

SUPREME COURT OF NOVA SCOTIA

Citation: *SD v. JH, 2019 NSSC 266*

Date: 2019-08-22

Docket: SFHMCA 066775

Registry: Halifax

Between:

S.D.

Applicant

v.

J.H.

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Elizabeth Jollimore

Heard: August 21, 2019.

Decision Rendered: August 22, 2019.

Summary: Mother prohibited from moving 11-year old daughter to British Columbia.

There was no evidence to support mother's hope that a move would resolve the child's behavioural issues or social isolation which were being addressed in Nova Scotia.

Key words: Family, Parenting, Custody, Access, Relocation, Mobility, Joint custody substantial involvement,

Legislation: *Parenting and Support Act*, R.S.N.S. 1989, c. 160, subsection 18(6), subsection 18E(3), subsection 18G(2), subsection

18H(1), subsection 18H(3), subsection 18H(4)

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Counsel: Noel Fellows, counsel for J.H.
Hannah Rubenstein, counsel for S.D.

By the Court:

Introduction

[1] This is a variation application under the *Parenting and Support Act*, R.S.N.S. 1989, c. 160 relating to D, the 11-year old daughter of Mr. H and Ms. D. I rendered an oral decision the day after the hearing. These reasons have been edited for clarity and to provide a greater explanation of the guidelines contained in section 18H of the *Parenting and Support Act*, so that readers may more easily follow the reasons. I have also corrected reference to an interim order and the calculation of D's time with her father from May 12, 2019 to June 26, 2019.

[2] Mr. H wants an order prohibiting Ms. D from moving D to Surrey, British Columbia under section 18G of *Parenting and Support Act*. Section 18G gives me power to authorize a move or to prohibit one.

Which guideline governs the burden of proof?

[3] Subsection 18H(1) of the *Parenting and Support Act* provides guidelines for making an order about relocation. My first step is determining which guideline applies.

[4] Mr. H says that Ms. D bears the burden of proving the move is in D's best interests under clause 18H(1)(b) of the *Act*: he says this is a substantially shared parenting arrangement, so a move is not in D's best interests unless Ms. D can prove it is in D's best interests.

[5] Ms. D says that Mr. H bears that burden under clause 18H(1)(a) of the *Act*: she says Mr. H is not substantially involved with D so a move is in D's best interests unless Mr. H can prove that it is not. Alternately, Ms. D says that each party bears the burden of proving what is in D's best interests under clause 18H(1)(c) because Mr. H's involvement with D is either not substantial or substantially shared.

[6] I determine which guideline applies by considering the time the parents spend with D, how day-to-day responsibilities are met and how ordinary decision-making occurs: subsection 18H(3).

How is D's time spent?

[7] There is no dispute that Ms. D is D's primary caregiver.

[8] Mr. H spends alternate weekends with D. This is two days every two weeks or 52 days per year. This amounts to less than 15% of the year.

[9] For seven weeks, from May 12, 2019 until June 26, 2019, Mr. H was to have parenting time with D every weekend, which would add another 14 days to his annual parenting time and bring his parenting time to less than 19% of the year.

[10] Ms. D took a different approach, counting the hours that Mr. H spends with D. She estimates Mr. H's time at 39 overnights annually: less than 11% of the year.

[11] It's clear that Ms. D spends far more time with D than Mr. H does. When I review the time spent it's not substantial, whether it's 11%, 15% or 19%.

How are day-to-day care-giving responsibilities fulfilled?

[12] Mr. H has fulfilled the responsibilities for D's day-to-day care during his parenting time. Again, at very best, this amounts to less than 19% of the year.

[13] Mr. H says he hasn't taken part in D's day-to-day care while D's with her mother because Ms. D shuts him out of D's life and he fears if he insists on being involved, Ms. D will retaliate and deny him access. Ms. D denies this and says Mr. H has ways he could be involved in D's life, such as contacting D's school directly, but that he doesn't seek to be involved.

