

SUPREME COURT OF NOVA SCOTIA

Citation: *SK v. EC*, 2023 NSSC 410

Date: 20231214

Docket: 86996

Registry: Sydney

Between:

SK

Applicant

v.

EC

Respondent

Judge: The Honourable Justice Pamela Marche

Heard: November 27, 2023, in Sydney, Nova Scotia

Written Release: December 14, 2023

Counsel: Jennifer Snow for the Applicant
Alan Stanwick for the Respondent

Between:

By the Court:

Background and Overview

[1] SK and EC are involved in a contested parenting dispute involving their child, N, who was born in June 2012. Dueling interim motions to address parenting issues have been filed and, in support of their respective positions, each party (then self-represented) filed an affidavit that included hearsay evidence attributed to N that purported to demonstrate her views and preferences as they relate to her family situation.

[2] On October 26, 2023, SK filed a motion to have a Voice of the Child Report (“VOC”) prepared. EC objected. The parties agreed the Court could decide the issue based on affidavit evidence without either affiant being cross-examined.

[3] Oral submissions were heard on November 27, 2023. Counsel for SK provided written submissions on December 1, 2023.

Issue: Should the views and preferences of N be put before the Court through a Voice of the Child Report?

Position of the Parties

Position of SK

[4] SK believes N’s views and preferences can best be communicated to the Court through a VOC. He asks the Court to consider *EP v. SP*, 2016 NSSC 173 and argues:

- N is 11.5 years old. She is bright, mature and able to express her views and preferences.
- N has a right to have her views and preference considered by the Court and a VOC is the best way to have that information conveyed to the Court.
- EC put the issue of N’s views and preferences before the Court when she included child hearsay attributed to N in her affidavit evidence.

- The preparation of a VOC will not cause delay. Moreover, a VOC will facilitate settlement, thereby reducing conflict, in a cost-efficient manner.
- N's views and preferences will be more reliable if communicated through the third-party professional trained to work with children who will be tasked with preparing the VOC.
- The fact that the court proceeding is contentious increases the need to have N's views and preferences communicated to the Court in a manner that best protects her from the conflict between her parents. A VOC will remove the need to have N communicate to the Court through her parents.

Position of EC

[5] EC argues the Court should look at the unique circumstances of each case before ordering a VOC be prepared. A VOC should not be ordered as a matter of course and should not be ordered in this case because:

- SK has yet to demonstrate the requisite change in circumstances to demonstrate the existing parenting order ought to be varied.
- EC claims there is no evidence to suggest N wishes to have her views and preferences considered by the Court.
- EC argues that the preparation of a VOC will be harmful to N. She says N is a sensitive child and participating in the preparation of a VOC may hinder N's mental and emotional health.
- EC believes ordering a VOC will place N in the middle of the conflict between her parents and will put N in a position where she will be forced to choose sides.
- EC says a VOC is not necessary because N communicates her views and preferences to her directly and EC listens to what N has to say. EC claims she and SK are "getting along" and SK has liberal parenting time with N.

The Law

[6] Section 19 of the Nova Scotia *Parenting and Support Act*, SNS, 2014, c. 44 (the *Act*) provides me with authority to order a VOC. This authority is also conferred

in s 32F of the Nova Scotia *Judicature Act* RSNS c. 240

[7] Section 18(6) of the *Act* says the Court shall, when determining the best interests of a child, consider 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.

[8] The law in Nova Scotia aligns with the principles enshrined in the *United Nations Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, to which Canada is a signatory. *Article 12* provides:

State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

[9] A VOC must not be ordered as a matter of course. The Court must consider the unique circumstances of each case and be satisfied that it is in the child's best interest that a VOC be ordered: *EP v. SP*, *supra*; s. 18(5) of the *Act*. A highly conflicted dispute does not preclude a VOC from being ordered: *Leyte v. Leyte*, 2019 NSCA 41.

Findings and Decision

[10] The historical philosophical debate about whether Courts ought to consider the views and preferences of children has been resolved. I must consider the child's views and preferences when it is "necessary" and "appropriate" to do so. Whether it "necessary" and "appropriate" must be assessed within the context of: (1) the child's age and stage of development and (2) whether the views and preferences of the child can reasonably be ascertained (reasonableness).

[11] In the circumstances of this case, I find SK has met the burden of proving it is necessary and appropriate for me to consider N's views and preferences. More specifically, I find it necessary and appropriate that a VOC be prepared so N's views and preferences can be conveyed to the Court in a manner that is in N's best interests. These are the reasons why:

"Necessary and Appropriate" within the context of "Age and Stage of Development"

[12] Concepts of "age" and "stage of development" relate generally to the notion

of capacity. EC does not argue N lacks capacity to properly formulate and express her own views and preferences. In fact, some of EC's arguments are based on the views and preferences she attributes to N. Presumably, EC would not make these arguments if N's age and stage of development were of concern. EC's arguments against a VOC relate primarily to necessity and appropriateness which I will now address.

