SUPREME COURT OF NOVA SCOTIA
Citation: Parsons v. Fraser, 2013 NSSC 145

Date: 20130508
Docket: SPD 047948
Registry: Pictou

Between:

Lynda Marie Parsons

Applicant

v.

Douglas Roy Fraser

Respondent

Judge:	The Honourable Justice Kevin Coady
Heard:	April 17, 2013, in Pictou, Nova Scotia
Written Decision:	May 8, 2013
Counsel:	Karen Killawee, for the Applicant Tim Daley Q.C., for the Respondent

By the Court:

Background:

[1] Lynda Parsons and Douglas Fraser were married on September 27, 1997 and separated on September 30, 2005. They are the parents of two boys, Nicholas age 14 and Joshua age 9. They were divorced in 2009. The following parenting plan is reflected in their consent separation agreement which was incorporated into their Corollary Relief Judgment:

> 1. The parties shall enjoy joint custody of the children of the marriage, namely Nicholas Robert Douglas Fraser, date of birth January 26, 1999 and Joshua Michael Fraser, date of birth July 16, 2003, with primary care to the Petitioner;
>
> 2. The Respondent shall enjoy regular, reasonable access at reasonable times, upon reasonable notice as shown on schedule attached hereto and forming part of this judgment;
>
> 3. The parties shall enjoy block access during summer holidays; block access to be agreed between the parties on a reasonable basis. Both parties agree to allow reasonable telephone access to the other parent during the accessing parent's block access visitation;
>
> 4. Such other access on special occasions and holidays as may be agreed by the parties;

The separation agreement has been in place since July 12, 2007.

[2] It is not disputed that Mr. Fraser has exercised access to the children every second weekend from Friday after school until Sunday at 7:00 p.m. as well as two evenings each week. Mr. Fraser also has additional time with the children over holidays.

[3] The following financial arrangements are reflected in the Corollary Relief Judgment:

> The respondent shall be responsible and shall retire the line of credit. The parties agree that the line of credit shall be frozen such that no debits can be accessed by either party and the account shall be active only for the receipt of payment.

This clause represented part of an overall plan for an equal division of matrimonial property.

The Application:

[4] On February 20, 2013 Ms. Parsons filed a Notice of Application in Chambers (to vary). She seeks the following relief:

1. Variation of the Corollary Relief Judgment, dated April 1st, 2009 to allow the Applicant to move with the children of the marriage from Pictou County, Nova Scotia to England;

2. Requiring the Respondent to pay $10,500.00 plus interest and costs to the Applicant as indemnification for the Bank of Montreal debt she paid as a result of the Respondent's failure to comply with the terms of the Separation Agreement and the Corollary Relief Judgment;

3. Support in lieu of such payment.

[5] In relation to the first application Ms. Parsons cited the following grounds:

- The Applicant is from England, and lived there from birth to age 13, and again from age 18-23.

- The Applicant is in a long distance relationship with a man who resides in England, and has been in this relationship for approximately 7 years.

- The Applicant's father resides with her and the children and wishes to return to England. He provides substantial care for the children

- The Applicant has a job waiting for her in England, if she is permitted to relocate.

- The British school year contains week-long breaks from school every six weeks or so, with longer breaks for summer, Christmas and spring break.

Cross-examination on the affidavits in support of the Applicant did not disturb the accuracy of the above statements.

[6] In relation to the second application Ms. Parsons cited the following grounds:

- Under the Separation Agreement, dated July 12, 2007, the Respondent retained the matrimonial home free and clear from any interest of the Applicant.
- In exchange, the Respondent accepted responsibility for the joint debts. "the particulars of which are well known to the Parties".
- Included in these joint debts was a line of credit with the Bank of Montreal, with a limit of $40,000.
- The Respondent increased the debt for his own purposes post judgment.
- The Respondent ceased paying the debt and subsequently declared bankruptcy.
- The Bank of Montreal came after the Applicant for payment of same.
- The Applicant bargained with the creditor, who agreed to provide a full release for the sum of $10,500.00.
- The Respondent has refused to pay anything towards this debt.