[14] My concern is the extent of Mr. H's involvement in fulfilling the responsibilities of D's day-to-day care, not why Mr. H fulfils those responsibilities as he does. The parties differ in explaining Mr. H's lack

of involvement, but they are consistent in saying Mr. H only fulfils day-to-day care-giving responsibilities when D is with him.

[15] Because D is with Mr. H for so little time, he is not substantially involved in day-to-day caregiving.

How are ordinary decisions made?

[16] Mr. H makes ordinary decisions during his parenting time.

[17] According to the current court order, the parents have joint custody but there is no evidence of any custodial decision that they have made together. For example, I understand that D moved to Sambro Elementary School when she was in grade 3. I have no evidence that the parents, together, made that decision. I have no evidence that the parents, together, decided D would leave French school for English school. I have no evidence that the decision about D's tutoring, when she made the transition from French to English school, was jointly made. There is no evidence in front of me that tells me the parents have exercised joint custody.

[18] D's education might be an area where custodial decisions would arise but there's no evidence they were shared.

[19] Considering his time with D, Mr. H's involvement with D's day-to-day care and ordinary decision-making, I conclude that Mr. H is not substantially involved in D's care.

[20] Because of this finding, it is clause 18H(1)(a) which gives me the guideline for this application: relocation is in D's best interests unless Mr. H shows – on a balance of probabilities – that it is not.

[21] It's important to focus on how that statement is framed. I am to consider relocation in the context of D's best interests. I am not to focus on Mr. H's convenience in exercising access. His convenience doesn't determine whether there will be a move. I am not to focus on Ms. D's feelings of loneliness. Her feelings don't determine whether there will be a move. The affordability of access and Ms. D's career aspirations

are relevant only to the extent they engage consideration of D's best interests. I am to focus entirely on D and focusing on her means I read the materials I have and listen to what the parties say quite carefully.

D

[22] D has finished grade 5 at Sambro Elementary School. She's been there for three years. Historically, she's participated in different extra-curricular activities, such as dance, cubs and cheerleading, and she's attended summer camp.

[23] D has had a tutor in the past to help her in her reading and writing when she left the French education stream for English education stream.

[24] According to Ms. D, D has longstanding "behavioural issues" that were identified before D even started school. She has a hard time using her words and instead she becomes physical. Because of her behaviour, D's had in-school and out-of-school suspensions. The school takes a restorative approach to discipline which minimizes the number of out-of-school suspensions D's had.

[25] Ms. D refers to working with D's "schools, including resource teachers and school psychologists" to improve D's behaviour. Last year, D was meeting with the school psychologist once each week. Previously, she was seeing the guidance counsellor or the resource teacher every day. Ms. D says that Sambro Elementary School has been "phenomenal". In her affidavit, Ms. D said the school "has been great". The school has a Friendship Course, to assist with social relationships and D's been involved with this course because she's experienced some social isolation.

[26] Ms. D says D was socially isolated in grade 3. Last year, in grade 5, her classroom placement was modified. She started in a full grade 5 class with just other grade 5 students and then she was moved to a grade 5/6 classroom containing students in grades 5 and 6. It was just the right thing to do. This placed D with older students and, according to Ms. D, D "excelled socially" in the combined grade 5 and 6 classroom.

D isn't socially active outside of school at Ms. D's home. In her father's home D has an active life with members of that household, and with neighbourhood children.

[27] D has been enrolled in a community program called SNAP to help her respond to her emotions more suitably. Her growing vocabulary expands her options to avoid responding physically when she's emotional. She is better with consistency and routine in her life.

[28] Even with all these supports from her phenomenal school and the SNAP program, Ms. D still says D is "a work in progress".

[29] Ms. D parents alone: she has no partner and no other children. Ms. D's father and stepmother live in Surrey, British Columbia. Ms. D's brother lives in Alberta – an 8-hour drive from Surrey. He has three children; one is close in age to D and two are younger than D. I haven't been told the ages of the younger children. D has not had much in person contact with her relatives in western Canada.

