

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Murray v Park, 2013 NSSC 264

Date: 2013-08-07
Docket: SFHMCA-082987
Registry: Halifax

Between:

Jason Francis Murray

Applicant

v.

Linda Rebecca Park

Respondent

Judge: The Honourable Elizabeth Jollimore

Heard: August 6 and 7, 2013

Oral Decision: August 7, 2013

Written Reasons: November 21, 2013

Counsel: Jennifer L. Schofield for Jason Murray
Charlene Moore for Linda Park

By the Court:

Introduction

[1] This is Mr. Murray's application under section 18 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, for custody of eight year old Brandon and six year old Noah. The application is opposed by Ms. Park, the boys' mother and the mother of their half-sister, Madison. Both Mr. Murray and Ms. Park are excellent parents, and they have wonderful children, according to the evidence I heard. This application arises as a result of the need to determine where the boys will go to school in the upcoming year. I gave an oral decision at the conclusion of the hearing. Ms. Park had travelled from Corner Brook to appear, and I wanted both parents to know my decision with as little delay as possible so that they could make their plans. I told them that I might formalize my oral decision into written reasons, including full citations to the statute and better organizing of my comments. These are those reasons.

[2] While Mr. Murray also applied for child maintenance, the parties agreed on this and, as well, that they will sell their home.

Family history

[3] The parents began to cohabit in 2003 or 2004, and they married in July 2011. For the past six years, they've lived in Middle Sackville.

[4] Mr. Murray has been employed in the Canadian Navy as a senior sonar operator. He worked twenty-five hours each week, working Monday to Friday, from nine a.m. until two p.m.

[5] While the parties were cohabiting, Ms. Park worked part-time at various jobs, including as a building cleaner and at Lawton's. She says she took on these jobs because the family didn't "ever seem to have any money". She says the last two years of their relationship were quite difficult. Through that time, Mr. Murray was also dealing with health problems for which he sought and followed recommended treatment. He says that the circumstances of the past year have prompted some recurrence of his symptoms and he has attended to them. The circumstances have included the separation, and the loss of the personal, emotional and income support of another parent. The effect of these circumstances on Mr. Murray allows some appreciation of how they might affect the children.

[6] Ms. Park and Mr. Murray first separated in August 2012. At the time, Mr. Murray was deployed in the Pacific. Ms. Park took the children to her mother's in Newfoundland and Labrador. She says she did this with Mr. Murray's consent. According to Ms. Park, she returned to Nova Scotia so the boys could begin school in September 2012. She then returned with them to Newfoundland and Labrador, and Mr. Murray travelled there in September after his Pacific deployment ended.

[7] Ms. Park says that Mr. Murray asked to spend two weeks with the boys. She allowed this, understanding the boys would be returned to her after the visit. After the two weeks ended, Mr. Murray asked to extend the visit over Thanksgiving. When she contacted Mr. Murray about returning them to Newfoundland and Labrador from Nova Scotia after Thanksgiving, she says he responded to her with a text message informing her that he'd begun custody proceedings in Nova Scotia. These proceedings began in early October 2012.

[8] The parents agreed to an interim order which allowed the boys to stay in Nova Scotia with Mr. Murray. Ms. Park says she agreed to this because she was unable to secure counsel to deal with the interim application in Nova Scotia. She has been working with legal aid counsel in Corner Brook. When the matter came for hearing in January, she agreed the boys could remain in Nova Scotia, recognizing they were halfway through their school year, and Brandon was having some difficulty.

[9] In Nova Scotia, Mr. Murray arranged child care for the boys. Brandon continued at the school where he's been a student since Grade Primary. Noah started school there in 2012. Brandon had good attendance and his report card shows he consistently performed well during the first and second terms. Brandon has always done well at school according to his mother. Noah's attendance was also good, and he was consistent or usually consistent in his school performance, demonstrating positive traits in his work, interaction with others, organization and responsibility.

[10] Ms. Park says that both she and Mr. Murray were committed parents. This is consistent with the content and tone of the testimony I heard.

