He would waive his right to child support. In addition, he is prepared to contribute $500 per child, per month, to cover D.M.M.'s access costs, which would terminate for each child when they graduate from High School. T.C.M. has offered other access scenarios related to the amount of time D.M.M. spends with the children.

[26] Both girls appear to have a very healthy and loving relationship with each parent. The children have always had a close relationship with their maternal and paternal grandparents, who reside in the New Glasgow area. They have close relationships with other extended family in the area, including an aunt and uncle and T.C.M.'s cousin. The child, R.M.'s, Godparents reside in the area. R.M. has a speech impediment. She has had previous surgery and speech therapy sessions. Both girls have friends residing in their neighbourhood that they spend time with, both during and after school. Both children are actively involved in the community. They have played on several sports teams. They are active members of the YMCA in New Glasgow, and have been and continue to be actively involved in their church. They are succeeding in school and are involved in school activities, including concert band.

Children's Wishes

[27] The parties agreed to have Mr. Martin Whitzman, Marriage and Family Therapist, conduct a Wishes of the Children Assessment. In consultation with the court, the purpose of the Assessment was to address the following:

(1) What are the children's wishes?

(2) Are the wishes independent or have they been influenced by one parent or the other?

(3) The children's maturity level with respect to their ability to express their wishes in this matter?

[28] At the time of agreeing to obtain an Assessment, the son, T.M., 18 years, was attending post-secondary school and residing in Ontario. As a result, it was not contemplated that he would participate in the Assessment. However, at the time the Assessment was conducted, he was home on March Break. Mr. Whitzman interviewed T.M. once with his two sisters and interviewed the girls on two occasions. He also spoke with the son, T.M., over the phone and received his subsequent e-mail. Mr. Whitzman testified at trial.

[29] Due to the sensitive nature of the interviews, I am not going to reproduce the specific comments of the children that are a matter of record. Suffice is to say that the two girls are conflicted due to their positive relationships with both parents. They do not want to disappoint the other parent. They do not want to be the ones to make the choice.

[30] The son, T.M., was of the belief that it is in the best interest of the family to remain in New Glasgow.

[31] The Report, which I accept, does evidence concerns of subtle pressure on behalf of D.M.M. by way of previous comments and behaviour around the children. Mr. Whitzman concluded that pressure of this nature could influence the girls' comments. He stated that they were all mature children who were able to express their thoughts in an age-appropriate manner.

[32] Clearly the decision to relocate does not rest with these children. It is only one of the many factors considered by the court in determining the best interests of the children.

[33] This is not an exceptional case where weight should be given to D.M.M.'s reason for moving, as the move was not to better enable her to provide for the children's needs. Her primary motive for moving was to remain with her partner who accepted a transfer out of the area. Having said that, her move was made in good faith and not intended to frustrate access to the father.

[34] As stated, this is not a joint custody situation where primary care was granted to one parent, thereby requiring the court to consider the interests and wishes of that parent. In addition to the detailed terms of the Equal Time Parenting Plan contained in the Corollary Relief Judgment, I am satisfied that overall both parents jointly provided all aspects of parenting. This is the arrangement the parties agreed upon and are currently following.

[35] Both parties have the ability to provide for the children's needs. The girls are equally attached to both parents. Consideration of the best interest of the children must be from the children's perspective. Although the move to Fall River is only one and a half hours driving distance, the court must consider the disruption that would be caused to the two girls by removing them from the community. The children are rooted in their community with family, extended family and friends. They are heavily

involved in school, community, church and sporting activities. They have been growing up in the environment, essentially spending equal time and parenting from both parents. To remove the girls from this environment, it would cause a significant adjustment on their part.

[36] Because of D.M.M.'s move to Fall River, the court must decide which plan is in the children's best interest. Each parent has offered access time to the other in the range of 30% or more. Although there would no longer be equal shared time with each parent, the children will be able to have a meaningful relationship with both parents.

[37] This hearing is not a contest between parents. There is no winner or looser in an application of this nature.

[38] Having considered all of the evidence and relevant factors set out in *Gordon v. Goertz*, I find it would be in the best interest of the children to remain in New Glasgow.

[39] I find T.C.M.'s plan to be in the best interests of the children. They are able to remain in their community where they are well established and still have liberal access with their mother. I will leave it to the parties to work out liberal access provisions, as set out in the options offered by T.C.M. The parties have demonstrated in the past the ability to work out access that benefits the children and allows maximum contact with each parent in the circumstances. I will retain jurisdiction to hear the parties in the event they are unable to agree.

[40] Regarding child support, T.C.M. does not seek contribution from D.M.M. T.C.M. earns a base salary of $160,000 per year. In addition, he participates in a company incentive program and expects to earn upwards of $250,000 this year. D.M.M. earns approximately $65,000 per year. T.C.M. has acknowledged there would be an increase in D.M.M.'s costs relating to access, as well as periods of time the children are with her. I am satisfied T.C.M. is financially able to provide for the children.

[41] There is an issue of arrears of child support with Maintenance Enforcement. T.C.M. alleges there should be no arrears. Without an order dealing with arrears, Maintenance Enforcement will attempt to collect any outstanding arrears according

to their records. The parties agree there was a typographical error in the Corollary Relief Judgment that affects child support. T.C.M. experienced a reduction in income upon his return to Nova Scotia that should be factored in past child support. A further relevant factor involves his son's move to Ontario. I will hear the parties on this issue in the event they are unable to agree to a consent order reflecting the changes.

[42] Each party shall pay their own costs in this application.

J.