<u>SUPREME COURT OF NOVA SCOTIA</u>
<u>FAMILY DIVISION</u>
Citation: *Somers v. Aucoin*, 2020 NSSC 339

Date: 20201124
Docket: *Halifax* No. SFHPSA-115543
Registry: Halifax

Between:

Jillian Somers

Applicant

v.

Daniel Aucoin

Respondent

Judge:	The Honourable Justice C. LouAnn Chiasson
Heard:	September 17 & 18, 2020, in Halifax, Nova Scotia
Counsel:	Morgan Manzer for the Applicant Jessie Chisholm for the Respondent

By the Court:

[1] Z is now six years old. His parents live in different jurisdictions within Nova Scotia. Z has been in the interim primary care of the Respondent since September 2019. The Applicant moved away in August 2019 and wishes to have Z in her primary care. The Respondent wants Z to remain in his primary care.

ISSUES:

1) What is the appropriate parenting plan for Z, and in particular:

    a. Should one or both parents make major developmental decisions for Z?

    b. Should Z relocate to be in the primary care of the Applicant?

    c. What should be the schedule of parenting time for the non-residential parent?

2) Once the parenting arrangement has been determined, what is the appropriate level of child support payable for Z?

BACKGROUND

[2] The parties lived together for approximately five years. They separated in March 2019 but continued to cohabit until August 2019. Both the Applicant and the Respondent each have two other children in their primary care from previous relationships. Prior to separation, the parties resided together with all five children. Although the Respondent is not the biological parent of Z both parties acknowledge that he is Z's parent and was in a relationship with the Applicant throughout her pregnancy and the birth of Z.

[3] Both parties raised Z as their son. Even after separation, the Applicant sought to continue co-parenting Z with the Respondent. On August 7, 2019, she filed an application with the court seeking a shared parenting arrangement of Z with a week on/ week off arrangement of parenting.

[4] In August 2019 the Applicant went to visit family in Cape Breton. She left for the visit on August 11. On August 15, the Applicant testified that her sister had

purchased her a three bedroom mobile home that day without her request nor or consent. Nevertheless, the Applicant was excited about the purchase and advised the children (including Z) that they were moving to Cape Breton. Z then informed the Respondent of the intended move the same day.

[5] The Respondent commenced an emergency application seeking to have Z in his primary care. Following the hearing on September 19, 2019, interim primary care was given to the Respondent. The Applicant had specified parenting time.

[6] Following the interim hearing in early September, 2019, the Applicant testified that she reached out to the person she believed to be Z's father. For reasons detailed below, this third party had no knowledge nor had been involved in Z's life to this point.

[7] Testimony of the Applicant and Respondent differed on why the third party was not involved in Z's life. The Applicant indicates that the Respondent "controlled" her and refused to allow her to contact the third party. The Respondent indicated that he thought it was important to reach out to the third party. He is involved in the medical field and believed that it was important, at a minimum, to provide medical history as it related to Z. The Respondent testified that the Applicant threatened to end her relationship with him (the Respondent) if he reached out to the third party.

[8] Without the Respondent's knowledge or consent, the Applicant contacted the third party following the September 19, 2019 interim hearing. Z was 5 years old. The Respondent was the only father he had known. Without the knowledge or consent of the Respondent, the Applicant arranged for DNA testing as between the third party and Z. The results of the DNA testing confirmed Z to be the biological child of the third party. Again, without the knowledge or consent of the Respondent, the Applicant and the third party sat Z down and revealed that the Respondent was not his father but that the third party was his "real" father. Without the knowledge or consent of the Respondent, the Applicant arranged for the third party to spend time with Z. The Respondent testified that these actions caused considerable upset and confusion with Z. All of this was done when Z was in the interim primary care of the Respondent.

[9] The Applicant testified that within 2-3 weeks of relocating to Cape Breton she had secured a counselor. She further testified that she had met with that counselor but there was no evidence presented as to how many appointments she had with the counselor within that 2-3 week time frame. The Applicant's

justification for contacting the third party and undertaking DNA tests and introducing him to Z as his “real” father was as a result of the “insight” the Applicant had following her 2-3 weeks of counselling.

