

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Murphy v. Flynn*, 2020 NSSC 335

Date: 20201030

Docket: *Sydney* No. 097773

Registry: Sydney

Between:

Kevin Murphy

Applicant

v.

Maureen Flynn

Respondent

Judge: The Honourable Justice Robert M. Gregan

Heard: October 2, 2020, in Sydney, Nova Scotia

Oral Decision: October 30, 2020

Written Decision: November 25, 2020

Counsel: Heidi Fahie for the Applicant
Jeffrey Columbus for the Respondent

By the Court:

Introduction

[1] This matter comes before the court by way of motion filed by the Respondent, Maureen Flynn. The motion was an oral motion at the appearance on July 29, 2020. By way of a motion Ms. Flynn, through her counsel, requests that she be permitted to both give her evidence in these proceedings and participate in the custody/relocation hearing for a full day hearing on January 8, 2021 via video conference.

[2] Mr. Murphy, through his counsel, opposes the motion and says Ms. Flynn must appear in person to be cross examined on her evidence.

History of Proceedings

[3] The matter has been before the court for some time and therefore requires the court to review the history of the proceeding. The matter was first before me on May 3, 2016. Mr. Murphy had filed an application on September 24, 2015 re: parenting time. In response, Ms. Flynn sought custody, parenting time for Mr. Murphy to be addressed, as well as child support and section 7 expenses relating to daycare. Ms. Flynn sought sole custody, which was opposed, and the parties

discussed parenting time through the supervised access exchange program at the YMCA. Dates were set for judicial settlement conference on June 15, 2016. There were a number of appearances and judicial settlement conference was rescheduled for August 5, 2016.

[4] The parties had appeared for a pretrial in May 2016, requesting an order, by consent, for the supervised access exchange program, which counsel was of the view would assist a judicial settlement conference.

[5] On August 5, 2016, a judicial conference was held, and an interim order was issued. The interim order granted full custody to Ms. Flynn, parenting time for Mr. Murphy through the supervised access exchange program, child support in the amount of \$74.00 per month and a provision for Mr. Murphy to have access to third party information.

[6] There was a review on November 23, 2016. At that appearance, the court was advised that parenting time was going well, and they were requesting the matter be adjourned to March 14, 2017. At the appearance on March 14, 2017 there was discussions about parenting time at the New Waterford Library versus Mr. Murphy's home and the YMCA supervised access exchange was also renewed by the court.

[7] On April 10, 2017 there was a pretrial, and it was reported that two supervised access exchange visits had occurred, and Ms. Flynn also amended her response to include mobility and relocation. There was no agreement on the continuation of parenting time and there were a number of other appearances, May 30, October 25, and November 3, 2017, at which time hearing dates were set for March 6 and 7, 2018, and an interim hearing for December 13, 2017 and filing deadlines set.

[8] There was an interim hearing held on December 13, 2017. The issue was permission for Ms. Flynn to travel for Christmas Holidays and parenting holiday times for Mr. Murphy. Ms. Flynn was permitted to travel from December 17 to December 31. Mr. Murphy was to have Skype at 6:00 p.m. December 20, 22, 25, 27 and 29, 2017, and January 3, 2018 for one hour, in person, unsupervised parenting time. Hearing dates of March 2018 were confirmed.

[9] There was also an appearance at a pretrial January 24, 2018. Ms. Flynn requested an adjournment of the hearing date; said she was awaiting appeal of denial at Legal Aid. Hearing dates were removed, and the docket day was kept of March 6, 2018, for a pretrial.

[10] On March 6, 2018, the court put in place an order that the child not be removed from the Province of Nova Scotia. An order for parental capacity assessment in relation to both parties was granted and the matter adjourned without date pending the completion of the parental capacity assessment.

[11] On July 16, 2018 Mr. Barry appeared as counsel for Ms. Flynn and Ms. Hannem for Mr. Murphy. An interim motion was filed by Ms. Flynn seeking to relocate and a hearing date on the motion was set for July 30, 2018 at 10:00 a.m. and filing deadlines were also set.

