SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *F.M. v. A.M.*, 2021 NSSC 11

Date: 20210114
Docket: *Sydney* No. 65455
Registry: Sydney

Between:

F.M.

Applicant

v.

A.M.

Respondent

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	December 15, 2020, in Sydney, Nova Scotia
Written Release:	January 14, 2021
Counsel:	Alan Stanwick for the Applicant Candee McCarthy for the Respondent

By the Court:

BACKGROUND

[1] The parties are the parents of a son C.M., who is 12 years of age. They consented to an order in 2009, which placed the child in A.M.'s sole care, custody and control. F.M. was granted reasonable access at reasonable times upon providing 24 hours' notice of his intention to exercise access, such access to specifically include at least three visits per week.

[2] The order included a clause which states that A.M. "shall not remove the child's permanent place of residence from Cape Breton Island without providing 60 days' written notice to the Respondent, [F.M.]".

[3] The parties operated under that order until May 29, 2020, when A.M. provided notice to F.M. of her intention to relocate to Ontario. F.M. filed a variation application and an *ex parte* motion on June 9, 2020, to prevent the relocation of the child to Ontario. At that time, an order was issued prohibiting the removal of the child from Nova Scotia.

ISSUES

1. Is there a change in circumstances which justifies variation of the 2009 order?
2. Does the 2009 order govern the issue of mobility, or do the legislative provisions govern?
3. Should an order for relocation be granted?
4. What parenting arrangements are in the best interest of C.M.?

ISSUE 1: Is there a change in circumstances which justifies variation of the 2009 order?

[4] This is a variation application, and as such I must consider whether there's been a material change of circumstances since the 2009 order was issued. In the intervening years, both parties have re-partnered. A.M. is engaged to marry a man she has dated for three years, who lives and works in Ontario. She wishes to move there to create a life together with him and C.M..

[5] The above circumstances constitute a material change, sufficient to justify review and variation of the 2009 order.

ISSUE 2: Does the 2009 order govern the issue of mobility, or do the legislative provisions govern?

[6] A.M. argues that, before I resort to the mobility provisions in the ***Parenting and Support Act*** R.S.N.S. 1989, c. 160, I must determine whether the existing parenting order permits her to relocate with C.M. She argues that it does.

[7] The 2009 order does contemplate the possibility of A.M. moving away from Cape Breton. It contains a clause requiring her to provide at least 60 days' notice of a decision to move, which she did by way of text to F.M. on May 29, 2020.

[8] However, the order does not expressly permit relocation. Nor did it prohibit it. It simply provides for notice, which was given. In these circumstances, the question of whether relocation should be permitted is governed by the mobility provisions of the ***PSA***.

[9] The relevant sections are:

> **Relocation**
>
> **18E (1)** In this Section and Sections 18F to 18H,
>
> (a) "person planning to relocate" means
>
> (i) a person who is planning a change of that person's place of residence and is a parent or guardian or a person who has an order for contact time with the child,
>
> (ii) a parent or guardian who is planning a change of both that person's and the child's place of residence, and
>
> (iii) a parent or guardian who is planning a change of the child's place of residence;
>
> (b) "relocation" means a change to the place of residence of
>
> (i) a parent or guardian,
>
> (ii) a person who has an order for contact time with the child, or
>
> (iii) a child,

that can reasonably be expected to significantly impact the child's relationship with a parent, a guardian or a person who has an order for contact time with the child.

(2) A person planning to relocate shall notify the parents and guardians of the child and any person who has an order for contact time with the child of the planned relocation.

(3) The notification under subsection (2) must be in writing and must include

(a) the date of the planned relocation;

(b) the location of the new place of residence and, if known, the address;

(c) all available contact information for the person giving the notification; and

(d) the proposed changes to custody, parenting arrangements, parenting time, contact time and interaction resulting from the relocation.

(4) The written notification under subsection (2) must be delivered with as much notice as possible in advance of the date of the planned relocation.

...

Authorization or prohibition of relocation

18G (1) Subject to a court order authorizing or prohibiting the relocation of a child or an order changing or waiving the notification requirements, when the notification requirements under Section 18E have been complied with, the relocation of the child may occur on or after the date of the planned relocation, unless an application is made to the court to prohibit the relocation within thirty days of receiving the notification.

(2) On application by

(a) a parent or guardian of the child;

(b) a person with an order for contact time with the child; or

(c) any person that has been granted leave of the court to make the application,

the court may make an order authorizing or prohibiting the relocation of a child and may impose terms, conditions or restrictions in connection with the order as the court thinks fit and just.