[10] Between March and August 2019, the Respondent continued to pay all of the parties’ household expenses on a voluntary basis. The Respondent is employed with the Department of National Defence. The Applicant is a stay at home parent. The application for child and spousal support was made by the Applicant in August 2019.

[11] The Applicant graduated in 2013 with a certificate in automotive service and repair but was not employed outside the home since 2015. It is unclear as to what employment opportunities were pursued by the Applicant since separation. She referred to issues related to transportation and child care.

[12] By August 7, 2019, she had received a lump sum payout related to the Canada Child benefit and used those funds to purchase a mini van. She indicated that she sought employment on a night shift so that she could be available to the children during the day. The children were in full time attendance at school at the time and it was unclear as to what child care arrangements would be made if she were able to secure employment during a night shift.

[13] The Applicant testified that she was unable to secure housing as a result of her financial circumstances. She indicated that she could not afford housing prior to receipt of the Canada Child benefit or receipt of support from the Respondent. At the time of the Applicant’s move to Cape Breton, however, she had secured the Canada Child Benefit payments (including a lump sum payment). She also had a pending application for child and spousal support.

[14] In addition to the evidence filed on behalf of the Applicant, an Affidavit was filed by the Applicant’s sister. The Respondent filed documentation on his behalf as well as filing Affidavits sworn by the Respondent’s former spouse (and parent of the two other children in the Respondent’s care) and another Affidavit sworn by a friend.

LAW & ANALYSIS

Issue #1(a)- Who should make the major developmental decisions for Z?

[15] There does not appear to be a dispute in relation to decision making regarding Z. The parties will have joint custody and major developmental decisions will be made after fulsome and meaningful consultation.

Issue #1(b)- Should Z relocate to be in the primary care of the Applicant?

[16] The *Parenting and Support Act* provides a legislative framework to be considered in matters involving the relocation of a child. Both parents acknowledge that s.18H (1)(c) is applicable and that each party bears the burden to show what is in the child's best interests.

[17] This is not a variation application. This is the final hearing following an interim decision rendered in September 2019. The Applicant is seeking to relocate the child with her to her current residence in Cape Breton. The Respondent is seeking to maintain primary care of the child in HRM.

[18] In *H. (P.R.) v. L. (M.E.),* 2009 NBCA 18 the court stated at paragraph 30:

> "… In *Karpodinis v. Kantas*, 227 B.C.A.C. 192, 2006 BCCA 272 (B.C. C.A.) at para. 26, the Court observed that mobility cases vary infinitely in their fact patterns and no case can provide a complete template for another. Furthermore, in custody cases, wherein the governing consideration is the best interests of the child, the judicial inquiry is heavily fact-dependent and the decision is ultimately discretionary, the scope of appellate review is strictly limited…"

[19] The issue of relocation was dealt with by our Court of Appeal in *D.A.M. v C.J.B.*, 2017 NSCA 91. The court referenced the balanced approach that must be taken by a trial judge in deciding cases of mobility. In assessing whether a move with a child should be allowed, the court must examine the disruption of the proposed move balanced as against the benefits if the move were allowed.

[20] The Court of Appeal in *D.A.M., supra*, held at paragraph 34:

> [34] The approach in the case before us was not balanced. It focused on C.J.B.'s circumstances to the detriment of C.'s relationships in Nova Scotia. As the British Columbia Court of Appeal observed in *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 (CanLII):
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> > [46] . . . While this is a different case, this case required at least consideration of the potential effect of refusing the move upon the

> relationship between the child and the moving parent, assuming the move will occur. In other words, it is consideration of the possibilities in the round, and not from one perspective only, that is required. The subtle, and troublesome, consequence of approaching the question with preference for the status quo is that the fully rounded analysis does not occur. In my respectful view, this is what happened here. The narrow ambit of the factors considered by the judge in assessing the alternative, in my view, reflects a material error in principle.

