SUPREME COURT OF NOVA SCOTIA
(Family Division)
Citation: MacRae v. MacRae, 2012 NSSC 427

Date: 20121207
Docket: SFPAMCA 082842
Registry: Halifax

Between:

Liza Marie MacRae

Applicant

and

Richard Shawn MacRae

Respondent

Judge:	Associate Chief Justice Lawrence I. O'Neil
Date of Hearing:	October 17, 2012 at Port Hawkesbury (and by subsequent written argument)
Counsel:	W. Brian Smith, Q.C., counsel for the Applicant Wayne J. MacMillan, counsel for the Respondent

By the Court:

Introduction

[1] The parties first separated in the Spring of 2012, although they lived separate and apart in the same home in Halifax for months prior to agreeing to separate in June 2012. The Applicant mother hereinafter referred to as the "mother" moved to Port Hawkesbury following June 2012 for a short period. The

parties then reconciled in Halifax. They again separated in September 2012 and Ms. MacRae moved once again with the child to the Port Hawkesbury area.

[2] Since September 2012, the mother has resided in the Port Hawkesbury area with the parties' two younger children, age seven (7) and eight (8). She has family in the area. The oldest child lives independently.

[3] The parties were a couple for more than twenty years and lived in the Halifax region for all of this time. Each have employment in the Halifax Regional Municipality. (Ms. MacRae is not actually working in Halifax. The Court is told she is on a leave of absence.) The children attended schools in this community until September 2012.

[4] Ms. MacRae, commenced an emergency application on September 24, 2012 at Port Hawkesbury. On September 27, 2012 the parties filed an interim consent order with a review date of October 17, 2012 before me at Port Hawkesbury.

[5] Mr. Brian Smith, Q.C. appeared by telephone on October 17, 2012 and Mr. Wayne MacMillan was present in Court.

[6] Mr. Smith made a request to transfer the proceeding to the Supreme Court (Family Division) in Halifax. All agreed arguments on the motion would be made by correspondence.

[7] This is a ruling on that motion.

Issue

[8] Should the proceeding be transferred to Halifax from Port Hawkesbury as requested by the father.

Legal Principles

[9] The term "ordinarily resident" is used in the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.). For a discussion of these principles, see *Quigley v. Willmore*, 2007 NSSC 305. It arises in the context of competing jurisdictions, not competing locales within the same jurisdiction, as is the case here. Nevertheless the case

discussion on the criteria applied to determine whether one is ordinarily resident in a locale is helpful.

[10] In *Lariviere v. Lariviere* [1999] N.S.J. 490, Kelly, J. considered whether a Nova Scotia Court should exercise jurisdiction over children in Alberta. However, in that case the parties had earlier agreed that the children would only be temporarily placed in the father's care in Nova Scotia and then returned to the mother. Nova Scotia was not the "ordinary residence" of the children and at the time of the hearing, the mother had returned the children to Alberta and they were residing there with her.

[11] In *MacLean v. MacLean* [1996] N.S.J. 167, Edwards, J. ordered that a custody/access hearing should take place in Truro, not Sydney because the child had, "the most substantial connection with the Truro area". He concluded "it is in that area that the child's roots, school, home, friends and support system are located."

[12] In *Pitts v. Noble*, 2009 NSSC 512 the Court was required to consider the appropriate forum to have a child support issue considered, as between Nova Scotia and British Columbia. This required a discussion of the *forum conveniens* for a custody and access trial when child support was also an issue.

[13] In *Abbott v. Algarvio*, 2012 NSSC 312 the court considered whether Nova Scotia was the *forum conveniens* to hear a custody and access application filed by the mother who had recently moved to Nova Scotia from Ontario with her three year old. The court found it had jurisdiction but directed that the matter be heard in Ontario.

[14] Recently the Supreme Court of Canada discussed the principles defining *forum conveniens* in *Van Breda v. Village Resorts Ltd.,* 2012 SCC 17. More specifically the court elaborated on the "real and substantial connection" test as an appropriate common law conflicts rule for the assumption of jurisdiction.

[15] For a helpful discussion of the principles governing the transfer of proceedings into the Family Division of the Supreme Court from 'non Family Division' regions of Nova Scotia see the decision of Justice LeBlanc in *Doncaster v. Field*, 2012 NSSC 231. Herein the Court is being asked to decide as between

two judicial districts within the Family Division of the Supreme Court, i.e. Port Hawkesbury or Halifax.

[16] Rule 59.03 governs where a Supreme Court (Family Division) proceeding is to be started and heard. It provides:

> Where a proceeding is started and heard
>
> Rule 59.03
>
> 59.03 (1) A proceeding in the Supreme Court (Family Division) must be started, dealt with, and heard in the judicial district where the applicant resides.
>
> (2) An applicant who resides outside a judicial district, and who obtains permission of a judge or court officer in the judicial district, may start a proceeding in that judicial district.
>
> (3) A proceeding must be heard where it is started, unless a judge changes the place of the proceeding, changes the place of hearing, or adjourns a hearing from one place to another, under Rule 32 - Place of Proceeding or Rule 47 - Place of Trial or Hearing.
>
> (4) A judge may transfer a proceeding to an office of the court in one of the following judicial districts:
>
> > (a) a district where a child, who is the subject of a custody, access, or parenting dispute in the proceeding, ordinarily resides;
> >
> > (b) a district where it is substantially more convenient to deal with the proceeding or a step in the proceeding.

[17] The subject proceeding was started in Port Hawkesbury and must be heard there unless a Judge orders otherwise (R.59.03(1)). At the time the proceeding started, Ms. MacRae was residing in the Port Hawkesbury region, although for only a very brief period of time. A Judge may transfer the proceeding to another judicial district where a subject child ordinarily resides or to a district that is substantially more convenient (R.59.03(4)).

[18] Mr. MacMillan, on behalf of Ms. MacRae, argues that Port Hawkesbury is where the children reside and that it is the most convenient place to deal with the

issues. Mr. Smith, on behalf of Mr. MacRae, argues that prior to their move to Port Hawkesbury, the children lived their entire lies in the Halifax areas.

[19] I am satisfied that Halifax is the judicial district where this proceeding must be heard. It is the district with the closest connection to this family and Halifax is the community where the children have lived most of their lives. They have a history in Halifax. The best opportunity to present evidence relevant to an assessment of their best interests exists if the proceeding is in Halifax.

[20] The parents also have a history in Halifax. Halifax is the ordinary/habitual residence of the children. Although the child is present in Port Hawkesbury, the child has a real and a greater connection to Halifax.

[21] The inconvenience and costs for Ms. MacRae as a consequence of having the proceeding in Halifax can be partially addressed by the use of technology such as appearances by video and telephone as deemed appropriate. Justice Legere Sers sits in both Port Hawkesbury and Halifax and she is a leader in the use of technology as a means of lessening the burdens of litigation imposed on parties.

[22] This proceeding will be scheduled on her docket. Her office will be in further communication to confirm a return date.

ACJ