(3) An application for an order authorizing or prohibiting the relocation of a child may be filed at any time prior to or after the relocation occurs.

Relocation considerations

18H (1) When a proposed relocation of a child is before the court, the court shall be guided by the following in making an order:

> (a) that the relocation of the child is in the best interests of the child if the primary caregiver requests the order and any person opposing the relocation is not substantially involved in the care of the child, unless the person opposing the relocation can show that the relocation would not be in the best interests of the child;
>
> (b) that the relocation of the child is not in the best interests of the child if the person requesting the order and any person opposing the relocation have a substantially shared parenting arrangement, unless the person seeking to relocate can show that the relocation would be in the best interests of the child;
>
> (c) for situations other than those set out in clauses (a) and (b), all parties to the application have the burden of showing what is in the best interests of the child.

…

(3) In applying this Section, the court shall determine the parenting arrangements in place at the time the application is heard by examining

> (a) the actual time the parent or guardian spends with the child;
>
> (b) the day-to-day care-giving responsibilities for the child; and
>
> (c) the ordinary decision-making responsibilities for the child.

(4) In determining the best interests of the child under this Section, the court shall consider all relevant circumstances, including

> (a) the circumstances listed in subsection 18(6);
>
> (b) the reasons for the relocation;
>
> (c) the effect on the child of changed parenting time and contact time due to the relocation;
>
> (d) the effect on the child of the child's removal from family, school and community due to the relocation;
>
> (e) the appropriateness of changing the parenting arrangements;
>
> (f) compliance with previous court orders and agreements by the parties to the application;
>
> (g) any restrictions placed on relocation in previous court orders and agreements;
>
> (h) any additional expenses that may be incurred by the parties due to the relocation;
>
> (i) the transportation options available to reach the new location; and

> (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.
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> **(5)** Upon being satisfied that the child's needs or circumstances have been changed because of the order granted under subsection 18G(2), the court may vary a previous order granted under Section 18 or 37. 2015, c. 44, s. 20.

[10] The circumstances in 18(6) referred to above are:

> **(6)** In determining the best interests of the child, the court shall consider all relevant circumstances, including
>
> (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;
>
> (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;
>
> (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;
>
> (d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
>
> (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
>
> (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;
>
> (g) the nature, strength and stability of the relationship between the child and each parent or guardian;
>
> (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;
>
> (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; and
>
> (j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on
>
> (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and

> (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

ISSUE 3: Should an order for relocation be granted?

[11] F.M.'s position has changed since he filed his parenting statement. In that document, he essentially asks that the status quo remain in place, with him exercising parenting time on weekends, but the child remaining in A.M.'s primary care in Cape Breton. However in the affidavit he filed afterwards, and in his submissions, he says that if A.M. wishes to move, the child should be placed in his primary care.

[12] A.M. takes the position that, as the child's primary caregiver his whole life, and with F.M. only exercising limited parenting time, her request to move should be approved.

[13] A.M. meets the definition of a person planning to relocate and change her and C.M.'s residence under s.18E(1)(a)(ii).

[14] If permitted, the relocation to Ontario can reasonably be expected to significantly impact the child's relationship with his father, as he will no longer be in the same community.

[15] The next question is whether A.M. provided notice of the proposed move in compliance with s.18E(2) & (3). She alerted F.M. on May 29, 2020 that she was considering a move to join her fiancé. However, in that text, she provided no further information about the proposed move. It wasn't until she filed her affidavit in response to F.M.'s application that her full plan became known.

[16] In effect, A.M. complied with the 2009 order, but not the notice provisions of the ***PSA***. However, she does not plan to relocate until late Summer, 2021 and F.M. was able to file this application (and have a hearing on the issue) before she left. So while her compliance is imperfect, I'm satisfied that it is sufficient in these circumstances.

[17] F.M. says that the fact that the court granted an *ex parte* order restricting A.M. from removing the child from Nova Scotia supports his argument that A.M. did not provide proper notice. I disagree. That order was granted on limited information as a precautionary measure, without hearing from A.M..

The fact that F.M. filed an *ex parte* motion speaks to the fact that he had notice of a proposed move.

[18] After receiving that notice, F.M. complied with s.18G of the ***PSA***. He filed an application to vary to prevent the relocation on June 9, 2020.

