

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Abbott v. Algarvio, 2012 NSSC 312

Date: 20120817

Docket: SFHMCA-081703

Registry: Halifax

Between:

Jody Lynn Allister Abbott

Applicant

v.

Philip Frank Algarvio

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Heard: August 17, 2012

Counsel: Jody Abbott on her own behalf
Philip Algarvio on his own behalf

By the Court:

Introduction:

[1] Jonah is the three year old son of Jody Abbott and Philip Algarvio. In late June 2012, Ms. Abbott left Ontario and brought Jonah with her to Nova Scotia. According to Mr. Algarvio, he was told that Ms. Abbott and Jonah were going to spend the night at the home of Ms. Abbott's friend and, on the following day, he learned Ms. Abbott and Jonah were leaving Ontario. Ms. Abbott wouldn't admit that Mr. Algarvio had virtually no advance notice of the move. She says that she and Mr. Algarvio didn't have "much discussion" about the move: they "weren't communicating on any level". At best, Mr. Algarvio had less than one day's notice that Jonah was being taken to Nova Scotia.

[2] Since leaving Ontario, Ms. Abbott and Jonah have lived in Nova Scotia, first with Ms. Abbott's mother and now with her father. Ms. Abbott filed an application for interim custody of Jonah on July 4, 2012. Her application is pursuant to section 18 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160. She was directed to effect personal service of the pleadings relating to her application on Mr. Algarvio by August 2, 2012. The parties disagree about whether Mr. Algarvio was served within this timeframe. Regardless, Mr. Algarvio attended court for the hearing.

[3] Ms. Abbott seeks an interim order giving her custody of Jonah and imposing terms on Mr. Algarvio's access. She filed an affidavit and parenting statement in support of her application. Mr. Algarvio filed no documents in response to her application, having little time to do so. Mr. Algarvio believes that the issue of Jonah's custody should not be decided in Nova Scotia, but in Ontario.

[4] At this stage, the issue is whether I have jurisdiction to hear Ms. Abbott's application. Each party offered evidence about this issue and was cross-examined by the other. I gave an oral decision at the conclusion of the hearing and am providing this written decision to ensure each party is able to understand my reasoning.

The legal framework

[5] In *Bouch v. Penny*, 2009 NSCA 80, (leave to appeal this decision to the Supreme Court of Canada was dismissed on March 25, 2010 at 2010 CanLII 14708) the Court of Appeal outlined the analysis to be conducted when determining matters of jurisdiction under the *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2nd Sess.), c. 2.

[6] In *Bouch v. Penny*, 2009 NSCA 80, Justice Saunders, with whom Justices Roscoe and Oland concurred, approved of the two-step analysis Justice Wright performed in deciding the application at first instance. Justice Wright said, at paragraph 40 of his decision in *Penny v. Bouch*, 2008 NSSC 378, that where there's a dispute over assuming jurisdiction, the *Court Jurisdiction and Proceedings Transfer Act* requires I must first determine whether I can assume jurisdiction, given the relationship between the subject matter of the case, the parties and the

forum. If that legal test is met and I can assume jurisdiction, I must then consider whether I ought to assume jurisdiction. He said this means considering the discretionary doctrine of *forum non conveniens*. There may be more than one forum capable of assuming jurisdiction and I may decline to exercise jurisdiction because there is another, more appropriate, forum.

Can I assume jurisdiction?

[7] Part I of the *Court Jurisdiction and Proceedings Transfer Act* determines the court's territorial competence. Section 4 of the *Act* provides that only in certain circumstances does the court have territorial competence in a proceeding brought against a person. The only one of those circumstances that could apply in this case is subsection 4(e) of the *Act* which refers to circumstances where there is a real and substantial connection between this province and the facts on which the proceeding against that person is based.

[8] A "real and substantial connection" is presumed to exist in twelve different categories that are enumerated in section 11 of the *Act*. Those are not the only circumstances where a real and substantial connection may exist: they are simply the categories where there is a legislated presumption of real and substantial connection. The opening clause of section 11 explicitly says that the section doesn't limit the plaintiff's right to prove other circumstances that constitute a real and substantial connection between this province and the facts on which a proceeding's based.

[9] There's no legislated presumption of real and substantial connection in this case. So, I must return to the factors articulated in the common law to determine whether there is a real and substantial connection between Nova Scotia and the facts on which Ms. Abbott's case is based.

[10] There's no basis for jurisdiction stated in the *Maintenance and Custody Act*. At common law, a court has jurisdiction in a parenting application where the child is present, resident or domiciled in the jurisdiction when the proceedings were begun.

[11] Jonah's been present in Nova Scotia since late June 2012 when he came here with his mother. The application was commenced on July 4, 2012.

[12] Jonah was present in Nova Scotia when the proceedings were begun and, as a result, I conclude that I can assume jurisdiction in this application. This conclusion means I must consider whether I ought to assume jurisdiction. As I've noted this means considering the discretionary doctrine of *forum non conveniens*. There may be more than one forum capable of assuming jurisdiction. I may decline to exercise jurisdiction because there is another, more appropriate, forum.

Ought I assume jurisdiction?