[12] The parties appeared on July 30, 2018 and advised an agreement had been reached and there was an order granted permitting Ms. Flynn, by consent, to relocate with the child to British Columbia. There was also consent for Skype access between 5:00 p.m. British Columbia time and 9:00 p.m. Atlantic time Tuesdays, Thursdays, and Sundays for 15 minutes. There was also provisions for in person access for August 2018 prior to Ms. Flynn leaving the Province of Nova Scotia. At that interim stage, the parties were still awaiting the parental capacity assessment and final hearing dates were set for January 2, 2019 for two and a half days, and a pretrial for December 3, 2018.

[13] There were appearances on December 3 and 17, 2018. The parties advised they were near agreement. At the December 17, 2018 appearance the court was advised hearing dates could be removed and January 3, 2019 could be used to read the terms into the record.

[14] On January 3, 2019, the parties advised they were still awaiting the parental capacity assessment and they wished the benefit of the parental capacity assessment for a final agreement. They agreed to the access by Mr. Murphy in the summer of 2019 as Ms. Flynn was going to be in Cape Breton in August. A review date was set for April 23, 2019.

[15] The parental capacity assessment was received and reviewed by the parties. A judicial settlement conference was requested before Justice MacLeod Archer on July 9 and 12, 2019. Mr. Murphy's counsel also advised that the issue was not relocating to British Columbia, but the issue was about parenting time. The court reminded the parties of their obligations under the interim order.

[16] On September 5, 2019, it was before me and the court was advised that Ms. Flynn did not return from British Columbia to Cape Breton, and Mr. Murphy did not have summer access. Counsel for Mr. Murphy requested additional judicial

settlement conference, which was set for December 4, 2019, before Justice MacLeod Archer.

[17] Judicial settlements did not occur on December 4, 2019. It was before me again on January 21, 2020. Hearing dates were set for June 29, 30 and July 2, 2020, and that was meant to accommodate Ms. Flynn's work schedule, and a pretrial was scheduled for February 26, 2019.

[18] At the February 26, 2019 at the prehearing conference, hearing days was reduced from four to three days and filing deadlines were set. Ms. Flynn was requesting again to appear by video conference.

[19] There was an additional pretrial scheduled for on June 10, 2020. After discussion and at the request of counsel, the hearing was adjourned because of the pandemic and the July 29, 2020, was set as a new pretrial date.

[20] On July 29, 2020, the court was updated on the situation, and a number of parenting difficulties were also put on the record. Ms. Flynn, again, was requesting appearance by video for the hearing date. Pretrial was adjourned to August 14, 2020, and at the appearance on August 14, 2020 the court was advised that counsel remained opposed to Ms. Flynn appearing by video conference. A hearing for one hour was set for October 2, 2020 to deal with that issue.

[21] Hearing dates for the full hearing of the matter were set for January 8, 2021 from 10:00 a.m. to 4:30 p.m., and a pretrial for November 19, 2020 at 10:00 a.m. Deadlines were set as September 11, 2020 for Ms. Flynn, and September 25, 2020 for Mr. Murphy.

[22] The court received the affidavit of Ms. Flynn, that was filed, as well that was considered for the motion hearing, as well as submissions from Ms. Flynn and submissions by Mr. Murphy. The court also granted an order for production, as well, which had been signed and issued.

[23] At the October 2, 2020 hearing, I considered the affidavit of Ms. Flynn, which was filed unopposed. When asked by the court, counsel for Mr. Murphy declined the opportunity to cross examine Ms. Flynn on her affidavit in support of the motion.

[24] At the October 2, 2020 hearing, it was acknowledged that during the Covid 19 pandemic that while the Atlantic bubble currently required quarantining for 14 days, it was conceded by counsel for Ms. Flynn that the *Health Protection Act* (s. 2.6) permitted the exemption from the 14 day quarantine requirement for the purposes of attending court.

[25] To say this matter has been before the court for some time would be understatement. It clearly must move forward and be heard.