[19] The next consideration is the extent to which F.M. is involved in C.M.'s care. This will determine whether there's a presumption in favour of one party's plan or not, and who bears the onus of proof on the application.

[20] There is no evidence or suggestion that the parties have a substantially shared parenting arrangement, so the presumption under s.18H(1)(b) doesn't apply.

[21] The next question is which of s.18H(1)(a) or 18H(1)(c) applies. Under s.18H(1)(a) I must determine whether F.M. is substantially involved in the care of the child. If he's not, then there's a presumption that the move is in the best interests of the child, unless F.M. can show otherwise.

[22] A.M. says that F.M. is **not** substantially involved in the care of C.M., so s.18H(1)(a) applies, giving rise to a presumption in favour of relocation. F.M. says that he **is** substantially involved in the care of C.M., so each party bears the onus of proving that their plan is in the child's best interest under s.18(1)(c).

[23] In support of his position, F.M. cites the decision of Justice Forgeron in **J.E.W. v W.E.D.,** 2019 NSSC 141, where the meaning of the words "substantially involved" were considered. As Forgeron, J. noted, the court must consider three specific factors in determining this question:

1. How much actual time does F.M. spend with the child (s.18H(3)(a))?
2. Who has day-to-day care-giving responsibility for the child (s.18H(1)(b))?
3. Who is responsible for the ordinary decision-making responsibilities for the child (s.18H(1)(c))?

[24] F.M. and his mother filed affidavits and testified, as did A.M.. From their evidence I conclude that:

1. F.M. attends some of C.M.'s special school events, and he attends many of C.M.'s sporting activities, though usually as a spectator. A.M. is the parent responsible for arranging his attendance. C.M. and

his father frequently spend weekends together, although F.M. leaves C.M. with his grandmother overnight and returns in the morning. He has never parented C.M. alone and he has never had him overnight on a school night. He has only spent a week's extended time with C.M. twice during the summer, when his brother and nephew were visiting.

2. A.M. has been the child's primary caregiver since birth, and she provides day-to-day care-giving to C.M.. She feeds, clothes and equips him. She registers him for school, packs his schoolbag, deals with teachers, maintains C.M.'s calendar, signs consents, ensures completion of homework, and packs his lunches. The one time A.M. asked F.M. to help their son with a project, C.M. returned home with it incomplete. A.M. ensures that C.M. gets to school (though on occasion she will ask F.M. to drive him and he complies), and she arranges for him to participate in activities (though F.M. has been the one to register him on several occasions). She, or her parents, take C.M. to most of his off-island games and tournaments. Again, F.M. may attend, but he is not responsible for arranging hotels, travel, etc.

3. A.M. is responsible for the ordinary decision-making responsibilities for the child. F.M. does not contest this.

[25] Unlike **J.E.W.** (*supra*), the parties in this proceeding separated when the child was a month old. C.M. has been in his mother's primary care since then. C.M. didn't stay overnight with his father until he was two years old, and only then in his grandmother's home, with her present. Even now, although F.M. is more involved with C.M., his parenting time doesn't follow a set schedule. He takes C.M. when his other commitments permit, or when A.M. asks.

[26] Unlike the mother in **J.E.W.** (*supra*), A.M. does not downplay F.M.'s role in their son's life. She acknowledges that he's substantially connected to C.M., but she rejects the idea that he's substantially involved in C.M.'s care. I agree.

[27] I find that the presumption under s.18H(1)(a) applies. That presumption operates in favour of relocation, unless F.M. can establish, on a balance of probabilities, that the move is not in C.M.'s best interests.

[28] Both parties agree that C.M. is an outgoing, well-adjusted, and talented athlete who does well in school academically. They both love him, and they are both proud of him. They also want what's best for him, although they differ on whether that involves a move.

[29] In answering that question, I must consider all of the evidence and relevant circumstances. F.M. addressed each of the circumstances enumerated under s.18H(4) individually as follows:

18(4)(a) – the circumstances of subsection 18(6)

It is submitted that applying the relevant factors of 18(6), it would be in the best interests of [child] to remain in Cape Breton.

18H(4)(b) – the reason for the relocation

It is submitted that [A.M.'s] reasons for relocation to Cornwall, Ontario do not support the conclusion that such a move would be in [child]'s best interests.

18H(4)(c) – effect of changed parenting time on children

It is submitted that the evidence will show that a proposed move to Cornwall, Ontario would have a significant and negative impact upon [child].