[30] Ms. D's mother, RD, and stepfather, BM, live in Nova Scotia. Ms. D doesn't have contact with them, but D does. Ms. D and D lived with RD and BM for a period of time. This ended badly and there isn't ongoing relationship between Ms. D and her mother, RD.

[31] D's father, Mr. H, has a common law partner. He and his partner have been together for more than eight years. His partner has a son who lives with them. The boy is thirteen: two years older than D. D has been particularly close with her father's new partner. D has spent time with her paternal grandparents, as well as with her stepmother's extended family.

[32] D's access with her father was initially restricted to a few hours in 2010 when she was not quite two years old. This has expanded over the past nine years.

[33] At issue is whether it is in D's best interests to prohibit her move to Surrey, British Columbia.

[34] Ms. D has a job offer in British Columbia and says she can earn \$50,000.00 - \$150,000.00 annually doing commissioned sales work. She testified that she is guaranteed four sales each week, providing her with a guaranteed monthly income of \$7,000.00 or \$84,000.00 annually.

[35] This income guarantee is not contained in the employment contract she provided. According to this contract, even her employment is not guaranteed. Any party to the contract can terminate Ms. D's employment at any time. I was given no indication of average earnings of the sales staff for her proposed employer in British Columbia. Ms. D hasn't done sales work in the past.

[36] I have no precise information about Ms. D's earnings situation in Nova Scotia. She has had continuous employment in contract positions for a decade, almost all of D's life. Ms. D mentioned a figure of \$30,000.00 but was not specific about when she earned this, and what and where her particular position was.

[37] The *Parenting and Support Act* identifies various aspects of "best interests" for me to consider, among any other factors that may be relevant: subsection 18(6) and subsection 18H(4). I have no evidence about some of the aspects listed in the *Parenting and Support Act*, such as D's heritage and her particular views about the move.

[38] Turning to the considerations in the *Act*, D's emotional and social needs are the most critical concern. I've described D's emotional and social needs and how they've been met through the school and community programming. I am mindful that this is a result of Ms. D's efforts as the primary parent.

[39] Ms. D thinks a move to British Columbia will give D a "fresh start" and a "new perspective". Mr. H says this is "aspirational". D's behavioural difficulties have existed since before she even started school. D's move to Sambro Elementary School three years ago provided D with the chance for a "fresh start" and "new perspective" but the change didn't resolve D's difficulties. To the extent D is a "work in progress", this is because of the phenomenal support at Sambro Elementary School (the support of a resource teacher and guidance

counsellor daily and a psychologist weekly, the Friendship Course, and the continuity of the school's involvement), and services like SNAP. Her progress since starting at Sambro Elementary is due to programming at the school and in the community, not simply the change of school.

[40] I accept Mr. H's characterization – the move is aspirational, a hope that another new start will resolve D's difficulties, even though this hasn't happened in the past. There's no evidence to support the hope about how D will respond to a new environment. I accept that Ms. D hopes for the best.

[41] The evidence shows that D is in a highly supportive school environment which offers a grade 6 class. D would continue in this environment through the coming year.

[42] There's no evidence D's community programming (SNAP) – which Ms. D says has been favourable – is available in British Columbia. There's no evidence that the year-to-year institutional support provided by her current school is available in British Columbia. No school in Surrey has any history with her. There is no evidence of any services available at the schools in Surrey.

[43] The parties don't demonstrate a willingness to support D's relationship with each other. Ms. D has prohibited D's contact with her father in the past and Mr. H has not assisted Ms. D with her vacation travel. Neither parent goes the extra mile to help the other parent. Each has acted out of frustration with the other, but neither seems to appreciate that their daughter bears the brunt of their frustrations with each other.

[44] Historically, D has been primarily in her mother's care and her father has been the secondary parent.

