

SUPREME COURT OF NOVA SCOTIA
(Family Division)

Citation: *Doucette v. Babin*, 2021 NSSC 259

Date: 20210824

Docket: 1217-001073

Registry: Port Hawkesbury

Between:

Troy Bernard Doucette

Petitioner

and

Crystal Ann Babin

Respondent

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Judge: The Honourable Associate Chief Justice Lawrence I. O’Neil

Hearing: August 5, 2021 in Port Hawkesbury, Nova Scotia

Issue: Relocation of one child

Summary: The mother lived in Arichat and the father in Glace Bay. Each was heavily involved in the life of their six (6) year old child. The mother wished to relocate with the child to Spryfield. The Court held the plan advanced by the mother was motivated by her desire to be with a recently married partner. The Court found her plan to have been hastily developed and not well thought out. The Court was concerned about her reliance on her partner for the plan to be successful. The best interests of the child were that their son be with his father in Glace Bay given the stability of the plan

he proposed. The father lives near the paternal grandparents and other extended family members, has stable employment and a close and proven positive relationship with his son.

Keywords: Extended family; stability

Legislation: *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.)

Cases Considered: *Gordon v. Goertz* [1996] 2 S.C.R. 27

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Counsel: Karla Bray, Counsel for Troy Doucette
M. Gerard Quigley, Counsel for Crystal Babin

Overview

[1] The parties were in a common-law relationship for approximately one year prior to their marriage in April 2014. They separated on June 10, 2016 and divorced in July 2019. The parties entered a consent order resolving property and parenting issues in 2018. At the time of their separation they were living in Port Hawkesbury. Subsequently Ms. Babin relocated to Arichat.

[2] They are the parents of one child, a son, born May 18, 2015.

[3] Ms. Babin is also the mother of a twelve (12) year old daughter who lived

with the parties throughout their relationship. However, she is not the subject of the parties' divorce order.

[4] In 2020, Mr. Doucette relocated to Glace Bay from Port Hawkesbury with the support and encouragement of Ms. Babin. Mr. Doucette says Ms. Babin agreed to relocate separately to the Glace Bay area. He says had she not agreed to do so he would not have moved. Ms. Babin says she did entertain moving but did not agree to it saying she "never once agreed 100%" to relocate to the Glace Bay (see para 11, tab 6 of exhibit 1). In recent years, Ms. Babin has been living in the Arichat area, approximately forty-five (45) minutes from Port Hawkesbury. The parties now six (6) year old son has been living primarily with Ms. Babin and attending French school. Mr. Doucette has had very liberal parenting time with his son. Their 2018 Corollary Relief Order 'CRO' provided that Mr. Doucette would have parenting time that approximates a shared parenting arrangement.

Issues

[5] The principal issue for the Court to decide is whether it is in the best interests of the subject child to be relocated to Spryfield with his mother or to be relocated to Glace Bay. Mr. Doucette indicated that regardless of whether Ms. Babin relocates, he would like the child to live primarily with him in Glace Bay. Ms. Babin asked the Court to decide which of the two relocation plans is in the best interests of the child.

Ongoing Parenting Arrangement

[6] The parties consented to a 'CRO' issued July 17, 2019 which anticipated the need for changes in the parenting arrangement as the child approached school age and as the parties' employment and other circumstances changed.

[7] The 'CRO' provided that the parties would have joint custody of the child, but the child would reside primarily with the mother. It obligated the parties to cooperate in keeping each other informed on issues affecting the child. It stipulated very generous parenting time for the father and child providing they would be together a minimum of four (4) overnights over each six (6) day period the father is available all day. This is the six (6) days he would not be working following four twelve (12) hour shifts. The parties have cooperated to achieve that allocation of parenting time and have modified it from time to time.

[8] As stated, at clauses four (4) and six (6) of the same order, the parties acknowledge that the parenting schedule would have to be re-examined to effect changes in the father's parenting schedule, due to changes in the employment circumstances of the father and when the child started school. Clause six (6) provided that the new parenting schedule would have, as an objective, the apportionment of parenting time on a basis similar to that contained in the July 2019 order. Clause seven (7) of the 'CRO' states the parties agree to share holidays and special occasions equally.

[9] In her affidavit filed December 9, 2020 with her notice of variation, Ms. Babin listed a number of days when the child was with the father between October 16, 2020 through to the filing of the application. This is a period of approximately six (6) to seven (7) weeks. In cross-examination, Ms. Babin conceded that the child was with the father approximately 40% of the time over that period.