18H(4)(d) – effect of removal from family, school and community

[Child] has always lived in Cape Breton. He has extended family on both sides. He has a lot of friends both inside and outside of school. [Child] is an elite hockey player. He has excelled in hockey while living in Cape Breton.

It is submitted that the proposed relocation would negatively affect [child].

18H(4)(e) – Appropriateness of changing parenting arrangement

It is submitted that the evidence will not establish that [child]'s health care, education and extra-curricular activities would be superior in Cornwall, Ontario to those currently available in Cape Breton.

18H(4)(f) – compliance with previous Court Orders and agreements by the parties to the Application

This does not appear to be a material factory in this case.

18H(4)(g) – any restrictions places upon relocation in previous Court Orders and agreements

The Consent Order issued on November 30, 2009 stated that [A.M.] shall not remove the child's permanent place of residence from Cape Breton Island without providing 60 days' written notice to [F.M.].

It is submitted that it can be reasonably inferred from the issuance of the Interim Ex Parte Order, that the Court was concerned that [A.M.] would not comply with the restrictions on relocation contained in the Consent Order.

18H(4)(h) and (i) – additional expenses and transportation costs

It is submitted that the only viable transportation option from Cape Breton to Cornwall, Ontario and back would be by air. In these circumstances, it is further submitted that [F.M.] would incur significant costs to exercise parenting time with [child] and such costs would negatively affect the ability of [F.M.] to exercise such time.

18H(4)(j) – notice and proposed new parenting time schedule

It is submitted that [A.M.] did not give notice of the proposed relocation either in accordance with Section ___ [sic] of the Parenting and Support Act or pursuant to the Consent Order. This resulted in the issuance of the Interim Ex Parte Order.

[30] In the context of s.18(6), I find as follows:

1. The child's physical, emotional, social and educational needs are being met in the current parenting arrangement.
2. Each parent has been willing to support the development and maintenance of the child's relationship with the other.
3. A.M. has historically cared for the child as primary care giver, ensuring that the child's physical, emotional, social and educational needs are met. F.M. has been more involved with C.M. in recent years.
4. The plan proposed for child's care and upbringing in Ontario is reasonable and well considered. The child has no special physical, emotional, social or educational needs that cannot be met in the proposed relocation area. However, he would have less contact with his father and extended family.
5. There's no evidence with respect to the child's cultural, linguistic, religious and spiritual upbringing and heritage.
6. The child's views and preferences are unknown. I have not considered inadmissible statements attributed to the child by A.M.
7. F.M. has a good relationship with his son, and he is a regular presence in his son's life.

8. The parties have been able to communicate and cooperate on issues affecting the child to date.

9. There is no evidence of family violence, abuse or intimidation.

10. There is no evidence to suggest that requiring cooperation between the parties would threaten the safety or security of the child or other person.

[31] Under s.18H(4)(b) I find as follows:

1. A.M. is relocating to start a life with her fiancé. Although she says that financial security plays a role, it is clearly secondary to her desire to pursue a family life with her fiancé, his children, and C.M.. Having become a mother at age 21, and having raised C.M. as a single parent for 12 years, her motivation is understandable.

2. The effect on C.M. of a relocation would mean less periodic parenting time with his father. However, extended parenting time during the summer would constitute more quality time between C.M. and his father. F.M. would also be able to exercise electronic parenting time with C.M., who is old enough to initiate contact on his own.

3. The effect on the child of his removal from family, school and community due to the relocation would be a major disruption to C.M.'s life and routine. But a transfer of primary care would be even more disruptive. F.M. has never parented the child alone, nor for an extended period. He works Tuesday through Saturday from 1 p.m. to 9 p.m. He says that his mother (C.M.'s grandmother) would provide childcare, but that would place C.M. in his grandmother's care four out of every 5 weekdays after school, through the evening, until bedtime.

4. F.M.'s partner did not testify. There is some question of whether she and C.M. get along. F.M. did not suggest that his partner would play a role in childcare, even though a reversal of primary care would see C.M. living in the home they share as a couple, so her commitment to F.M.'s plan is uncertain.