[21] It is necessary, therefore, to review the evidence both in favour of and contrary to the relocation of the child. The factors to be considered by the court include the factors set out in s.18(6) of the *Parenting and Support Act*, supra. Prior to the legislative codification, these factors were often referred to as the Foley factors, as set out in the case of *Foley v Foley*, **. I will refer to the factors in s. 18(6) which were paramount in this case:

s.18(6)(a)- "the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development"

[22] The evidence discloses that each parent would be able to meet the child's physical, social and educational needs. Although the Respondent's home would enable the child to have his own room and the child would share a room in the Applicant's home, this is not determinative. The evidence did confirm that the Applicant shared her home with two children in her primary care, as well as a number of pets and farm animals. In addition, her sister, her niece and their dog also resided there for a period of time. Although there may be some concern in relation to the Applicant's judgment related to the number of people, pets and animals in her home, that concern is insufficient to indicate that she is unable to provide for the child's physical needs.

[23] Both parties confirm they would ensure that the child's requirements related to education and socialization could be met by each of them. The Respondent was concerned that the Applicant did not follow through on the child's schoolwork. Given the Covid pandemic and the circumstances surrounding the upheaval to the child's education by virtue of the schools closing for the year, coupled with the child's young age, make it difficult to ascertain with any degree of certainty as to whether the Applicant is unable to meet the child's educational needs.

[24] There is a concern, however, related to the Applicant's ability to provide for the child's emotional needs, including the need for stability and safety. This concern is more fully addressed below.

s. 18(6)(b)- "each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian"

[25] It is clear that the Applicant has sought to minimize the Respondent's role as the child's father. The Respondent had been the only father figure known to the child. Without discussion, or consent, the Applicant took it upon herself to seek out the child's biological father, and to introduce him to the child as his "real" father. As indicated, this was done after the interim hearing which placed Z in the Respondent's interim primary care. There can be no clearer indication of the undermining of the Respondent as a parent than the Applicant's actions immediately following her relocation to Cape Breton and interim hearing that followed.

[26] I must address the issue of credibility at this juncture. The principles in assessing issues of credibility were set out in the case of *Baker-Warren v. Denault*, 2009 NSSC 59 (N.S.S.C.), which was approved the Court of Appeal in *Hurst v. Gill*, 2011 NSCA 100 (N.S.C.A.). The recent case of *Bradley v. White*, 2020 NSSC 15 (N.S.S.C.) reaffirmed the principles set out in *Baker-Warren v. Denault*, supra. I have considered those principles in assessing the credibility of the parties.

[27] I found the Applicant's evidence with respect to the introduction of the biological father not credible. The possibility that she found a counselor, undertook significant counselling sessions such that she gained considerable insight into her marriage and the Respondent's role as a parent within weeks of moving to Cape Breton is simply not believable.

[28] Where the evidence of the Applicant and the evidence of the Respondent conflict, I found the evidence of the Respondent to be more credible. I conclude that the Respondent wanted to look into Z's biological background very early on and the Applicant threatened to leave him if he pursued it any further. I conclude that the Applicant did not want to seek out the child's biological father at any point in time during their relationship but sought to do so within weeks of a court order placing the child in the Respondent's care.

[29] I conclude that the Applicant's actions were unilateral and risked causing harm to Z. The child was impacted in a way that would shake the foundation of

everything he had known to that point – his identity and relationships. It was not enough that the Applicant sought to alter, and complicate the Respondent's role in the child's eyes, she then undertook a campaign in the public eye through social media to portray the Respondent as a virtual stranger to the child.

[30] The Court concludes that the Respondent is the child's father- by legal definition, by moral definition, and most importantly by the child's definition. Any attempt by the Applicant to continue a social media campaign to define the Respondent as anything but the child's father will potentially harm the child and could impact upon the parenting arrangements in the future.

[31] Further evidence of the Applicant's lack of credibility is seen in her assertion that she was not provided with any additional time with Z over and above the schedule specified in the Interim Order. This was shown to be false. Texts were introduced to show that the Respondent had offered and accommodated additional time between Z and the Applicant.

[32] In absolute contrast to the Applicant's actions, the Respondent continued to support and foster the child's relationship with the Applicant. He provided photos and updates to the Applicant. He facilitated calls to the Applicant from the child that occurred on a daily basis for a period of time. He assisted the child in making or buying gifts for the Applicant on special occasions. These actions were not reciprocated by the Applicant.

s. 18(6)(c)- "the history of care for the child, having regard to the child's physical, emotional, social and educational needs"

[33] The evidence was clear that the Applicant stayed at home with the children and the Respondent was the financial provider. There is no question that the Applicant spent more time with the child than the Respondent during their relationship. At one point, the Respondent was working a full time as well as a part time job. The Applicant was not employed outside the home as a result of her role as an at home parent to five children.