Cross-examination on the affidavits in support of the Applicant did not disturb the accuracy of the above statements.

[7] Mr. Fraser opposes the move to England claiming that it would severely diminish his relationship with the boys. He acknowledges that he breached the separation agreement by running up the line of credit to its $40, 000 maximum. He testified that he had no choice as he was financially "strapped". He accepts that Ms. Parsons paid $10,500 to the bank but feels no obligation to reimburse her. He takes the position that his bankruptcy absolves him of any responsibility for that debt.

The Law Respecting Mobility:

[8] *Gordon v. Goertz* [1996] 2 S.C.R. 27 remains the authority on mobility. The Supreme Court summarized the law as follows in paragraph 49:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.

2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.

6. The focus is on the best interests of the child, not the interests and rights of the parents.

7. More particularly the judge should consider, inter alia:

    (a) the existing custody arrangement and relationship between the child and the custodial parent;

    (b) the existing access arrangement and the relationship between the child and the access parent;

    (c) the desirability of maximizing contact between the child and both parents;

    (d) the views of the child;

> (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;
>
> (f) disruption to the child of a change in custody;
>
> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.
>
> In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[9] In order to analyse the mobility issue it is necessary to consider the directives contained in sections 16(8) and 16(10) of the *Divorce Act*. Those directives are as follows:

> 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.
>
> ...
>
> 16 (10) 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.

The Gordon v. Goertz Analysis:

[10] *Material Change:* Mr. Fraser acknowledges that the proposal to relocate the children to England constitutes a material change in circumstances affecting the children. I agree with that position. Since the signing of the separation agreement several events have occurred. Ms. Parsons has met a new serious partner in James Seward. Additionally her father John Parsons lost his longstanding spouse which prompted a desire to return to the land of his birth. Mr. Parsons has been a very significant presence in the childrens life since separation.

[11] *Fresh Inquiry:* This family post separation found a very traditional balance that satisfied both parents. Ms. Parsons presents as a strong personality in family matters while Mr. Fraser presents as one who is only too happy to submit to Ms. Parsons on issues respecting their family. I suspect this was a dynamic that contributed to the breakup of the marriage. The evidence satisfies me that Mr. Fraser surrendered much of his parenting role to Ms. Parsons and her parents without protest. He was personally content with being an "access parent" as that role did not interfere with other aspects of his life. The evidence satisfies me that the children flourished under this arrangement. They benefited from the structure of the Parson's household while enjoying carefree time with their father. I find that Mr. Fraser has no interest in primary parenting. If it were not for this application Mr. Fraser would never complain about how much time he spends with the boys. Ms. Parsons is quite content with the status quo as it suits her view of the separated family.

[12] Over the years there have been many opportunities for Mr. Fraser to expand his parenting role. He has ignored those times as increased parenting would complicate his life. When Ms. Parsons regularly travelled to England he made no effort to take the boys beyond the usual schedule. He was content to leave them with their grandparents. On occasions when the boys were at an activity that went beyond his parenting time, he would leave as per the usual schedule leaving Mr. Parsons to drive the boys home. The boys were quite content with these arrangements as they viewed their father as strictly a week-end parent and Mr. Parsons as the "go to" male parent figure.

[13] I am not suggesting that Mr. Fraser is a failed parent or that the children do not enjoy their time with their father. I am satisfied that they love him and that Mr. Fraser genuinely loves them. Unfortunately their expectations have been limited by Mr. Fraser's view of his parenting role. It is noteworthy that there was limited evidence as to what the children did when they were with Mr. Fraser. Their friends did not visit them at his home. Birthdays and special occasions were not celebrated at Mr. Fraser's home. I was left with the distinct impression that Mr. Fraser's home was nothing more than an interruption in their usual routine. Nonetheless I am satisfied that the boys never resisted the visits with their dad, and genuinely enjoyed their time with him.

[14] Mr. Fraser testified that he strictly stuck to the terms of the order so as to stave off the threat of a move to England. I do not accept that evidence. If he was concerned about this possibility, the natural response would be to strengthen his relationship with the boys by spending more time with them.