[10] I am satisfied on a balance of probabilities that the parents have been in an arrangement which affords to Mr. Doucette something approximate to a shared parenting arrangement, with Mr. Doucette having approximately forty percent (40%) of the parenting time.

[11] In his affidavit (at tab 7 of Exhibit 2 beginning at paragraph 25) Mr. Doucette proposes a parenting plan that would have the child living primarily with him in Glace Bay and having generous time with his mother in Spryfield. The mother in response says that if she has primary care, she will make him the same offer of parenting time.

[12] It is clear from the evidence of the parties and the foregoing offer and counter-offer, that each parent does not question the capability of the other to provide a healthy living situation for the child nor question their ability to care for the child appropriately.

Evidence

(a) Ms. Babin's Plan

[13] Ms. Babin's Notice of Variation Application was signed by her on

December 4, 2020 and filed with the court on December 9, 2020. In her affidavit accompanying the notice of variation application at paragraphs 16, 17 and 18 Ms. Babin says that she is in a relationship with Joey Bannister and once relocated, will be living with Mr. Bannister. Over the summer of 2021, she has lived with him in Spryfield.

[14] Ms. Babin also testified that she and Mr. Bannister became engaged on January 2, 2021 and married on July 10, 2021.

[15] In his evidence, Mr. Bannister said the original plan was for the parties to marry in October 2021, but they advanced the date of the marriage to July 10, 2021. In the affidavits of both Ms. Babin and Mr. Bannister, Mr. Bannister is described as a manager for a drywall and construction company in HRM (see paragraph five (5) of Mr. Bannister's affidavit sworn July 23, 2021 and the affidavit of Ms. Babin sworn December 4, 2020 (tab 5 of exhibit 1)).

[16] However, in his oral evidence Mr. Bannister testified he, in fact, owns his own business; is an independent contractor and has five employees.

[17] In her affidavit sworn December 4, 2020 at paragraph sixteen (16), Ms. Babin says Mr. Bannister owns his own home. At paragraph four (4) of his affidavit sworn July 23, 2021, Mr. Bannister says he lives in a home in Spryfield. When testifying, he agreed with Ms. Babin's counsel that he, like many people, had a mortgage. However, when questioned further by the Court, he indicated that he pays rent and does not pay a mortgage.

[18] The Court does make allowances for witnesses to be imprecise and does not presumptively question the credibility of witnesses because of innocent errors. However, inconsistencies in basic facts such as whether one is an employee or an employer and whether one rents or owns a home cause the Court to have some concern as to the credibility of a witness.

[19] Mr. Bannister testified that he began dating Ms. Babin in October 2020. Ms. Babin says they began dating in September 2020. Both dates are approximate to the filing of an affidavit from Ms. Babin on December 9, 2020, wherein she stated that her plan was to move in with Mr. Bannister. As stated, the affidavit filed on December 9 was in fact signed on December 4, 2020. Clearly in November 2020,

Ms. Babin was developing a plan to live with Mr. Bannister, a person she started dating as recently as September or October 2020. As referenced earlier they became engaged on January 2, 2021. I am satisfied this plan came on the heels of a plan to relocate to the Glace Bay area a year earlier.

[20] I am satisfied on the balance of probabilities that the Court has not been given a candid response to questions about the origin of the parties' relationship most recently or alternatively that the Court has in fact, been given the correct answers. Regardless each scenario is a concern for the court.

[21] A lack of candour on the part of the parties raises concern for the reliability of their evidence and therefore for the security of the plan they advance for the child. The court is not confident Ms. Babin has given the level of assessment to her plan which the interest of the child requires. There have been a series of rushed decisions that once implemented, will significantly impact the child.

(b) Mr. Doucette's Plan

[22] Mr. Doucette has been employed by Nova Scotia Power for more than ten (10) years and earns approximately \$100,000 per year. He was employed at a facility in Point Tupper until 2020 when he transferred to Glace Bay to work there with the same corporation.

[23] His current and recent employment schedule requires him to work four twelve-hour shifts. These are followed by six (6) days off.

[24] He says his time off is committed to being with his child.

[25] Following his relocation to Glace Bay, he purchased a home across from his mother and father. This is in a neighbourhood where he was raised and is proximate to other members of his extended family.

[26] He says his son is familiar with the neighbourhood, many members of his extended family and in particular, with his parents.

[27] Ms. Doucette's mother is a retired nurse who worked for more than twenty-five years with local health care.