“Necessary “within the context of “Reasonableness”

[13] EC and SK have each put the issue of N's views and preferences before the Court. In this way, I find that EC has acknowledged it is necessary for the Court to consider N's views and preferences when determining their parenting issues. A party should not point to child hearsay, on the one hand, in support of their position and then, on the other hand, argue that the views and preferences of the child should not be considered.

[14] I reject EC's argument that a VOC is not necessary because EC herself can communicate N's views and preferences to the Court. The comments each party attributes to N are contradictory and are not accepted by the opposing party as being true. Furthermore, I reject EC's argument that a VOC is not necessary because EC herself is hearing directly from N and is already abiding by N's views and preferences. This is an area of disagreement between the parties. The parties are clearly not “getting along” as suggested by EC. In light of this dispute, it is not reasonable to suggest a VOC is not necessary because the parties themselves can effectively communicate N's views and preferences.

[15] I also reject EC's argument that it is not necessary that a VOC be prepared because there is no indication that N wants to have her views and preferences considered by the Court. This is an issue that can be fully canvassed by the Assessor appointed to prepare the VOC. It is not reasonable to suggest that N's views and preferences should not be canvassed because N has yet to express a view and preference on whether she wishes to participate in the preparation of a VOC.

[16] I also reject EC's argument that a VOC is not necessary because N is scheduled to meet with a therapist and her views and preferences can be communicated through this professional. EC's evidence is that N is scheduled to see a therapist in January to “ensure her mental health is stable.” I have no evidence to suggest the therapist, who has yet to meet with N, would be prepared to communicate N's views and preferences to the Court within the scope of a therapeutic relationship that has yet to be developed. It is not reasonable to forgo the preparation of a VOC based on the potential that a therapist might be prepared to testify to N's views and preferences at some point in the future.

“Appropriate” within the context of “Reasonableness”

[17] I reject EC's argument that it is not appropriate to order a VOC because SK has failed to demonstrate a material change in circumstance. In fact, it was EC who filed a Notice of Variation Application in June 2023. Furthermore, the affidavit evidence of EC sworn in June 2023, filed to support her Interim Motion, contains *prima facie* evidence of a change in circumstance. Moreover, the issue of whether a VOC ought to be prepared is best addressed early in a court proceeding. To suggest that a VOC may only be ordered after a change in circumstance has been demonstrated is not reasonable. This would create a systemic delay, discourage VOCs from being prepared in a timely manner, and therefore limit the ability of Courts to consider the views and preferences of children.

[18] I reject EC's argument that it is not appropriate to order a VOC because there is high conflict between the parties and the preparation of the VOC will place N in a loyalty bind that may be harmful to her mental and emotional health. If N is in the middle of her parent's conflict, it is because her parents have put her there. The preparation of a VOC, in and of itself, does not necessarily create a loyalty bind or place a child in the middle of parental conflict. It is the parental response to the preparation of a VOC that may be harmful to a child. It is not reasonable to suggest a VOC is not appropriate because of the potential inappropriate parental response to the VOC.

[19] Furthermore, there is *prima facie* evidence to suggest N's parents have already put N in the middle of their conflict. It is reasonable to expect a VOC is more likely to help N rather than harm her because the VOC provides N with an avenue to communicate her views and preferences in a manner removed and protected from her parents and their conflict. A VOC will relieve the pressure of N communicating her views and preferences through her parents. A VOC may help facilitate settlement negotiation and reduce family conflict. A plan for therapy for N is thankfully already in place and I would hope a goal of this intervention will be to address the impact of family conflict on N.

[20] SK argues a VOC is the most reliable method of putting N's views and preferences before the Court. EC did not explicitly argue the VOC would not be reliable, although high conflict, and related issues which may serve to reduce the reliability of a VOC, are often cited as reasons why a VOC should not be ordered. The reliability of the VOC can reasonably be tested through cross-examination and probative value can be weighed accordingly. Furthermore, N's views and preferences are not determinative, but are one of many factors I must consider when assessing what parenting arrangement is in N's best interest. The obligation of the Court to fully consider and assess all relevant best interest factors helps to ensure a reasonable approach when considering a VOC.

Conclusion

[21] It is in N's best interests that a VOC be prepared. It is necessary and

appropriate that N's views and preferences be considered by the Court given her age and stage of development. A VOC is the most reasonable way to ascertain N's views and preferences and put them before the Court. It is necessary and appropriate, therefore, that a VOC be prepared.

[22] SK's motion for an Order directing that a VOC be prepared is granted. Counsel for SK will draft an Order accordingly. The issue of costs will be deferred to the overall determination of parenting issues.

Marche, J.