[11] As a result of the parents' agreements, the boys were able to remain in their home, school, activities and church. They continued to have contact with their mother's extended family in Newfoundland and Labrador and with their father's extended family in Prince Edward Island. The disruption they experienced was

limited to the absence of their mother and half-sister from their day-to-day lives. The minimal disruption contributed to their wellbeing.

The Maintenance and Custody Act

[12] The *Maintenance and Custody Act* was amended by S.N.S. 2012, c. 25. In particular, subsection 18(6) was added. It itemizes a number of matters to be considered when determining children's best interests. Some of the matters listed in subsection 18(6) have no relevance to this family, such as clause 18(6)(f) dealing with the children's views and clause 18(6)(j) dealing with family violence, abuse or intimidation.

The children's needs: clause 18(6)(a)

[13] Neither of the boys have any particular or special needs. Each parent has demonstrated an ability to meet the boys' needs appropriately.

Willingness to support relationship with other parent: clause 18(6)(b)

[14] At best, the circumstances surrounding the parents' separation and the boys' various relocations stemmed from confusion between their parents. At worst, each parent was attempting to get the upper hand. Ms. Park didn't rush her decision to leave the marriage, and Mr. Murray wasn't in a hurry to accept her decision. This was coupled with the difficulties of communicating about so intimate an issue where they were a continent apart. As a result, there was uncertainty about the state of the relationship in August and September, and I believe that the events which occurred were more a consequence of the confusion than either parent attempting to manipulate the situation to his or her advantage.

[15] Since this application's been before the court, Ms. Park has acted appropriately in surrendering time with the boys (such as an overnight visit in January 2013) and delaying the January hearing so as not to disrupt or upset the boys. Ms. Park has shown her willingness to give priority to the boys' relationship with their father. As well, in proposing access between them, she suggests that the boys spend more of their summer with their father than with her, recognizing the importance of this relationship.

[16] Mr. Murray has had less opportunity to demonstrate his willingness to put the children's welfare first in arranging access. It appears that he's not done as much as is possible to facilitate access between boys and their mother but, as I say, he hasn't had as much opportunity to demonstrate his good intentions.

History of care: clause 18(6)(c)

[17] Mr. Murray says that while the family was together, Ms. Park would be responsible for the boys during the day while he was at work, taking them to activities and appointments, making their meals or getting supper started if she was working in the evening, participating in school activities when possible and going to parent/teacher meetings. On occasion, Mr. Murray attended parent teacher meetings. Mr. Murray would take over in the evening when Ms. Park typically went to work.

[18] Mr. Murray was active in coaching the boys' baseball teams. These were activities attended as a family. Brandon plays hockey and Noah has started: both boys are goalies. Mr. Murray also takes them to church. They had gone to church as a family, but Mr. Murray says Ms. Park stopped attending church almost two years ago. Regardless of her attendance, Ms. Park ensured the boys participated in Sunday school and related activities. The boys have gone fishing with their father, and he says he's primarily responsible for their bedtime routine and any homework. This would be modest since Brandon is only entering Grade Three and Noah's just finished Grade Primary.

[19] Since the separation, the boys have been in their father's primary care. Mr. Murray says he's kept the boys busy at home and at school. He'd drive them to and from school and play in the school playground for thirty to forty-five minutes after school. He arranged for their care during this summer with a neighbour who has three children of her own. The children have had three different care-givers since the parents separated.

Plans for care: clause 18(6)(d)

[20] Mr. Murray's naval employment is ending this September. He's completed twenty years of military service and he is pursuing two job opportunities, both in Prince Edward Island.

[21] One employment opportunity is offered by Loomis Express. Mr. Murray offered a letter outlining the circumstances of this employment. The letter is explicitly not a contractual agreement, but a letter to assist Mr. Murray in obtaining financing because Mr. Murray will need to acquire a van to take on this employment. The letter says he may have an annual gross income of approximately \$100,000.00 with a three year business agreement. There's no indication of the magnitude of expenses that will be incurred, so I don't know his likely net income. The work that Mr. Murray will do and the hours it will entail

aren't known exactly. He told me that he can anticipate clearing \$162.00 per day. He says he would work from 7 a.m. until 5 p.m., Monday to Friday. Assuming that he works forty-eight weeks each year, he would earn an annual income of \$38,880.00. I note that he would be working a ten hour day, twice as long as his current hours.