Legal Principles

[28] The parties agree a change of circumstances exist for the subject child and the parties and the Court has jurisdiction to vary their 2019 Corollary Relief Order ‘CRO’ (*Gordon v. Goertz* [1996] 2 S.C.R. 27).

[29] The issue for the Court to decide is whether it is in the best interests of the child to move to Glace Bay to live with his father or to Spryfield to live with his mother, his teenage half sister, Mr. Bannister and when Mr. Bannister has parenting time with his three children. Each plan proposes that the child would be moved from Arichat.

[30] In determining which plan is superior, this Court must take a balanced approach and consider all factors relevant to an assessment of what is in a child’s best interests without deference to the status quo. The status quo is not offered as an option by the parties.

[31] The *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.) directs that I consider all factors related to the circumstances of the child. Section 16 (3) of the *Divorce Act* requires the court to consider the following factors when assessing a child’s best interests:

Factors to be considered

16(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

- (a) the child’s needs, given the child’s age and stage of development, such as the child’s need for stability;
- (b) the nature and strength of the child’s relationship with each spouse, each of the child’s siblings and grandparents and any other person who plays an important role in the child’s life;
- (c) each spouse’s willingness to support the development and maintenance of the child’s relationship with the other spouse;
- (d) the history of care of the child;

- (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
- (f) the child's cultural, linguistic, religious, and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
- (g) any plans for the child's care;
- (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
- (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
- (j) any family violence and its impact on, among other things,
 - (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
 - (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
- (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security, and well-being of the child.

[32] Recent amendments to the *Divorce Act* require the Court to consider additional factors when relocation of a child is proposed. Section 16.92(1) provides:

Best interests of child — additional factors to be considered

16.92 (1) In deciding whether to authorize a relocation of a child of the marriage, the court shall, in order to determine what is in the best interests of the child, take into consideration, in addition to the factors referred to in section 16,

- (a) the reasons for the relocation;
- (b) the impact of the relocation on the child;

(c) the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;

(d) whether the person who intends to relocate the child complied with any applicable notice requirement under section 16.9, provincial family law legislation, an order, arbitral award, or agreement;

(e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;

(f) the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and

(g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

[33] The recent *Divorce Act* amendments also define who bears the burden of proof when relocation of a child is contested. Section 16.93 provides:

Burden of proof — person who intends to relocate child

16.93 (1) If the parties to the proceeding substantially comply with an order, arbitral award, or agreement that provides that a child of the marriage spend substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.

Burden of proof — person who objects to relocation

(2) If the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the vast majority of their time in the care of the party who intends to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child.

Burden of proof — other cases

(3) In any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child.

[34] Given each party proposes to relocate the child, the Court is governed by s.16.93(3). Regardless the outcome of this proceeding would be the same. The evidence clearly establishes the plan of Mr. Doucette to be in the child's best interests.

Conclusion

[35] These parents accept that each is capable of parenting their son. The choice for the Court is which of the two plans before it is in the child's best interest. To perform this function I must consider the factors identified at section 16 (3) of the *Divorce Act* and the additional factors identified in s.16.92 because the relocation of a child is proposed.

[36] I must consider all factors related to the circumstances of the child of which the factors in the *Divorce Act* are a non-exhausted but mandatory list.

[37] I am satisfied that the subject child is at an age and stage of development when stability is very important. This child is six years of age, has established relationships with extended family members and with both parents. He is familiar with the community of Glace Bay and the neighbourhood where extended family members reside in that community. He is familiar with the home in which his father resides at Glace Bay. The home of Mr. Bannister is a new environment for him, as is Spryfield. Although the child is getting introduced to Mr. Bannister and his extended family and life in his community that is a process which is incomplete.

[38] As commented on, the child has a strong relationship with each parent. An established relationship exists between the child and Mr. Doucette's parents and extended family. Ms. Babin did identify herself as a person with a temper who occasionally threatened to withhold the child from Mr. Doucette. This is a concern for the court. However, on balance Ms. Babin is supportive of the child having a meaningful relationship with his father. I am satisfied that both parents have been intimately involved in the care of their child although in recent years this has been more the responsibility of Ms. Babin by virtual of the child living with her more of the time.

[39] The child is living in a culturally unique community, an Acadian community and both plans have the child relocating to Anglophone communities. I am satisfied each parent will support the child's connection to his cultural heritage. The child care plan advanced by Mr. Doucette is clearly superior in that his mother will be the primary alternative caregiver to the child and his mother has an established relationship with the child. That plan will also bring their son in regular contact with his cousins in the community.

