IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *J.J.M. v. P.L.M.*, 2004 NSSF 2

Date: 20040119
Docket: 1201-55307
Registry: Halifax

Between:

J.J.M.

Applicant

v.

P.L.M.

Respondent

Judge: The Honourable Justice F.B. William Kelly

Heard: October 14, 2003, in Halifax, Nova Scotia

Written Decision: January 26, 2004

Counsel: Ms. Megan Longley, for the A.
Mr. P.L.M., for the Respondent

By the Court:

[1] J.J.M. seeks a variation of the Corollary Relief Judgment to permit her to relocate to Saint John, New Brunswick with the only child of the M. family, J., born […], 1999. The boy's father, P.L.M., opposes the move from the Halifax area because it would severely limit his access and disrupt his relationship with J..

[2] Mr. P.L.M. is self-represented. He has been advised of the value of counsel at the time of the hearing and as well, at an extensive pre-trial held by Justice Dellapinna on June 27, 2003. At that time, he advised that it was unlikely that he would retain counsel at the hearing but would possibly consult with counsel.

[3] The parties were married at Saint John, New Brunswick on May 16, 1992 and were divorced on January 22, 2002. The Corollary Relief Judgment provides they share joint custody of J.. Ms. J.J.M. has had primary care and Mr. P.L.M. was to have "care and control as agreed by the parties". Thus, access was not specifically defined, and shortly thereafter, access problems developed between the parties. On Mr. P.L.M.'s application, Justice Campbell subsequently defined access on an interim basis by Order dated June 26, 2002. Whether this mobility application is granted or denied, Mr. P.L.M.'s ongoing access will have to be determined. If granted, a schedule of access will have to be defined to deal with the distance factor between Saint John and Halifax.

[4] It was clear to the court during the hearing that the relationship between the parties had considerably deteriorated, in some measure because of access problems on the part of both of them, but probably also due to other underlying factors. Both have established relationships with other persons. Much of the lengthy affidavit evidence and the viva voce evidence at trial related to allegations of mistreatment of J. and allegations of deliberate infractions of access arrangement, causing inconvenience to the other party. Mr. P.L.M. has involved both the police and the Children's Aid Society in the process with neither agency taking any action after initial inquiry.

[5] I have reviewed all of this evidence and find there has been some carelessness and lack of consideration by both parties in execution of the access arrangement but much of this evidence has little probative value in assessing the mobility motion relating to the possible move to New Brunswick. It does, however, relate to any access decision arising from this hearing.

[6] I am nevertheless concerned with that part of the evidence that indicates to me that both parents at times conducted themselves when in J.'s presence in a manner that gives rise to a concern that the conduct may have harmed him emotionally. Any order arising from this hearing must include a strong direction to cease this conduct and to ensure that each parent not speak or act in a manner that would encourage J. to feel negatively in relation to the other parent.

[7] After the separation, Mr. P.L.M. exercised access only sporadically for a period. His evidence and that of Ms. J.J.M. is consistent that he had considerable employment and lifestyle difficulties in the period following the separation. These involved changes in residence, employment, and the establishment of the

relationship with his present partner. These disruptions and his concerns relating to a person then occupying the residence with Ms. J.J.M. were significantly responsible for the inconsistent and irregular performance of Mr. P.L.M.'s access obligations.

[8] Mr. P.L.M. originally applied to seek specific access after achieving some stability in his employment and personal life. I am satisfied that Ms. J.J.M. made serious efforts to support a meaningful relationship between J. and his father during and after this period of uncertainty, including showing some flexibility in accommodating Mr. P.L.M.'s unusual circumstances. However, the uncertainties of his life for several months were part of the access problem and raised in the minds of both parents a concern that the other was deliberately breaching access arrangements.

[9] The leading authority on mobility cases is *Gordon v. Goertz*, [1996] 2 S.C.R. 27, 19 R.F.L. (4th) 177, where the Supreme Court of Canada set out the principles and enumerated the factors to be considered in a situation where one custodial parent proposes to move with the child or children, in a manner which would result in a material change of circumstances. The Court noted that the relevant statutory provisions are Sections 16 and 17 of the *Divorce Act*, R.S.C., c.3 (2nd Supp.) McLachlin, J., speaking for the majority, summarizes the law and lists factors which a judge should consider in a mobility case at para 49:

> 49. The law can be summarized as follows:
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> 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
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> 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.
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> 3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
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> 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.
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> 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 relationships 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) (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

[10] In paragraph 48 of *Gordon v. Goertz* the Court rejected a legal presumption in favour of the custodial parent but did indicate that:

> While a legal presumption in favour of the custodial parent must be rejected, the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability.