[15] I have no concerns about Ms. Parsons ability to provide for the children both physically and emotionally. I am satisfied that she values Mr. Fraser's role in their lives and will strive to maintain that relationship even from afar. I am also satisfied that John Parsons is totally devoted to their well being and the importance of Mr. Fraser in their lives. I am satisfied that the children would miss John Parsons terribly were he not with them. I was very impressed with Mr. Seward who I found to be totally devoted to Ms. Parsons, Mr. Parsons, Nicholas and Joshua. I am satisfied that these individuals will make a conscientious effort to foster Mr. Fraser's relationship with the boys from afar. Unfortunately, I am not certain that Mr. Fraser will make the required effort.

[16] *Previous Order:* There was no actual litigation involved in the parenting plan set out in this couples separation agreement and Corollary Relief Judgment. All terms were the result of negotiations. I will say, however, I am not satisfied that Mr. Fraser was advocating for a shared parenting arrangement.

[17] *Ms. Parsons' Views:* While the parties enjoy a joint custody arrangement, the evidence satisfies me that Ms. Parsons has been the guiding parent since separation. *Gordon v. Goertz*, *supra*, directs that there is no legal presumption that custody remain with her in England. Nonetheless her views are entitled to great respect. Mr. Fraser's wishes are also entitled to respect. These wishes would have greater currency had he not abdicated his joint custody responsibilities and settled for the role of a traditional access father.

[18] McLachlin J. in *Gordon v. Goertz, supra*, set forth five reasons why no presumption should apply in the mobility analysis. The fifth reason is the most compelling and appears as follows at paragraph 44:

> Fifthly and most importantly, a presumption in favour of the custodial parent has the potential to impair the inquiry into the best interests of the child. This inquiry should not be undertaken with a mindset that defaults in favour of a preordained outcome absent persuasion to the contrary. It may be that in most cases the opinion of the custodial parent will reflect the best interests of the child. In such

> cases, the presumption might do no harm. But Parliament did not entrust the court with the best interests of most children; it entrusted the court with the best interests of the particular child whose custody arrangements fall to be determined. Each child is unique, as is its relationship with parents, siblings, friends and community. Any rule of law which diminishes the capacity of the court to safeguard the best interests of each child is inconsistent with the requirement of the *Divorce Act* for a contextually sensitive inquiry into the needs, means, condition and other circumstances of "the child" whose best interests the court is charged with determining. "[G]eneral rules that do not admit of frequent exceptions can[not] evenly and fairly accommodate all of the varying circumstances that can be present themselves": per Morden A.J.C.O. in *Carter v. Brooks, supra*, at p. 62. The inquiry is an individual one. Every child is entitled to the judge's decision on what is in its best interests; to the extent that presumptions in favour of one parent or the other predetermine this inquiry, they should be rejected: "No matter what test or axiom one adopts from the many and varied reported decisions on this subject, each case must, in the final analysis, fall to be determined on its particular facts and, on those facts, in which way are the best interest of the children met.

Obviously the Court was concerned that applying a presumption could shift the focus from the best interests of the child to the interests of the parent.

[19] *Unique Circumstances:* The best interests of the child must always guide us through the circumstances of each case. I have concluded that the proposed move is not just a relocation for the sake of relocation. Ms. Parsons has a real connection with England. Her relationship with Mr. Seward is firmly established. Her father has a compelling reason to return to England. Joshua and Nicholas are not strangers to England and have extended family in that country. The proposed move involves all the important people in the boys life with the exception of Mr. Fraser.

