IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Bjarnason v. Bjarnason 2005 NSSC 129

Date: 20050317
Docket: SAM1202-001409
Registry: Amherst

Between:

Kerry Bjarnason

Plaintiffs

v.

Catherine Anne Bjarnason

Defendants

DECISION

Judge: The Honourable Justice Haliburton

Heard: 17 March 2005, in Amherst, Nova Scotia

Oral Decision: 17 March 2005

Counsel: Ms. Wanda M. Severns, for the plaintiff
Ms. Cindy Bourgeois, for the respondent

By the Court:

[1] Well, this is an application for a change of venue in relation to this action of *Bjarnason v. Bjarnason*. It's a separation and divorce, a matrimonial proceeding. It is, in my view, most unfortunate that what started out apparently as a reasonably agreeable arrangement reached by the parties, I gather at the time of their separation, and from what I understand of the circumstances, regularized by a separation agreement that was signed in July of 2003.

[2] The arrangement (in the context of the affidavits that have been filed, and the evidence I've heard this morning, the materials in the file persuade me) that the arrangement that was regularized in the separation agreement was very close to whatever arrangement might have been designed to be in the best interests of the children. It provides for maximum access to both parents. It provides that when the children are free from their obligations to go to school that they would spend as much time as possible with the non-custodial spouse, which in this case was the husband and father who, if I understand the evidence correctly, lives on a farm in Cumberland County. The mother is presently living in Dartmouth, in the city,

where she shares a home with a sister and the sister's family. I gather there are two apartments.

[3] That arrangement is about as good as you can do when people decide to separate, and where everybody hopes that contact with the children is going to be maximized.

[4] In June of 2004, the husband started divorce proceedings. There was no response to that divorce petition for a significant period of time. I accept the representations of counsel for Mr. Bjarnason that the respondent has not responded in a timely fashion to the legal steps that have been taken in order to get the matter before the court for a hearing of the divorce petition and/or the answer.

[5] Those are some background facts and some underlying considerations that, rightly or wrongly, effect my thinking about what is the appropriate thing to do with this application. As pointed out by Ms. Bourgeois, the facts in every case are different, and in every case determine the appropriate method of dealing with an application such as this.

[6] Several cases have been produced by counsel with respect to the appropriate venue for a trial. Most of them deal with a change in jurisdiction from one province to another, or from one country to another. I find that those cases are essentially irrelevant. We are not here dealing with a change of venue that would in any way effect the outcome of a hearing. We are two hours or two hours and a quarter from Halifax, where the matter might be heard if the venue were changed. And there has been a suggestion that the doctors and the dentists and other professionals are all available because the children have resided in Halifax for the last three years, or at least have gone to school in Halifax for the last three years. That those people, and perhaps some coaches or people connected with other activities the children have had, would be available in Halifax.

[7] I'm not persuaded that there is any significant advantage or disadvantage in having the matter heard in one locus or the other in terms of the witnesses who would be available. The principal witnesses are going to be the mother and father and their close relatives. There is no suggestion that these children are suffering any disability, any illness, any reason why professional evidence ought to be required or necessary. There is no suggestion that even if it were, that the

professionals would not be available to come here to Amherst to hear the matter, or to testify in relation to the matter.

[8] There is a general principle that a party who commences an action, the plaintiff in a normal civil action, or the petitioner in a divorce matter, has the right to determine the location of the trial. They include that in the initial pleadings. If the other parties involved wish to dispute that, they should do so promptly and without delay. In this case, as I say, there has been substantial delay, but in any case that choice is normally accorded to the party who has decided to start the proceedings. So there is a significant onus on the other party to demonstrate that it would be inappropriate for some reason to have the hearing in Amherst. I'm not satisfied that that has been done.

[9] I think guidance can be found in one of these cases that I say I'm not, that I find to be not particularly relevant, but the case of *Boudria v. Boudria* cites the Rule in their jurisdiction. Rule 46.03 provides that:

> ...the court, on motion by any party, may order that the trial be held at a place other than that named in the statement of claim where the court is satisfied that,

> (a) the balance of convenience substantially favours the holding of the trial at another place; or
>
> (b) it is likely that a fair trial cannot be had at the place named in the statement of claim.

[10] I think that's the onus that is on the person attempting to change the place of trial. I am satisfied that that onus has not been met. I've not been put in doubt that a fair trial can be held here in Amherst. And in terms of the balance of convenience, and in terms of the time frame in which a trial may be held, there is a substantial advantage in holding the trial in Amherst, and that furthermore will be a substantial benefit to the children and the parties involved because it will get this business behind them, rather than having to anticipate the court proceedings and orient their lives to recording every little incident of misbehaviour on the part of the other party so that they will be well armed when they get to a trial in a year's time or two year's time.

[11] Anyone who...if either party thinks that there is going to be any significant change in the "status quo" with relation to these children, from what I've seen, the party attempting to change generally, in a general fashion the agreement that they made when they signed the separation agreement is going to have a very heavy

onus. That was thought to be in the best interests of the children by them. It objectively looks like it's in the best interests of the children that they should be with their mother during the school week, and with their father as much as possible otherwise.

[12] So the application will be denied.

J.