[34] The Respondent testified that despite the Applicant remaining home with the child while he was at work, that he was significantly involved in caring for the child. He indicated that despite working he was also responsible for parental responsibilities including cleaning, meals and child care responsibilities. He testified that the Applicant did not clean the home and that the number of pets in the home meant significant issues with the state of the home.

[35] The Respondent testified that the state of the home was concerning enough that the Department of Community Services was involved at one point directing that the house needed to be addressed to ensure it was safe and appropriate for the children living there. The Applicant did not deny that the Department of Community Services was involved. At the time of their involvement, the Applicant was primarily responsible for the household as the Respondent was the breadwinner.

s. 18(6)(d)- "the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs"

[36] The plan of the Applicant is to relocate the child to Cape Breton to be closer to her and her extended family. The plan of the Respondent is that the child remain in HRM in his primary care.

***s. 18(6)(f)*- "the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained"**

[37] Both parties provided affidavit evidence containing the child's "preferences". Both acknowledge that such evidence is hearsay and should not be considered by the court.

***s. 18(6)(g)*- "the nature, strength and stability of the relationship between the child and each parent or guardian"**

[38] It is clear that Z has a close and loving relationship with both of his parents.

***s. 18(6)(h)*- "the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life"**

[39] It is also clear that Z has a close relationship with his half siblings on both sides of his family. His connections to extended family are a very important part of Z's life. Relationships with both families should continue to be fostered for the sake of Z.

***s. 18(6)(i)*- "the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and cooperate on issues affecting the child**

[40] The evidence disclosed strained communication by both parties. It is clear that the Applicant has undertaken unilateral actions in relation to Z without any consultation with the Respondent whatsoever. Some of the decisions made without communication could significantly alter the path of Z's life. One need only look to the Applicant's decision to introduce Z to his biological father to see evidence of the inability or unwillingness to communicate effectively with the Respondent. The Applicant's difficulties in communication with the Respondent were also highlighted in the unilateral decision to move hours away from the Respondent without prior consultation, and her activity on social media denigrating his role as Z's parent.

[41] Other considerations for the court in relocation cases are found in s.18(4) of the *Parenting and Support Act*, supra. I will refer to the more salient considerations before the court:

s.18(4)(b)- The reasons for the relocation

[42] The Applicant asserts that the relocation was required as a result of her inability to secure housing because of financial reasons. No evidence was provided by the Applicant to confirm her financial circumstances. There was no evidence related to the lump sum payout on the Canada Child Benefit or the monthly amount received by her. There was no evidence of her employment search or specifics related to her search for housing. She did not file a Statement of Expenses or Statement of Income.

[43] The Applicant also asserts that she moved to be closer to family. On August 7, 2019 her court filings and plan indicated an intention to remain in HRM and have a shared parenting arrangement with the Respondent. Within 8 days, a mobile home was purchased, she was moving and wanted primary care.

s.18(4)(c)- The effect on the child of changed parenting time and contact time due to the relocation

[44] Currently Z is in the primary care of the Respondent. To allow the relocation will be to reverse the current primary care arrangement. The Applicant asserts that changing Z's primary care parent will not affect Z because he spends a lot of time with her. For the past year, Z has spent one regular weekend and one long weekend with the Applicant per month during the school year and six weeks during the summer months. The child spends a significant amount of non-school time with the Applicant currently. The issue is what **effect on the child** would

occur as a result of changing his school time to be with the Applicant (if she were successful in her application).