At paragraph 13 the Court stressed that in applying for a change in custody or access, a parent seeking such an order must first meet the threshold requirement of demonstrating a material change in circumstances affecting the child:

> It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the

> child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

And further at paragraph 14:

> These are the principles which determine whether a move by the custodial parent is a material change in the "condition, means, needs or other circumstances of the child". Relocation will always be a "change". Often, but not always, it will amount to a change which materially affects the circumstances of the child and the ability of the parent to meet them. A move to a neighbouring town might not affect the child or the parents' ability to meet its needs in any significant way. Similarly, if the child lacks a positive relationship with the access parent or extended family in the area, a move might not affect the child sufficiently to constitute a material change in its situation. Where, as here, the child enjoyed frequent and meaningful contact with the access parent, a move that would seriously curtail that contact suffices to establish the necessary connection between the change and the needs and circumstances of the child.

Only if I am satisfied on the threshold test may I embark on an inquiry of the best interests of the child, having regard to the factors listed and all relevant circumstances including the child's needs and abilities and the ability of the respective parents to satisfy them.

In *Gordon v. Goertz*, the Court acknowledged that with the increase in the number of separated parents and the increase of mobility in our society, mobility applications are a growing phenomenon. McLachlin, J. commenced her comments as follows:

> When parents separate, one typically enjoys custody of the child, the other access. So long as both parents live in the same area, this arrangement protects the child's continuing relationship with both parents. However, if the custodial parent decides to move away and change the principal residence of the child, the situation may change. The access parent may be unable to see the child as often as before, if at all. He or she may seek a review of the custody order, contending that removing the child from its familiar surroundings and restricting or depriving the child of access to the other parent is not in the child's best interests. With the prevalence of separated families and the increasing mobility of modem society, such applications are more common. On this appeal, we are asked to establish the principles that should guide judges in making these difficult decisions.

Other useful authorities I have considered are *Handspiker v. Rafuse* (2001), 190 N.S.R. (2d) 64 (CA), [2001] N.S.J. No. 1, 2001 NSCA 1; *Nikolaev v. Horsburgh*, [2001] N.S.J. No. 110, (S.C.(F.D.))(unreported), 2001 N.S.S.F. 14; and *Best v. Fraser* (2002), 208 N.S.R. (2d) 247 (S.C.(F.D.)), [2002] N.S.J. No. 444, 2002

NSSF 42.

As provided in the *Maintenance and Custody Act*, R.S.N.S. C.160 as amended, the welfare of the child is the paramount consideration in matters related to custody.

CONSIDERATIONS

As stated in *Gordon v. Goertz* (at paragraphs 10 to 16 inclusive), the court must first consider whether the threshold requirement of material change in circumstances of the child and the parents' ability to meet them was established by the mother's intended move. In that case, the mother intended to move from Canada to Australia. Here, of course, the intended move is from the Halifax area to the city of Saint John in the neighbouring Province of New Brunswick. In evidence, the parties commented that on occasions when Ms. J.J.M. has visited Saint John with J., they met at the border of the two Provinces, at about the half way point of an approximately five to six hour automobile trip. In the present application, Ms. J.J.M. proposes that she will provide the transportation for bi-monthly access visits to Halifax, as well as have the child available for access visits of Mr. P.L.M. in Saint John when he can arrange visits there. She also proposes extended summer access during the summer holidays.

[17] Ms. J.J.M. presently works part time as a hairdresser, earning a very low income. In the recent past, she has had some uncertainty as to obtaining an appropriate residence (living with a friend) and uncertain employment. Since the last determination of custody and access, Ms. J.J.M. also has had an aunt who was close to her and J., and who lived in Halifax, move to St. John, New Brunswick to the area of Ms. J.J.M.'s parents and extended family. This and an offer of temporary accommodation and a job offer in her profession at a higher rate of pay has added to her interest in moving back to the area where most of her extended family live.

[18] I am satisfied from the evidence that Ms. J.J.M.'s relocation would not have been within the reasonable contemplation of the Judge who issued the order. At the time Ms. J.J.M. had some supportive extended family living in Halifax and there was some hope she could eventually establish a better income and adequate residential conditions for J. and herself. Until the present, such hope has not been fulfilled. The move she proposes would be a considerable change in

circumstances. I am satisfied she has satisfied the threshold requirement.

