SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *Langmead v. Langmead*, 2018 NSSC 244

Date: 2018-10-05
Docket: 1201-067737
Registry: Halifax

Between:

Amber Langmead

Petitioner

v.

Aran Langmead

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Heard: September 24, 2018

Decision: October 5, 2018

Counsel: Damian J. Penny, counsel for Aran Langmead

Tanya G. Nicholson, counsel for Amber Bell

By the Court:

[1] Aran Langmead has applied to vary the parenting terms of a 2015 Corollary Relief Order so that his son, Roman, will have his primary home with Mr. Langmead.

[2] I was provided with three affidavits from Mr. Langmead and one from Ms. Bell. There was no cross-examination. There were no objections to the contents of any affidavits. Even without objections, I cannot consider inadmissible evidence.

[3] The parties agreed to address the threshold issue of whether there had been a material change in circumstances through argument by their lawyers. Depending on the result, Mr. Langmead's application will continue, or it will be dismissed.

[4] The first step in a variation application is determining whether there has been a change in circumstances since the Corollary Relief Order was granted: *Divorce Act*, R.S.C. 1985 (2nd Supp), c. 3, subsection 17(5).

[5] "Change alone is not enough; the change **must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way**.": *Gordon v. Goertz*, 1996 CanLII 191 (SCC) at paragraph 12, emphasis added.

[6] Mr. Langmead says the change is Roman's age. When his parents divorced, Roman was almost ten. Roman's almost 13 now. Mr. Langmead argues the change in Roman's age means that Roman's long-standing wish to live with his father carries greater weight than it did in 2015.

[7] Roman's wish to live with his father is not a material change. Roman wanted to live with his father in 2015 when Associate Chief Justice O'Neil decided that it was in Roman's best interests to live with his mother, Ms. Bell.

[8] The real issue is whether Roman's age has altered his needs or his parents' ability to meet his needs in a fundamental way. A parenting order must reflect a child's best interests. A child's best interests may change or a parent's ability to meet a child's needs may change. Variation applications allow parenting orders to be changed so they continue to serve the child's best interests.

[9] The parents agree that Roman says he wishes to live with his father. Roman has not testified to this statement. Mr. Langmead repeats this statement from his son and offers it for its truth.

[10] Mr. Langmead and Ms. Bell don't agree that Roman's statements about where he wants to live are admissible as an exception to the rule against hearsay as a statement about his mental or emotional state. For a child's statement about wishes or preferences to be admissible under the state of mind exception to the rule against hearsay, the statement must meet certain requirements:

- The statement must assert a condition or state;
- The statement must describe a contemporaneous mental or emotional state of the person making the statement;
- The statement must not describe the cause of the state, whether the cause is past or present events;
- The mental state can include the person's present intention to do a future act; and
- The statement must not be made under circumstances of suspicion.

[11] The first four requirements are described in *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 and the last is found in *R. v. Starr*, 2000 SCC 40 and *R. v. Griffin*, 2009 SCC 28.

[12] Mr. Langmead argues that Roman's statements that he'd like to live with his father are an admissible exception to the rule against hearsay. Ms. Bell disagrees. She says that Roman's health (he has a diagnosis of Autism Spectrum Disorder) is a circumstance creating suspicion about his statements.

[13] I don't need to decide whether Roman's statements about his wishes are admissible because his desire to live with his father doesn't determine his parenting arrangement.

> There is no principle of law that the wish of a child is absolute and in itself determines the issue of custody. Such an approach would ignore the statutory mandate to ". . . take into consideration only the best interests of the child.": *Johns v. Hinkson* 1996 CanLII 6863 (SKQB) at paragraph 14

[14] The state of mind exception does not apply to Roman's communications with Mr. Langmead to discern a cause or reason for Roman's emotional or mental state and construct a material change from there. These communications are not admissible.

[15] The evidence doesn't disclose a change in Roman's needs, or a change in Mr. Langmead's ability to meet Roman's needs, or a change in Ms. Bell's ability to do so. Mr. Langmead has offered evidence only of Roman's wishes – not evidence which would allow me to determine that the order no longer meets his best interests and must be reviewed.

[16] Mr. Langmead has not shown a material change in circumstances has occurred since the Corollary Relief Order was granted. I dismiss his application.

[17] Ms. Bell has claimed costs. Written submissions on costs should be filed by October 18, 2018. The order dismissing this application will be issued once the issue of costs has been resolved.

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

Halifax, Nova Scotia