[20] *Children's Best Interests:* In many mobility cases the proposed move is driven by what the custodial parent wishes. Parental wishes apply only if they are consistent with the child's best interests. McLachlin J. In *Gordon v. Goertz, supra*, discussed this principle at paragraph 19:

> What principles should guide the judge on this fresh review of the situation? This inquiry takes us to the last clause of s. 17(5) of the *Divorce Act*: "...in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change". The amendments to the *Divorce Act* in 1986 (S.C. 1986, c. 4 (now R.S.C., 1985, c. 3 (2nd Supp.)) elevated the best

> interests of the child from a "paramount" consideration, to the "only" relevant issue.
>
> The best interests of the child test has been characterized as "indeterminate" and "more useful as legal aspiration than as legal analysis": per Abella J.A. in *MacGyver v. Richards* (1995), 11 R.F.L. (4th) 432 (Ont. C.A.), at p. 443. Nevertheless, it stands as an eloquent expression of Parliament's view that the ultimate and only issue when it comes to custody and access is the welfare of the child whose future is at stake. The multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interests to expediency and certainty. Moreover, Parliament has offered assistance by providing two specific directions – one relating to the conduct of the parents, the other to the ideal of maximizing beneficial contact between the child and both parents.

[21] The proposed reasons for a move “however meritorious or however reprehensible” does not enter the mobility analysis unless it relates to that parent’s ability to meet the needs of the children. McLachlin J. discussed this at paragraph 23:

> Under the *Divorce Act*, the custodial parent's conduct can be considered only if relevant to his or her ability to act as parent of the child. Usually, the reasons or motives for moving will not be relevant to the custodial parent's parenting ability. Occasionally, however, the motive may reflect adversely on the parent's perception of the needs of the child or the parent's judgment about how they may best be fulfilled. For example, the decision of a custodial parent to move solely to thwart salutary contact between the child and access parent might be argued to show a lack of appreciation for the child's best interests: see *McGowan v. McGowan* (1979), 11 R.F.L. (2d) 281 (Ont. H.C.); *Wells v. Wells* (1984), 38 R.F.L. (2d) 405 (Sask. Q.B.), aff'd (1984), 42 R.F.L. (2d) 166 (Sask. C.A.). However, absent a connection to parenting ability, the custodial parent's reason for moving should not enter into the inquiry.

[22] The *Divorce Act* directs that when assessing the best interests of a child a court “shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child”. McLachlin J. discusses this objective at paragraph 26:

> The reduction of beneficial contact between the child and the access parent does not always dictate a change of custody or an order which restricts moving the child. If the child's needs are likely to be best served by remaining with the

> custodial parent, and this consideration offsets the loss or reduction in contact with the access parent, then the judge should not vary custody and permit the move. This said, the reviewing judge must bear in mind that Parliament has indicated that maximum contact with both parents is generally in the best interests of the child.

[23] I find that the boys relationship with their mother is more entrenched than their relationship with their father. Mr. Fraser has allowed that to happen. I also find that John Parsons' relationship with the boys is fundamental to their happiness. I cannot be critical of Ms. Parsons' reasons for wanting to return to England. I accept that Ms. Parsons in entitled to move on with her life and that her happiness directly impacts on the boys' happiness. The proposed plan is well thought out and not ill conceived. I am satisfied that Ms. Parsons's plan is not inconsistent with what is in the boys' best interests.

[24] Further, I am satisfied that Ms. Parsons will make efforts to maximize contact between the boys and Mr. Fraser. I am satisfied that her contact proposals will diminish the impact of the boys not seeing their father every second weekend. The success of long distance contact will primarily be in the hands of Mr. Fraser.

[25] *Custodial Relationship:* The evidence establishes that the boys relationship with their mother is close and loving. Mr. Fraser acknowledges same but points out that the parties enjoy a joint custody arrangement. I have concluded that while Mr. Fraser is a joint custodial parent in name, he has not been one in action.

[26] *Access Relationship:* The evidence also establishes that the boys relationship with their father is loving and valued. However it does not compare to the custodial relationship. The boys are dependant on Ms. Parsons and her father. I cannot say the same about their relationship with Mr. Fraser. This in no way suggests that he is an inferior parent, only that he has adopted a more removed style of parenting. Mr. Fraser views himself as an access parent. I am satisfied that if the boys were in distress, they would turn to Ms. Parsons and her father for attention.

[27] *Maximizing Contact:* The Applicant has satisfied me that she will make every effort to maintain the boys relationship with their father. I am satisfied that she recognizes how important that relationship is for the boy's long term well being. I accept that communication through technologies such as Skype is not the

same as personal contact. I accept that ongoing contact is preferable to block periods. However, I am satisfied that these contacts will mitigate any diminishment in the father-son relationship. The rest will be up to Mr. Fraser.

