

**Supreme Court of Nova Scotia (Family Division)**

**Citation:** *C.P v. L.D*, 2021 NSSC 230

*C.P and L.D*

**July 23, 2021**

**SFSNMCA - 077678**

- Danielle MacSween, Counsel for CP
- Pavel Boubnov, Counsel for LD

**Decision:**

**Facts and Procedural Background**

1. This matter involves a child, ADP., born July \*\*, 2011. ADP just turned 10 years old. Her parents are CP and LD.
2. There is a Consent Order in place that was issued December 29, 2016. Pursuant to that Consent Order:
  - CP and LD have joint custody of ADP.
  - CP has primary care of ADP.
  - CP has final decision-making authority on all major decisions affecting ADP.
  - LD has supervised access to ADP. The access is to be supervised by AP or another supervisor deemed appropriate by CP.
  - LD is to have access two days per week ranging from 2-3 hours per visit. LD must confirm her visit in writing to CP 48 hours in advance of the visit.
  - LD shall not consume drugs or alcohol within 24 hours of a visit or being under the influence during a visit.
  - The person supervising LD's visits has the sole discretion to terminate the visit if there are concerns to justify the visit ending.
  - CP is not to move the child from the Cape Breton Regional Municipality without the consent of LD or further order of the Court.
  - The terms of the Order can not be varied without prior notice to the Minister of Community Services
  - Communication between the parties must be respectful and child focused.
  - All emails can be saved and used as evidence in any future court proceeding.

3. When the parties agreed to the Consent Order, child protection authorities had been involved. The Minister of Community Services terminated their involvement upon the Consent Order being issued.
4. CP filed a Variation Application on August 26, 2020. CP seeks to vary a Consent Order so that he may have primary care of ADP and so they can relocate to Alberta. He proposes that ADP have parenting time with LD during the summer and during vacation times when CP is in Nova Scotia.
5. The Minister of Community Services was notified of CP's application and took no position. A hearing was held on July 22, 2021. Both parties were represented by counsel. The Court heard from CP, LD and CP's mother, AP.

**Issues:**

1. Has there been a material change in circumstances justifying a variation of the 2016 Consent Order?
2. Should the Order for relocation be granted?
3. What parenting arrangements are in ADP's best interest?

**Law**

6. The applicable legislation is the *Parenting and Support Act*, 1989 RSNS c. 160, (the *Act*).
7. Pursuant to s. 37(1) of the *Parenting and Support Act*, I may make an order varying, rescinding or suspending an order of custody or parenting arrangements where there has been a change in circumstances since the making of the order.
8. The *Act* also sets out what I must consider when determining a request to relocate and the parties agree that s. 18H(1)(a) is the test to be applied in this case:

*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;*

9. The parties agree, therefore, that there is a presumption that the relocation is in ADP's best interest and the onus is on LD to show that the relocation is not in ADP's best interest.

10. Section 18(4) of the *Act* sets out the best interest factors to be considered in the context of a relocation analysis as follows:

*(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.*

11. Section 18(6) of the *Act* states that the Court shall consider all relevant circumstances when determining the best interests of the child, 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.

12. In determining what is in the child's best interests, I must compare and balance the advantages and disadvantages of each proposed parenting scenario: *D.A.M. v. C.J.B.*, 2017 NSCA 91.

13. The best interest test is the only test and parental preferences, and rights play no role in the determination of a child's best interests: *Young v. Young*, [1993] S.C.J. No. 112, para. 202.

14. Counsel for both CP and LD have referred me to the case of *Gordon v. Goertz*, [1996] 2 SCR 27 and agree that the test to establish a material change in circumstance is as follows:

[12] What suffices to establish a material change in circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way...The question is whether the previous order might have been different had the circumstances now existing prevailed earlier.... Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. ...