[13] Subsection 12(2) of the *Court Jurisdiction and Proceedings Transfer Act* says that in deciding the more appropriate forum in which to hear a proceeding, I must consider the circumstances relevant to the proceeding, including:

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
- (b) the law to be applied to issues in the proceeding;
- (c) the desirability of avoiding multiplicity of legal proceedings;
- (d) the desirability of avoiding conflicting decisions in different courts;
- (e) the enforcement of an eventual judgment; and
- (f) the fair and efficient working of the Canadian legal system as a whole.

Convenience and expense

[14] Ms. Abbott has lived in Ontario for at least the past ten years. Jonah was born there in 2009. Mr. Algarvio continues to reside there.

[15] In summary, Ms. Abbot's claim for custody is based on her view that the environment in which she and Jonah lived in Ontario is unhealthy for Jonah. In her affidavit, she says Mr. Algarvio was not an involved parent, he used drugs, "he suffers from bi-polar & major depression" and he refused to seek counselling for his mental illnesses. She says Mr. Algarvio would hide in his bedroom, would not attend to household requirements such as bill paying or buying groceries and would rely on her to transport him to work and deal with his employer.

[16] Ms. Abbot says that she was responsible for taking Jonah to his paternal grandmother's for childcare each day. She describes Jonah as being "delayed" while living in Ontario and says he has "blossomed" since coming to Nova Scotia. It wasn't made clear whether the opinion that Jonah was delayed was a professional opinion of his development or her own view.

[17] Mr. Algarvio disputes Ms. Abbott's comments. The witnesses required to testify regarding this are in Ontario: his mother, his family, his employer, his doctor and any professionals who have treated Jonah. Witnesses in Ontario have been able to observe both Jonah and the parents' situation over the course of Jonah's life. Ms. Abbott's parents have been engaged with Jonah to a lesser extent.

[18] There will be expense and inconvenience to each parent if he or she is compelled to litigate in the other forum.

[19] The witnesses who have the most to say about the matters Ms. Abbott has placed in issue are available in Ontario. As well, there are a greater number of witnesses who have relevant information in Ontario than in Nova Scotia. There is greater convenience in hearing this matter in Ontario where greater and superior evidence is available.

The applicable law

[20] Nova Scotia's applicable law is found in the *Maintenance and Custody Act* which provides in section 18(5) that "In 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."

[21] The parents are unmarried, so Mr. Algarvio's parenting application in Ontario would be pursuant to that province's *Children's Law Reform Act*, R.S.O. 1990, c.C.12, as amended. Section 19(a) of that *Act* provides that applications with regard to custody, incidents of custody, access and guardianship "will be determined on the basis of the best interests of the children".

[22] The applicable law in each jurisdiction is guided by Jonah's best interests and I need not be concerned that a contest relating to his parenting in Ontario would be determined on bases that are inconsistent with those considered in Nova Scotia.

Avoiding multiplicity of legal proceedings and conflicting decisions

[23] At this point, the only proceeding is Ms. Abbott's application before me.

[24] According to Mr. Algarvio, when Ms. Abbott and Jonah left Ontario, he contacted the police and a lawyer. He took steps to start a legal action and, as he was starting this, he was served with the materials relating to Ms. Abbott's Nova Scotian application. When this happened, he says his lawyer advised him to deal with the Nova Scotian application before taking further steps in Ontario. Mr. Algarvio is ready to start a proceeding, but has been advised to wait, pending my determination of the jurisdictional question. Ensuring that only one court is actively engaged in this matter (as has been done) ensures there will not be a multiplicity of legal proceedings or conflicting decisions.

Enforcement of an eventual judgment

[25] Each parent is able to bring an application under provincial legislation only. Both provinces have legislation enabling the recognition and enforcement of foreign custody orders. In Nova Scotia, we have the *Reciprocal Enforcement of Custody Orders Act*, R.S.N.S. 1989, c. 387. Ontario has been a reciprocating state under that legislation since November 1982. Ontario has provisions for the enforcement of extra-provincial custody or access orders in sections 40 to 45 of the *Children's Law Reform Act*. An eventual judgment from either jurisdiction would be enforced with equal ease in the other jurisdiction.

Fairness and efficiency

[26] In *Bouch v. Penny*, 2009 NSCA 80, Justice Saunders highlighted the difference between unfairness and inconvenience. He explained, at paragraph 77, that "[i]nconvenience typically reflects concerns such as increased, unnecessary expense; time tabling difficulties; disruption to other obligations owed by parties and witnesses, and the like." In contrast, he said

that unfairness was broader, including the concepts of equity, the parties' interests and the interests of other similarly situated litigants, fairness and comity.

[27] Mr. Algarvio is ready to begin a parenting application in Ontario. He began to prepare this application shortly after Ms. Abbott moved Jonah to Nova Scotia. It's been held in abeyance because of Ms. Abbott's application. If I don't assume jurisdiction, there will not be significant delay in addressing Jonah's parenting.

[28] In light of all these considerations, I conclude this is a case where I can have jurisdiction but, to ensure fairness and the availability of the best evidence in determining Jonah's custody, I should decline jurisdiction. This matter should be heard in Ontario.

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

Halifax, Nova Scotia