Ms. Flynn's position

[26] I will briefly set out the position of the parties, on the motion. Counsel for Ms. Flynn says that financially Ms. Flynn is unable to attend, because of student loan debt. He said she has had no financial support from Mr. Murphy. Ms. Flynn says, as well, that the child, who is only six years of age, has not been separated from his mother for any period of time and that requirement for in person attendance would force a choice for Ms. Flynn to either bring the child with her and risk exposure to Covid 19 or; alternatively leaving the child behind in alternate care and risk of Covid 19 exposure by Ms. Flynn if she was exposed to it during the commute between British Columbia and Nova Scotia.

Mr. Murphy's position

[27] Mr. Murphy says that the costs are reasonable for Ms. Flynn to attend and provided a sample itinerary with rates and says that it was a reasonable cost. He says that because the hearing is scheduled on a Friday that there would be minimal days missed for employment. Mr. Murphy also says it is a short duration

visit and travel results in less risk and says Ms. Flynn could coordinate to stay with family members in the Cape Breton area to reduce costs.

[28] There were also concerns expressed by Mr. Murphy with respect to the video quality and trial efficiency, particularly in light of time zones.

Authorities

Civil Procedure Rules

[29] Rule 56 and Rule 56.01, apply for obtaining evidence from a witness who is not present in court. Subsection (2) of 56.01, states:

The evidence is obtained by one of the following methods:

- (a) a commission to take the evidence and deliver a transcript to the court;
- (b) a commission to transmit the evidence to the court by video conference while the court is in session;
- (c) a transmission under order without a commission. The evidence is obtained by one of the following methods.

[30] What is being proposed here is that the evidence for Mrs. Flynn be made by video conference while the court is in session under commission. Section 56.02 states:

A judge who decides whether to order transcribed or transmitted evidence must consider each of the following:

- (a) the circumstances of the person to be examined, including the potential for disruption to employment or personal life if the witness were to travel to the place of trial or hearing;

- (b) the chances that the person will not be available to testify in the courtroom;
- (c) the chances that the person will be beyond the ability of the court to compel attendance and will not attend voluntarily;
- (d) the expense of bringing the person to the trial or hearing, and, if the person is in Nova Scotia, the expense of bringing the trial or hearing to the person;
- (e) the apparent importance of having the person's testimony;
- (f) the possibility of convening court where the witness is located, if that place is in Nova Scotia;
- (g) the possibility of appointing the judge to take evidence under commission, if the witness is outside Nova Scotia and there is no jury.

[31] Here those factors apply. Also, under subsection 4 of 56.02 states:

A judge who decides whether to order transmitted evidence must also consider each of the following:

- (a) the quality of the proposed transmission for the purposes of the trial or hearing, especially for assessment of the evidence by a judge or members of a jury;
- (b) if there is a significant difference in time zones of the place of transmission and Nova Scotia, the impact on the trial or hearing of accommodating the need for alertness at both places;
- (c) if the transmission cannot be readied whenever the witness may be called, the impact on the trial or hearing of having to fix a date and time for the transmission or having to adjourn the trial or hearing.

[32] Section (b) is applicable here given that Ms. Flynn resides in British Columbia.

Case Authorities

[33] In addition to the *Civil Procedure Rules*, I have considered **Armoyan v. Armoyan**, 2015 NSSC 176. I will not review all of the decision, but I will

highlight those portions which are important. At paragraph 12, Justice Forgeron says:

[12] Instructions for commissioners overseeing the transmission of video-conference evidence are found in *Rule 56.06*. *Rule 56.06(1)(g)* incorporates by reference *Rule 56.05(2)*, which provides specific instructions to commissioners taking evidence outside Nova Scotia.

[34] Reference is also made at paragraph 14 to **Pack All Manufacturing Inc. v. Triad Plastics Inc.**, which stated the following:

➤ Commission evidence is not to be granted as a matter of right. The Court must balance the relevant factors and determine whether the advantages of using video conferencing outweigh the possible prejudice that might arise. Principles of efficiency, and savings of time and cost may weigh in favor of such an order: para 9.