[13] It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

15. I have also considered the case of *F.M. v. A.M.*, 2021 NSSC 11, referred to me by counsel for CP.

### **Position of the Parties**

*CP*

CP argues:

- He has been ADP's primary care giver since 2014 and LD's parenting time has been supervised since 2016
- There has been a change in circumstance that justifies the variation of the 2016 Order:
  - He has been offered a full-time employment in Alberta, a significant change from his current seasonal shift work.
  - LD has not exercised parenting time with ADP since June or September 2020
- LD is facing 19 outstanding criminal charges which are scheduled to be heard in December 2021
- He has provided LD adequate notice of his intention to relocate.
- He is currently not able to provide specific details about the relocation because the relocation has not yet been authorized but is willing to do so within a specified period of time, if permitted to move to Alberta with ADP.
- LD has not met the burden of establishing that the relocation is not in ADP's best interest.

- LD's allegations that he has denied her parenting time with ADP are false and he has always been willing to facilitate LD's parenting time with ADP.
  - CP asserts that it has been approximately a year since LD has sought parenting time with ADP and that his relocation will not substantially interfere with LD's parenting time because such parenting time has not been taking place.
  - CP further claims that LD's parenting time with ADP prior to June 2021 was sporadic; that LD was often late or did not attend at all for parenting time, that the visits were often cut short or of poor quality.
  - CP notes that the current Order places the onus on LD to confirm her parenting time in writing 48 hours in advance of the visit and no corroborating evidence was offered by LD to demonstrate that she has been requesting parenting time that has been denied by CP.
- CP points out that LD has not filed a Response. Nor has she pursued an application to vary the 2016 Consent Order or enforce her parenting time under that Order, all avenues to address any alleged denial of parenting time.
- CP does not support LD's request to have her mother, ND, supervise LD's parenting time with ADP because ND is elderly and suffering from health issues, because ADP is not familiar with ND and because CP is not satisfied that ND has the capacity to terminate LD's parenting time should that parenting time be inappropriate. CP also notes that the Minister of Community Services has not been provided with the proper notice required under the 2016 Consent Order of LD's request to change the Court Order in this regard.

*LD*

- LD admitted that she struggles with a multitude of mental health issues. She acknowledges, however, that up to approximately a year and a half ago, her life was not on the right path and she was in no position to actively parent a child.
- LD acknowledges that she has not seen ADP since July or September 2020. LD argues that her parenting time with ADP has been limited because of the high conflict between herself and CP and because her mental health suffers when she is forced to interact with him. LD claims CP has unreasonably refused her request to have someone from her family, namely her mother ND, supervise her parenting time with ADP.
- LD argues that CP has failed to provide sufficient detail to prove that ADP's best interests will be met in Alberta. She is concerned that CP has shared

no specific details about where they will live, what school ADP will attend, who ADP's doctor will be, etc.

- Should the Court be inclined to allow CP to relocate with ADP, LD is asking the Court to award significant parenting time for LD with ADP to be supervised by LD's mother, ND.

## Findings

16. I am satisfied that CP has established a material change in circumstances sufficient to warrant a variation of the 2016 Consent Order.
17. CP has is seeking to change the nature of his employment from construction to safety (emergency response) and from seasonable shift work to full time employment. This change will significantly impact ADP: CP will have more time and resources to attend to ADP's needs. This change was not contemplated in 2016 when the Consent Order was issued.
18. This change alone would have supported CP's application to vary, but I must also view this change in the context of other circumstances that have evolved since the 2016 Order was granted. I find that LD has not exercised parenting time in the manner contemplated in the Consent Order. The prohibition against relocation in the 2016 Consent Order was made with the anticipation that LD would be exercising parenting time twice weekly for 2-3 hours. This has not been the case.
19. LD has not met the burden of proving on a balance of probabilities that the proposed relocation is not in ADP's best interest. There is no evidence before me that the proposed move will be contrary to ADP's best interests. The presumption in s. 18H(1)(a) has not been refuted.
20. In the context of s. 18(6) I find that ADP's physical, emotional, social and educational needs are currently being met by CP. CP has been ADP's primary caregiver since 2014. I accept CP's evidence that he is willing to support the development and maintenance of ADP's relationship with her mother. I acknowledge that the parties have difficulty communicating and that there has been a history of violence between the parties. I appreciate that a determination was made that it was in ADP's best interests to be placed in the primary care of CP with supervised parenting to LD in 2016 in full appreciation of this dynamic between the parties.
21. I find that CP has put forth a reasonable request to relocate and provided sufficient notice to LD of his intention to do so. ADP will benefit from the increased resources that that will be made available for her care upon relocation, not the least of which will be increased time with her primary care giver, CP, who will evolve from a being a rotational shift worker to a more stable, Monday to Friday, 9 to 5 employee.