[22] The second employment opportunity is with Atlantic Beef Products in Albany, Prince Edward Island. This job would pay \$13.00 per hour and Mr. Murray says he would work forty-five hours each week, twenty hours more each week than he currently works.

[23] Mr. Murray plans to live with his parents until he is established in Prince Edward Island and the family home in Nova Scotia is sold. He and the boys will live in his parents' basement. He's not sure how long this will last. Once he's established, he will rent or purchase a home. He has not made any definite plans in this direction yet.

[24] Ms. Park works thirty hours each week at Sobey's. Her employer has told her that her hours are flexible. She has arranged her hours to begin after the boys have gone to school and to end before they are dismissed at the end of the day. Her work is in a two week rotation. During one week, she works only weekdays and during the other week, she works on Saturday. She is established in her job and almost through her probationary period.

[25] Madison, Ms. Park's daughter, is established in her school. Ms. Park has a home, a three bedroom townhouse. The children have stayed in this home. It is a five minute walk from the home of Ms. Park's mother, brother and sister and a ten minute walk to the school the boys would attend.

[26] Ms. Park is pregnant and expects to deliver her baby in early January 2014. After the baby's birth Ms. Park plans on taking maternity leave for one year.

[27] Mr. Murray questions the attention that Ms. Park will be able to give Brandon and Noah when there is a baby and Madison, as well, is at home. Ms. Park has, in the past, cared for three children age five and younger: when Noah born, Madison would have been five and, if my calculation is correct, in grade primary while Brandon was still a pre-schooler. When this baby is born, Madison will be eleven, and Brandon and Noah on the verge of nine and eight (assuming the baby arrives when due, which is just before their next birthdays).

[28] Mr. Murray questions the stability of Ms. Park's new relationship. He says that she has had two relationships since relocating to Newfoundland and Labrador

and her first relationship was with a man who had been charged with possession of drugs. Ms. Park says that she was unaware of the charge when the relationship began and she ended the relationship as soon as she learned of the criminal charge.

[29] Ms. Park testified that she has been slowly introducing her new partner, Jeremy Blake, to the boys. They began to spend time together during the March Break. Ms. Park doesn't cohabit with Mr. Blake yet, though she plans to have him move in this November. She described Mr. Blake's priorities and, if his priorities are not as they appear, she is not obliged to move in with him. She and Mr. Blake have already discussed how Mr. Blake will relate to the boys and the role he will play in their lives. Ms. Park has clearly considered Mr. Blake's personal priorities and his involvement with her children. She has shown herself capable of determining whether a person is an appropriate partner and ending a relationship that is not appropriate.

[30] Ms. Park's plan for the boys is more advanced than Mr. Murray's. She is employed, has housing, and her family is established nearby to provide support, if needed. She's had a year to make these arrangements while Mr. Murray is just now beginning to make plans.

Children's heritage: clause 18(6)(e)

[31] I've been given no particular information about the boys' cultural or linguistic heritage. I know that Brandon made his first communion last spring and that the boys attend church regularly.

Children's relationship with each parent: clause 18(6)(g)

[32] Both boys have a close relationship with their parents. Mr. Murray and Ms. Park have been active in their boys' lives and each understands the importance of the other to their children.

Extended family relations: clause 18(6)(h)

[33] Mr. Murray has extended family in Prince Edward Island: his parents, two brothers and a sister live there. His siblings are married and the boys have nine cousins who live on the Island. Their cousins are all older, however most are still in elementary school. The boys have seen their father's family three times since the separation and were frequent visitors before then.

[34] Ms. Park's extended family is in Newfoundland and Labrador: her mother, brothers and sister. Most live within a few minutes of Ms. Park's home and are available to provide care, if needed.

[35] Both boys have been raised with their half-sister, Madison. She has lived with them since they were born. She lives with her mother. Her father is in Newfoundland and Labrador. Preserving this relationship is best done by awarding custody to Ms. Park.