[28] *Children's Views*: There is no reliable evidence before me respecting the wishes of the children.

[29] *Reason for Moving:* I agree with Mr. Fraser's submission that there are no circumstances in this case where Ms. Parsons' ability to parent requires a move to England. She testified that if this application is denied she will remain in Pictou County until the boys are older. I am not persuaded that such an outcome would be in the best interest of Nicholas and Joshua. They would run the real risk of losing their relationship with John Parsons. Their standard of living could be reduced and they might have to move residence. Furthermore Ms. Parsons would have her life on hold for several years and that could impact on the boy's happiness.

[30] *Disruption:* A move to England will cause a disruption in the boy's relationship with Mr. Fraser, his family, their friends and their activities. The evidence satisfies me that these boys are capable of dealing with these losses and finding new relationships and activities in England. I can find no factor at play in Pictou County that cannot be replaced in England. The evidence suggests that Nicholas and Joshua are very resilient. The fact that Ms. Parsons, John Parsons and James Seward have roots in England will mitigate any disruption. The boy's previous exposure to England will limit the impact of any disruption. Mr. Fraser will also have a role in minimizing any disruptions in the boy's lives.

Conclusion on Mobility Issue:

[31] I am satisfied that it is in the best interests of Nicholas and Joshua to allow Ms. Parsons to move to England in time for the 2013-2014 school year. On the urging of Ms. Parsons, I am cancelling Mr. Fraser's child support obligations effective on the date of the boy's relocation. It is expected that Mr. Fraser will use these funds to support his access costs. I am satisfied that the lack of child support will not adversely effect the boys. Ms. Parsons, John Parsons and Mr. Seward have testified that they will support the boys.

[32] At this time I am not going to stipulate the access schedule on a go forward basis. I feel it is in this families best interest to negotiate the schedule. In the event that no agreement is possible, I will make myself available to resolve such issues.

The Debt:

[33] The subject line of credit was incurred as a matrimonial debt payable by both Ms. Parsons and Mr. Fraser. There is no dispute that Mr. Fraser took over responsibility for this debt through the separation agreement. It is also not disputed that he ran up the line of credit without Ms. Parson's knowledge. Mr. Fraser declared bankruptcy on March 3, 2010 and was discharged on December 4, 2011.

[34] Ms. Parsons argues that while Mr. Fraser is protected from the bank, he is indebted to her for her settlement with the bank. She submits that the debt to her did not pre-exist the bankruptcy and that the indemnification clause in the separation agreement is a basis for payment. It is of note that this alleged obligation related to a division of assets and not support.

[35] Mr. Fraser argues that the *Bankruptcy and Insolvency Act* protects him from any obligation arising from the debt. He submits that the indemnification clause relates to any future obligations he may incur in the name of Ms. Parsons. He also submits that the indemnification clause does not survive the bankruptcy.

[36] Mr. Fraser relies on section 121(1) of the *Bankruptcy and Insolvency Act* which states:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day in which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in a proceeding under the Act.

I accept Mr. Fraser's position that the obligation by Mr. Fraser to pay the debt under the Corollary Relief Judgment is a provable claim. Consequently I dismiss Ms. Parson's application in relation to the $10,500 payment to the bank.

[37] In the event I am wrong on this discreet point, I would not call on Mr. Fraser to make this payment to Ms. Parsons. Mr. Fraser presently earns an income of $54,381. From that figure he pays approximately $14,000 in income taxes leaving a rough net figure of $40,000. He must support himself. The evidence satisfies me that he struggles financially. I do not want to place any financial burdens in the way of access. Consequently I would exercise my discretion to forgive this alleged obligation based on the best interests of the children and the need to maximize their contact with Mr. Fraser.

Costs:

[38] I am not encouraging Ms. Parsons to seek costs. Mobility cases are unique and there is little opportunity to negotiate a resolution. It is important that Mr. Fraser participated in this application. However, if Ms. Parsons wishes to pursue costs, I will accept written submissions.

J.