[40] As indicated, I am required to consider the reasons for Ms. Babin's relocation. Mr. Doucette proposes to remain where he is.

[41] I am satisfied that Ms. Babin's plan to relocate is principally motivated by her desire to advance a relationship with Mr. Bannister. I do not discount the merits and benefits of her plan for her teenage child and the possible advantages that will be available to her when relocation is achieved. However, it is clear given the hasty nature of Miss Babin's decision-making that she is principally motivated by a desire to live with Mr. Bannister. Given Mr. Bannister's decision to not relocate to Arichat her only option is for her to relocate to Spryfield.

[42] There are a wide range of educational and extracurricular opportunities available for the subject child in the Glace Bay area. Clearly when Ms. Babin was contemplating a move to the Glace Bay area following the completion of her recent training she was satisfied there were employment prospects for her.

[43] Relocation of the child to Spryfield will have a significant impact on the child's relationship with Mr. Doucette, the paternal grandparents and members of Mr. Doucette's family. It is naïve of these parents to believe that the level of involvement of Mr. Doucette and his family in the child's life will not be significantly diminished if the child relocates to Spryfield.

[44] Currently Mr. Doucette shares decision-making responsibility for the child which as a practical matter will also be diminished.

[45] It is clear that Ms. Babin's plan to live with Mr. Bannister has been developed quickly. I am satisfied it has not been carefully assessed by her and is not child focused.

[46] Her decision to live with and to marry Mr. Bannister is hers to make and it may be in her best interests. I am satisfied her plan to relocate reflects her belief that it is and it reflects that priority.

[47] Ms. Babin and Mr. Bannister were inconsistent when describing how long they dated and how frequently they were together before marrying. Mr. Bannister could not satisfactorily explain why the parties married on the eve of this proceeding given that their wedding was planned for October 2021. In his prehearing filing Mr. Doucette questioned the security and stability of Ms. Babin's relationship with Mr. Bannister and the court is forced to ask whether a sense of insecurity about her plan caused Ms. Babin to advance the date of her wedding to Mr. Bannister. I need not decide whether that is the case but the need to ask the question arises from the rushed plans proposed by Ms. Babin.

[48] The evidence as to whether Mr. Bannister is an employee, or an employer is inconsistent and he is inconsistent on whether he has a mortgage or rents.

[49] Currently, the child attends school in Richmond County. Mr. Doucette proposes that the child be relocated to Glace Bay and Ms. Babin proposes to relocate the child to Spryfield. Both propose to continue his education in the French school system.

[50] Mr. Doucette is a stable and reliable person. He is a responsible, loving parent who has demonstrated that he places a high priority on the well-being of his son. To be with his son he has walked the walk, frequently driving from Glace Bay to Richmond County to pick up his son and to return him to his mother. This is a significant commute.

[51] Mr. Doucette's plan is more in the child's best interests than is the plan offered by Ms. Babin.

[52] I have come to this conclusion because Mr. Doucette's plan offers a more stable and predictable path forward for this child. Mr. Doucette has well paying employment with a corporation which has employed him for some time. He has purchased a home in a neighbourhood familiar to the child.

[53] Mr. Doucette's mother lives across the street from him and will provide after school and other care for the parties' son. He knows her. She performs a similar role for other grandchildren who are cousins of the subject child.

[54] The Court did not learn much about Mr. Bannister. He has three other children with two former partners.

[55] Notwithstanding his stated commitment to Ms. Babin and her son and daughter and the parties' objective to live together and to stay together, much care must be taken by parents proposing to relocate with a child and to live with a new partner, particularly one with whom there is only a brief history.

[56] I am not satisfied Ms. Babin and Mr. Bannister fully considered what their plan to relocate Ms. Babin's child actually means for this child.

[57] Regardless of the optimism, both Mr. Doucette and Ms. Babin expressed about the ability of the other to remain closely involved in the life of their son if they live in communities five hours apart, there is no doubt the relationship of this child with one of the parents will be significantly impacted by the distance between his parents' homes. The child's opportunity to maintain his current level of contact with each parent and extended family members on both sides will be significantly diminished.

[58] As between the plan to relocate the child to Spryfield or Glace Bay, I am satisfied Mr. Doucette's plan is in the child's best interests.

[59] The court retains jurisdiction to hear from the parties further on parenting issues not addressed herein and which the parties cannot resolve.

ACJ