5. C.M. has extended family in the local area. He also has local friends and teammates.

6. A.M.'s plan to foster contact with family and friends from Ontario will ensure continued (albeit reduced) contact.

7. There are children C.M.'s age with whom he can make new friends in Ontario, as well as the fiancé's children, who are of similar age. There is a suitable school and sports opportunities for C.M..
8. Both parties have complied with previous court orders.
9. The 2009 order does not contain a restriction on relocation, rather it contained a notice requirement.
10. F.M. may incur some additional expenses if relocation is permitted, but A.M. has offered to pay the majority of those costs by way of transporting C.M. to Cape Breton and back to Ontario every summer.
11. There are transportation options available at the new location, including by road, rail, and air. C.M. is old enough to fly unaccompanied.
12. A.M. did provide notice and a plan. She has also proposed a new parenting schedule following relocation, if it's approved. She says that, because of the Covid-19 pandemic and health restrictions in place, she does not plan to relocate before the late Summer of 2021. That would allow C.M. to complete this academic term at his current school, finish his hockey season with his current team, and play one last season with his baseball team.
13. F.M. has not presented a plan for parenting time between C.M. and his mother, should primary care of C.M. be reversed.

[32] Considering all of the evidence and circumstances, I am not satisfied that F.M. has met the onus of showing that relocation is contrary to the child's best interests. A reversal of the parenting arrangements, however, would be. It would wrench C.M. from his primary caregiver, and place him in the care of a parent who has never had to meet his needs on a day-to-day basis over an extended period.

ISSUE 4: What parenting arrangements are in the best interests of C.M. ?

[33] I am satisfied that it is in the child's best interests to remain in his mother's primary care, and for him to relocate with her to Cornwall, Ontario. The terms of the 2009 order which deal with access (as it was then called) and relocation will be varied as follows:

1. A.M. may relocate with the child, but not before August 16, 2021.

2. A.M. must provide F.M. with a residential address where the child will be living upon relocation, even if it's on a temporary basis. Confirmation of a permanent residence must be provided immediately upon securing same.

3. A.M. must provide F.M. with a contact number for the child (her home and cell numbers, as well as the child's cell number), his school name and contact information, and the names and contact information for his family physician and dentist.

4. A.M. must provide the child with a cell phone or tablet which is capable of supporting contact between C.M. and his father by phone and video. She will be responsible to arrange for an appropriate plan and necessary upgrades.

5. A.M. will be responsible for the following costs: transportation costs to and from Cape Breton each summer; transportation costs for the child to visit his father over March break each year; and the cost of a phone plan that includes long distance, text and data charges (if any) for the child's cell phone or tablet, as well as the cost of upgrades, repairs and replacement devices.

6. F.M. will be responsible for the cost of travel associated with his Christmas parenting time with C.M.

[34] F.M. will have parenting time as follows:

1. During the summer of 2021, he will have C.M. in his care every second week, starting on Sunday, June 27, 2021 at 10 a.m. until Sunday, July 4, 2021 at 10 a.m., and continuing every second week until A.M. and C.M. move. This will allow him to parent over extended periods leading up to the move and the summer of 2022.

2. During the summer of 2022 and each summer thereafter, F.M. will have the child in his care for six consecutive calendar weeks, the dates to be agreed between the parties. Failing agreement by May 15 of each year, summer parenting time will comprise the last three calendar weeks of July and the first three calendar weeks of August, starting on the Sunday at 10 a.m..

3. Starting March/spring break in 2022, F.M. will have the child in his care for six consecutive days, the dates to be agreed between the parties. Failing agreement by January 15th each year, his

March/spring break parenting time will run from Saturday at 6:00 p.m. until the following Friday at 6:00 p.m.

4. Starting in 2022 and every second year thereafter, F.M. will have parenting time with C.M. for six consecutive days over the Christmas break, with the dates to be agreed between the parties. Failing agreement by November 1st of 2022 and every second year thereafter, his Christmas parenting time will run from December 22 at 6:00 p.m. through to December 28th at 6:00 p.m.

5. Reasonable parenting time with the child if A.M. and C.M. visit Cape Breton.

6. Open and liberal video/phone/text/other electronic contact between F.M. and C.M.

[35] Other terms will include the following:

1. For parenting time in Cape Breton, F.M. will be responsible to pick up the child and A.M. will be responsible to retrieve him afterwards.

2. A.M. must provide F.M. with copies of C.M.'s report cards and progress reports, as well as updates on the child's health, education and general well-being, starting in December, 2021 and continuing each quarter thereafter.

[36] All other terms of the 2009 order remain in effect. The *ex parte* order issued on June 9, 2020 is rescinded.

[37] Each party will bear their own costs. A.M.'s counsel is asked to prepare the order.

MacLeod-Archer, J.