[35] Reference is also made in **Armoyan to Aly v. Halal Meat Inc. et al**, 2012 ONSC 2585, and I should have mentioned that the **Pack All Manufacturing Inc.** reference is [2001] OJ No 5882. In any event, in **Aly v. Halal Meat Inc.** the court says as follows at paragraph 26 to 32:

If the technology that facilitates the video conference operates effectively, then the court will be able to observe the witness and make judgements about credibility. Credibility is not necessarily impaired in such circumstances.

[36] The court noted in **Armoyan** that the court did not see any difficulties in assessing credibility via video conference, however, based on the evidence before it the court, concluded that the cost of travel was not a significant feature in the

circumstances of that case, and that related to the issue of convenience. The court stated at paragraph 26:

Further the cost of travel is not a significant feature in the circumstances of this case. The factor weighing heavily in favour of the granting of the motion relates to convenience. Convenience, however, standing alone, is a weak basis upon which to excuse a witness from attending in person.

[37] That is a much different situation than in this case. Here, we have a single mother who is relying on one income, and a relatively small amount of financial support from Mr. Murphy. So, in my view can be differentiated from **Armoyan** on that basis.

Analysis

[38] I have considered the position of each of the parties and as well as the factors that I must consider under Rule 56. I would note that when the order was granted permitting Ms. Flynn to relocate to British Columbia, is it with the proviso that jurisdiction over the matter would remain here in Nova Scotia.

[39] This is significant in two respects. 1) Ms. Flynn therefore was aware that she would have to arrange to schedule and commit to having the matter heard here in Nova Scotia, which would include the financial consequences. 2) contrary to the assertions of counsel for Ms. Flynn, the governing law is the law of Nova Scotia, not British Columbia. That is, because as stated, permission to relocate was

premised in the order with this court retaining jurisdiction, therefore, it is not a reverse onus situation regarding the burden of proof and the onus is on Ms. Flynn, on a balance of probabilities to satisfy the court that her testimony and participation should be via video link.

[40] I would pause to note that the request of Ms. Flynn is as just stated, two-fold. She, as a party to the proceeding, wishes to (a) give her evidence via video link and (b) to participate in the entirety of the proceeding and to instruct counsel remotely from British Columbia. In other words, participate entirely in these proceedings remotely. This is significant because Rule 56 deals only with the issue of how the court should receive the evidence of Ms. Flynn, not whether she can be absent from the hearing of the remainder of the proceeding.

[41] The role of Rule 56 is to ensure that a party is not prejudiced if a person is permitted to give evidence physically outside the courtroom and not be present or confronted in person in the courtroom. The burden is on Ms. Flynn to show Mr. Murphy will not be prejudiced if this occurs. Also, to satisfy me that the factors enumerated in Rule 56 and the hardships of attending in Nova Scotia outweighs factors or prejudice to Mr. Murphy in her not attending.

[42] Having considered all the factors and the position of the parties I am satisfied Ms. Flynn should be permitted to testify via video link from British Columbia. I have reached this conclusion because under Rule 56.02(2)(a):

the circumstances of the person to be examined, including the potential for disruption to employment or personal life if the witness were to travel to the place of trial or hearing;

[43] Under “normal times” Ms. Flynn would be required to travel. As stated, when permission was given to relocate, it was on the understanding she be required to participate and give evidence here. However, that was before Covid 19. Before Covid 19 it was routine and very little thought was given that one could relatively inexpensively, conveniently jump on a plane in British Columbia and travel to Sydney, Nova Scotia safely. That has all changed with Covid 19.

[44] To compel Ms. Flynn to travel here for the hearing in Nova Scotia would require Ms. Flynn to travel from outside the Atlantic bubble from British Columbia where there are a large number of active cases. I can take judicial notice of that, to board a plane where there’s always a risk of Covid 19, and I would note according to the itinerary that was supplied for counsel by Mr. Murphy, it would require Ms. Flynn to connect in either Ontario or Quebec. Again, I can take judicial notice that at the present time are “hot spots” for Covid 19, that she would have to connect through in order to get to the final destination here in Nova Scotia. Furthermore,

with changing airline policies it is uncertain whether or not there will still be flights into Sydney on January 8, 2021, when the matter is scheduled for hearing.