[45] It is clear that the parties parent Z very differently. The Respondent is far more structured and has a routine developed with Z in relation to school, homework, weeknight activities, etc. It is clear that the Applicant is not as structured in her parenting and tends to make decisions quickly and sometimes without thought of the consequences to the child or the child's relationship with the Respondent. The fluidity of the Applicant's circumstances and her rash decision making process would not provide Z with the stability he needs, particularly during the school year.

s.18(4)(d)- The effect on the child of the child's removal from family, school and community due to the relocation

[46] There is no dispute that a relocation would mean that Z would be removed from his current school and community. The issue for the court in analyzing s. 18(4)(d) is not the change in and of itself, but rather **the effect on the child** of such a change. Z is close to both sides of his family and has siblings and relatives in each school and community. He does, however, have friends from his daycare attending his current school.

s.18(4)(e)- The appropriateness of changing the parenting arrangements

[47] Is the current situation of primary care with the Respondent in Z's best interests or would his best interests be served by changing his primary care to the Applicant? Although the status quo is a factor to be considered by the court, it is certainly not determinative of the decision of the court on a final basis. Z is doing well in the primary care of his father.

s. 18(4)(f)- Compliance with previous court orders and agreement by the parties to the application

[48] The Respondent asserts that the Applicant has been late in relation to transfers involving the child and has not facilitated communication between he and Z as set out in the Interim Order.

s.18(4)(h)- Any additional expenses that may be incurred by the parties due to the relocation

[49] Regardless of the outcome, these parties may continue to live hours apart from one another. The transition point for parenting time will be midway between the two homes. As such, the expense will be the same regardless of the outcome of the relocation issue.

s. 18(4)(j)- Whether the person planning to relocate has given notice as required under this Act and has proposed new parenting time and contact time schedules, as applicable, for the child following relocation

[50] The Applicant concedes that appropriate notice was not provided to the Respondent of her intended relocation. She concedes that her sister purchased her a home 8 days after filing court documents requesting a shared parenting. She concedes that the Respondent was advised by Z on the telephone with the Respondent the night of the purchase. It is clear that there was no meaningful notice provided to the Respondent and a clear breach of the duty under the Act to provide appropriate notice.

Issue #1(b)- Relocation conclusion

[51] The evidence clearly shows that the disruption of the proposed move of Z outweigh the benefits if the move were allowed. This is a fact specific exercise and each case will turn on the evidence before the court. I have considered all admissible evidence although this decision provides a review of the most salient points. Based on the evidence, I am extremely concerned about the marginalization of the Respondent if the Applicant were to be given primary care. Based on the totality of the evidence I find that it is in Z's best interests that he not relocate to be in the primary care of the Applicant but rather that Z remain in the primary care of the Respondent.

Issue #1(c)- What is the appropriate schedule of parenting time for the Applicant?

[52] The schedule of the Applicant's parenting time will remain as set out in the current Interim Order.

Issue #2- What is the appropriate child support payable?

[53] As the Applicant is unemployed, there is no child support payable at the present time. The order will include a provision related to the disclosure of tax return of the Applicant to be provided to the Respondent (filed or unfiled) by June

1st of each year. Further, the Applicant must advise the Respondent of any change to her employment situation or income as soon as reasonably possible upon such change occurring.

CONCLUSION

[54] The parties will retain joint custody and the following terms will apply:

1) Each party will meaningfully consult with the other on all major decisions including decision related to health, education and religion.
2) In an emergency, the parent with care of Z can authorize emergency medical care and shall notify the other party as soon is it is practical to do so.
3) Each party can make inquiries and receive information from Z's third party care providers including: educators, care-givers, and healthcare providers.
4) The Respondent shall ensure that the Applicant is provided documentation related to Z in a timely way. This will include: Z's school report cards, medical reports, dental reports, and information regarding Z's recreational activities.
5) The Respondent shall ensure that the Applicant is provided information related to Z in a timely way. This includes information related to teachers, school personnel, health professionals, recreation providers, and any other service provider for Z.
6) Both parties are entitled to attend appointments for Z with health care providers and school personnel.
7) Both parties are entitled to attend activities for Z including but not limited to concerts, games, practices, recreational activities, and birthday parties.
8) Neither party will speak negatively to, or about the other party or permit others to do so in the presence of Z or through social media.
9) At all times, the parties will encourage Z to have a positive and respectful relationship with the other party and members of the other party's family and household.
10) Neither party will discuss adult matters with Z or in his presence.
11) The communication of the parties will be respectful and child focussed.

[55] Z shall remain in the primary care of the Respondent. The current schedule of parenting time for the Applicant will continue. Given that the Applicant is currently unemployed, there is no child support payable at the present time. The

Applicant is responsible to provide information to the Respondent should her financial situation change.

Chiasson, J.