[45] Ms. D's plan is to move to British Columbia and enroll D in public school while she begins a door-to-door, fully commissioned sales job. She and D will live with Ms. D's father and stepmother in their 2-bedroom home until Ms. D becomes established, becomes secure in her

job and finds a home. There's no certainty about when – or whether – Ms. D will become established. D does not have a well-established relationship with her British Columbia grandparents: she hasn't spent a great deal of time with them. History has shown that things have not gone well for Ms. D when she has lived with her family. The arrangement of living with family in British Columbia may not be secure in the long term.

[46] D has a positive, strong and stable relationship with each of her parents.

[47] I've described D's relationships with members of her extended family. D's closest and stronger extended family relationships are on her paternal side because her father's family is in Nova Scotia. I include D's stepmother's family in this. D's maternal relationships in Nova Scotia are fewer and weaker because Ms. D and her mother do not speak. D's maternal relationships in western Canada are weak: she has had little in person contact with her family in Alberta and British Columbia.

[48] The parents' ability to communicate and cooperate with each other is poor. Even in court Mr. H's negative reactions to Ms. D's evidence were visible. This is a frustrating relationship for the parents, not one where they are enriched as parents. Ms. D has maintained a firm grip on D – controlling time she has with her father, stepmother and Mr. H's family. Ms. D has exerted her power when she and Mr. H haven't been able to communicate, and she wants him to pay attention to her. The parents are in the habit of being frustrated with each other.

[49] Relocating to British Columbia would have a significant impact on D's parenting and contact time, reducing it from twice monthly to twice annually. She would experience a significant loss of paternal contact and a critical loss of support from her school and community. There is no evidence that her extra-curricular activities can be replaced, though this is likely. She would lose her neighbourhood friends. For a child who is socially isolated, this is a difficult loss.

[50] In terms of parenting time, a move to British Columbia would bring the challenge of time zones, limiting electronic contact to late in the day. D is approaching an age where she would be eligible to fly as an unaccompanied minor though this may not be appropriate for her, given her behavioural difficulties and the fact that this is not a direct flight.

[51] Ms. D proposes driving across Canada to meet Mr. H, thereby reducing the amount of driving he would have to do. This places a significant travel burden on both parents. From D's perspective, she bears an even greater burden: she would be the only one making the trip across Canada twice for each visit. Driving is not an option at any time other than the summer. Even if the March Break is two-weeks long in British Columbia, travel by car means that D would spend most of the March Break in a car. There would be significant cost for Mr. H and his immediate family to travel to British Columbia though I was given no evidence of whether this could be afforded. Spending time with her extended paternal family would require D to be in Nova Scotia.

[52] The existing order has been complied with in terms of parenting time. Despite their differences, the parents have expanded Mr. H's access times. The order contained no requirements about relocation notice. Ms. D has not complied with the *Parenting and Support Act's* notice requirements in subsection 18E(3) of the *Act*.

Conclusion

[53] My focus must be on D. She has greater and more familiar family support in Nova Scotia.

[54] D's behavioral difficulties and her social circumstances have been the focus of services at school and community-based programming. There has been much positive work at her school and through SNAP, the community-based programming. Even with all this, Ms. D says D's a "work in progress": she excelled socially at school this past year and has neighbourhood friends at her father's home, but she is excluded from school friendships outside of school hours. This is what D has been able to accomplish, with the support of her school which Ms. D says has been "phenomenal".

[55] There is no evidence of any school or community supports in Surrey, let alone ones which would merit the praise Ms. D has given D's school.

[56] Focusing on D, her particular needs are met in Nova Scotia and there is no evidence that they can be met in Surrey.

[57] Mr. H has met the burden of proving it is in D's best interests to prohibit her move to Surrey, British Columbia and I grant his application.

[58] I will prepare the Order prohibiting the move and circulate it to the parties.

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

Halifax, Nova Scotia