[45] Therefore, it may not be possible for Ms. Flynn to get here without further expense and complications. Assuming she does get here, ordinarily she would be required for 14 days to quarantine. As noted, there is provision in the *Health Protection Act* that permits an exemption for court purposes. However, that would 1) in my view, put the entire persons in the courthouse at risk; 2) it would require additional measures from Ms. Flynn while entering the building and participating and would require extra resources; 3) it would require Ms. Flynn to further isolate in Nova Scotia before entering the courthouse. In other words, while not attending court.

[46] I also agree with counsel for Ms. Flynn that it would require a choice for Ms. Flynn either one leaving the child, who is six years old, in British Columbia and child care for him and the expense, or alternatively, bringing the child with her and exposing him, potentially, to Covid 19. In Nova Scotia, it would be impossible for the child to self isolate, even if an exemption were given for Ms. Flynn while attending in court. While attending court, it would require the child to remain in isolation the entire time he is in Cape Breton.

[47] If the child remains in British Columbia, it would be a difficult choice for Ms. Flynn, whether to return to the child right away and risk Covid 19 or, to quarantine; neither choice is in the child's best interests. Also weighing the risk to the public in Nova Scotia, it would not be in Ms. Flynn's best interests, or for the public, for Ms. Flynn to be compelled to appear in Nova Scotia when there are other alternatives.

[48] I also find under Rule 56.02(2) and the provisions I have already referred to it would be a significant disruption for Ms. Flynn's personal life to travel to the hearing to give evidence, particularly in light of Covid 19. Also, under section 4 and the factors enumerated, the quality of the proposed transmissions is a factor. Here it should not be an issue, if transmitted courthouse to courthouse. I will have more to say to that in terms of my wording of the order at the end of my decision. But I note that courthouse to courthouse transmission video link is done routinely.

[49] A significant difference in time zones, is a factor, which I must take into consideration (see R. 56.02(4)(b)). In my view, however, the time zones and the impact on the hearing can be addressed here; Mr. Murphy is the applicant, and his evidence would be presented first. Also, from the list of witnesses there is his evidence, his mother's evidence, there's also evidence of Doctor Landry, and a social worker. In my view, therefore, there would be sufficient time to permit the

calling of evidence without disruption to the hearing before Ms. Flynn is required to attend to a courthouse in British Columbia to have the evidence given via video link.

[50] This will also permit Ms. Flynn to ensure that she is able to get to the courthouse in British Columbia and have a commissioner administer either an oath or affirmation. Implicit in my ruling, Mr. Columbus, is to ensure and confirm by the next pretrial in this matter in November is that 1) a video is secured at a courthouse in Ms. Flynn's area, and that the appropriate form has been completed, which are required to request a video conference here in the courthouse in Sydney, Nova Scotia; and 2) a commissioner is secured and available.

[51] I am confident that the video link transmission will be sufficient quality if the courthouse video link to link is done, as I say it has been done routinely in the past. If not, if I am wrong in that, then it would go to the issue of weight and any prejudice would be prejudice to Ms. Flynn and not to Mr. Murphy.

[52] As mentioned, a second request from Ms. Flynn is to not only to give her evidence remotely, but also to participate remotely. Again, if there are difficulties consulting with counsel in person, and because it is limited, and also if there's limitations because Ms. Flynn, if she's appearing by phone, is unable to make

personal observations, any prejudice to that would be to Ms. Flynn and not to Mr. Murphy.

[53] To ensure trial efficiency I will permit five-minute adjournment between each witness prior to the conclusion of the cross examination, and it is a hearing by cross examination, for Ms. Flynn to consult with her counsel. Mr. Murphy, of course, will be in the courtroom and be able to consult with his counsel before concluding cross examination, as is the normal course. This will allow an efficient control of the hearing process, which is in the purview of the court.