22. I do not accept the relocation will have a significant impact on ADP 's parenting time with LD. I am sympathetic that LD is clearly struggling with mental health issues and has experienced some significant trauma. However, I must adopt a child-centered focus in my analysis. It is not ADP 's fault that she has had limited contact with LD, whatever the reason for the lack of contact might be, and ADP should not be deprived of the opportunities associated with relocation on the hope that LD may choose to be present and available for ADP at some point in the future.
23. If LD was encountering difficulties because of CP in exercising her parenting time, there were several avenues open to her to rectify the situation so that she could spend time with ADP. She did not do so and, at the end of the day, LD's parenting time with ADP as it currently stands, will not be significantly impacted.
24. I am not discouraged by the lack of detail provided in CP's plan to relocate. I find this to be a practical consequence of waiting to receive court approval to relocate before finalizing the details associated with moving. It is, of course, reasonable that LD should want this information and I direct that CP keep LD apprised of contact information for ADP and share with LD pertinent information related to ADP as soon as that information is available to him.
25. There is no reason for me to believe that CP, as suggested by LD, may keep ADP from LD if he is permitted to relocate. I accept CP's evidence that he will continue to attempt to support and maintain a relationship between ADP and LD provided LD makes the effort to exercise parenting time with ADP. To ensure the opportunity for a continued relationship between LD and ADP, I direct as follows:
- CP will ensure that ADP is available to spend time in Cape Breton for a minimum of three weeks each summer.
  - CP will provide LD with at least four weeks written notice of any time that ADP will be in Cape Breton.
  - LD will confirm in writing to CP the specific parenting times she wishes to spend with ADP while ADP is in Cape Breton and any reasonable request put forth by LD in this regard will not be unreasonably refused by CP.
  - There will be no overnight parenting time for LD and LD's parenting time will continue to be supervised by AP or such other person designated by CP other than himself, unless otherwise order by this Court.
  - CP will establish and maintain a mechanism for electronic communication (phone, FaceTime, email, IMs) between LD and ADP. It is incumbent upon LD to initiate contact with ADP. CP may supervise this communication.
26. I accept that when LD was having difficulty being supervised by AP, CP acted reasonably in putting forth his partner, RB, to supervise LD's parenting time. LD



appears to have accepted RB as an appropriate person to provide supervision apart from the fact that RB sometime brought her own child to the visits. I do not accept that CP has unreasonably denied members of LD's family as potential supervisors noting that CP testified that he would be agreeable to LD's sister doing the supervision. I have insufficient evidence to support the appointment of LD's mother, ND, as an appropriate supervisor. I agree that the input of the Minister of Community Services will be required to support such a change to the Order.

27. In review of the facts of this case, the evidence I heard, the legislation and the case law, CP's application to vary is granted. I am satisfied that it is in ADP's best interest that she be permitted to relocate to Alberta with her father. There is no evidence to suggest such a move is contrary to ADP's best interests. In support of CP's relocation, I confirm that ADP will be in CP's primary care and residence and that he will have final decision-making authority in relation to ADP.

Marche, J.