[19] I will briefly comment on some of the factors the authorities have listed as relevant in a relocation application of this nature.

Existing Custody Arrangement

It is clear that the existing custody arrangement has been somewhat problematic, particularly in relation to inconsistent access arrangements, due in part to parental communications problems. There is no evidence of substance to suggest the child is not bonded closer to and more emotionally reliant on the mother. I am satisfied the father is a caring and responsible parent with a sound relationship with the child.

Maximizing Contact

It is desirable to maximize the contact between the child and both parents. A move as requested by the mother would obviously run the risk of reducing contact with the father. Due mainly to circumstance in the father's life after separation, for a considerable period of time he had little or no contact with the child. It is therefore more important that the child's need for appropriate contact with the father in the future be emphasized.

The child's contact with extended family, although less relevant than parental contacts in some circumstances, is here a very relevant consideration. The move to New Brunswick will obviously allow the child much more extended contact with the extended maternal and paternal family.

Mr. P.L.M.'s parents now live in British Columbia and he is estranged from them. Ms. J.J.M. has maintained good relations with the paternal grandparents before and after their move to British Columbia and brought the child on a visit to them in December of 2002. Ms. J.J.M. continues to have regular contact with the paternal grandparents by telephone. Mr. P.L.M. presently has no contact with them.

The Views of the Child or Disruption to the Child

> Because of the age of the child no views of his wishes were presented. For the same reason, it would appear that minimal social disruption would occur if a move was effected, such as might normally occur on removal of an older child from extended family, schools and the community. However, the disruption of potentially less contact with the child's father is a factor to be considered, and thus the nature of the access change is most relevant.
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> The Custodial Parent's Reasons for Moving
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> As discussed above, Ms. J.J.M. states she has various reasons for moving. She seeks a better income and more stable employment with a member of her family who operates a hairdressing business in St. John. Her evidence is that she presently is unable to earn enough to afford even some basics, such as a telephone, which is important for both her and J. and for the child's contacts with his father and grandparents. Mr. P.L.M. argues she has not made the effort to obtain different employment opportunities in Halifax nor to obtain more work hours at her present employment. I do not have the evidence to be persuaded on these submissions. Ms. J.J.M. also wants to move so that both she and J. will have the benefit of the social life and the important support of her extended family in the St. John area. There is no evidence that Mr. P.L.M. has such extended family support in Halifax. However, he does have the enthusiastic support of his partner.

[20] I respect the views of the father that the move may not be necessary and that the mother might be capable of earning more income and raising the child in the Halifax area. But necessity is not the test. The onus of satisfying the Court that the application of Ms. J.J.M. to move to a location in another province rests with her to show it is in J.'s best interests. She has indicated in her access proposal that she will accept a major part of the effort to ensure J. gets frequent opportunities to phone his father and to stay with him in Halifax, and that Mr. P.L.M. will have significant opportunities to have access with his son when he visits the St. John area. Her main reservation, that Mr. P.L.M. provide J. with a stable and safe place to live, is an understandable one and not unreasonable.

I am satisfied that the child is more emotionally attached to his mother and her

extended family and will benefit considerably from such support at an important time in his life.

CONCLUSION

Based on all of the considerations as provided in the authorities, including the principles enunciated in *Gordon v. Goertz, supra*, and the other authorities referred to herein, I am satisfied that it is in the best interests of the child that the application for the move to New Brunswick be allowed.

I am moreover satisfied that Ms. J.J.M., based on her past conduct, will foster a positive relationship between J. and his father and his parental grandparents. As noted, there has been inconsistency in access performance in the past following the separation. On the whole, much of this disruption has been related to the employment, income and residential instability of the parents. Their angry attitudes to each other have contributed. I am persuaded it is more likely access cooperation will improve to J.'s benefit if his mother establishes a more secure and supportive life for them both in St. John, New Brunswick.

[24] There is a need to provide a satisfactory schedule of access to ensure J. has an adequate opportunity to maximize his relationship with his father in the new custody arrangement. Some reasonable proposals have been advanced by Ms. J.J.M. which have not been significantly commented upon by the self-represented Mr. P.L.M.. There also was not much evidence as to the most appropriate time for the move to take place. I would ask both parties to attempt to reach a common recommendation on these matters. If they cannot agree, I retain jurisdiction to deal with these and related matters and, after being provided with the recommendations of the parties, I will hear the parties orally and determine those issues and costs.

J.