[54] As I mentioned, I have reviewed the **Armoyan** decision and I've already highlighted the relevant portions, and in my view, it can be distinguished because **Armoyan** was 1) was pre-pandemic; 2) as stated in the **Armoyan** decision, the litigants had access to millions of dollars in assets and the costs of travel were not a factor and did not play a role and was the reason why the judge declined the video link, and as I said, this case where the ultimate situation where Ms. Flynn is a single provider, for the most part, and although employed full time has a modest income and simply, I find, that it would be difficult for her to cover the costs for traveling during Covid 19, not to mention the risks, with little financial support from Mr. Murphy.

[55] With respect to the comment in **Pack All Manufacturing Inc.** that I referenced earlier, I would say that here, the advantage of video conferencing in light of a pandemic, outweighs any potential prejudice. I am satisfied that Ms. Flynn has met the burden and any prejudice to Mr. Murphy is outweighed in favor of a video conference.

[56] If I am incorrect in my analysis, and my decision, and if I have determined that incorrectly I would also rely on the court procedures and policies that were implemented during Covid 19. I would specifically refer to notice number 11 to the Nova Scotia Bar that I note was implemented on October 9, 2020, that would be following the October 2, 2020 hearing of the evidence on this motion. Notice 11 references notice 10 to the Bar and posted June 15, 2020, safe services model in the unified family court and the family court and specifically clauses 5 and 6 of the notice to the Bar.

[57] Clause 5 of Notice 10 permits parties to be heard by telephone, by use of video or other electronic means. Clause 6 of the same Notice provides that a requirement for cross examination may cause a judge to direct the matter require attendance of some or all of the parties or witnesses to be present in court. The details of the arrangement will be decided on a case by case basis. So, there's significant discretion, which is given to the trial judge.

[58] Reference is also made in Notice 11 to the Public Health Order and *Protection Act* (section 2.6 exemption from quarantine to attend court). After referencing that section of the *Act*, Notice 11 goes on to state as follows on page 2:

While the UFC Family Court may exempt persons from the requirement of self-quarantine the UFC Family Court has chosen not to do so absent compelling circumstances as determined by the presiding judge in consultation with the Associate Chief Justice of the Family Division of the Supreme Court.

[59] Here for the reasons I have already expressed in my decision on the motion, I find that there are not compelling reasons to grant an exemption.

[60] Furthermore, in Notice 11, page 2, continues:

Recognizing that direct evidence of witnesses will always be in affidavit form, the court will assist parties and witnesses in self-quarantine or self-isolation when accessing alternative to in person participation. Those alternatives will include testifying on cross examination virtually, included via telephone. The court will also hear from parties or witnesses requesting an adjournment of all or part of the proceedings given a requirement to self-quarantine or to self-isolate.

[61] Here in accordance with Notice 11, cross examination virtually is appropriate and will proceed, and is not appropriate to adjourn given, as I have outlined the issues in this matter and the importance of this matter being heard.

[62] So the order will be as follows, and I am going to ask Mr. Columbus to draft the order: The motion of Ms. Flynn to appear by video link from the Province of British Columbia for cross examination is granted. Counsel for Ms. Flynn, by the next pretrial, is to confirm the date, time and place for Ms. Flynn to appear. She is

to appear by video link, and we will structure the hearing in accordance so that Ms. Flynn will appear by video link at 1:00 p.m. Atlantic Time, 9:00 a.m. British Columbia time on January the 8, 2021.

[63] Mr. Columbus is also to provide, prior to the pretrial, proof of a confirmation of a commissioner of oaths to be available for that time and place that I have just stipulated, that is 9:00 a.m. British Columbia time on January the 8, 2021. That proof is to be provided by the pretrial on this matter on November 19, 2020 at 10:00 am, as well as confirmation that there has been a video room secured for that evidence, as well as proof that all the appropriate forms have been filed for the request to participate by video link that are required to be filed here in the courthouse in Sydney, Nova Scotia.

[64] Lastly, I'm also ordering that Ms. Flynn may participate in the remainder of the hearing, via phone, and will be provided dial in information by the courthouse, it will likely be the same one used here today, but courthouse staff will discuss that at the pretrial information for the hearing and confirm that. As I said, Mr. Columbus is to prepare the order.

[65] Cost on the Motion shall be considered "costs in the cause".

Gregan, J.