[36] Overall, the boys have had fairly frequent contact with both their maternal and paternal extended families despite distances involved.

[37] Ms. Park's situation is more stable. She has had one year to become established in a job and to find a home.

Parent's communication and co-operation: clause 18(6)(i)

[38] While this past year has been a difficult one for the parents, they have been able to work through the year, arranging communication with the boys and visits. Each would likely prefer if this had been easier, but in the context of new separations, they have done very well.

Custody

[39] Both parents are capable and committed to their children. The circumstances of their separation have made this year a difficult one for them. In determining the boys' primary care, given the relative equality of each parent's ability, I have looked to the circumstances they offer the boys. Ms. Park's circumstances are more certain. She has an established home, a family support network, and a job with hours that are tailored to boys' school schedule. In contrast, Mr. Murray has not made any decision about his new employment. His housing arrangements are transitional. His job hours will exceed those he currently works which will create a greater need for child care than Ms. Park has.

[40] I find it is in the boys' best interest that they be in Ms. Park's primary care. Her situation is better established than Mr. Murray's. She offers more access for the boys and their father, and it is with her that the boys can maintain their relationship with their half-sister.

[41] Mr. Murray and Ms. Park have agreed that they shall have joint custody of the boys. To facilitate this, I want to be clear that each parent is entitled to seek information and to obtain information about the boys directly from those third

parties (doctors, dentists, teachers, coaches and others) who are involved with the boys. I recommend that a discrete order be prepared confirming this. An order which outlines this alone will ensure third parties are aware that it is appropriate to communicate freely with each parent while it will avoid providing them with information they do not require.

Contact with Mr. Murray

[42] Opportunities for access are constrained by the parents' residence in different provinces. In making my order, I am cognizant of the difficulties of winter travel and the weather. I also consider the boys' close relationship with their father and the activities they enjoy with him. Ms. Park's suggestion that the boys have more time with their father in the summer than they have with her demonstrates her recognition of the importance of the boys' relationship with their father.

[43] I order that the boys will be with their father during each summer from the first Friday in July until the second last Friday in August.

[44] Every year, the boys will be with their father from the Saturday before Thanksgiving until the Sunday following it. This shall continue until Brandon begins Grade Seven. I appreciate the importance that Mr. Murray and Ms. Park attach to the boys' education. However, until Brandon begins Grade Seven, I am making time with their father a greater priority. Ms. Park may wish to obtain schoolwork from the boys' teachers to send with them to their father's, both to ensure the boys don't miss schoolwork and to make Mr. Murray a part of the boys' education.

[45] The boys will alternate spending March Break between each parent's home, starting with their father in March 2014.

[46] In 2013, the boys will spend Christmas with their mother. Their time with Ms. Park will start the day school ends and continue until noon on December 26. From noon on December 26 until noon the day before school resumes, the boys will be with their father. In 2014, the boys will be with their father from the day school ends until noon on December 26. At noon on December 26, the boys will return to their mother's home.

[47] The Easter Break is one week long in Newfoundland and Labrador. The boys will spend the Easter school break with their mother in 2014 and they will have this break with their father in 2015.

[48] Viewed from the boys' perspective during the 2013-2014 school year, they'll spend a week with their father at Thanksgiving, the first part of Christmas with their mother, the second part of Christmas with their father, March Break with their father, Easter with their mother and they'll be with their father from first Friday in July until the second last Friday in August. During the 2014-2015 school year, the boys will be with their father at Thanksgiving, the first part of Christmas, Easter and from the first Friday in July until the second last Friday in August. They'll be with their mother during the second part of the Christmas school break and during the March Break during the 2014-2015 school year.

[49] On any other occasion when Mr. Murray is in Newfoundland and Labrador, the boys shall have access with him and on any occasion when the boys are in Prince Edward Island, they shall be made available for visits with him. If the boys take part in extra-curricular activities occurring in the Atlantic provinces (including Newfoundland and Labrador), Ms. Park must notify Mr. Murray of these, to provide the boys with the opportunity for additional contact with him.

[50] Mr. Murray may have telephone contact with the boys as often as twice each day. He intends to secure arrangements for face-to-face contact, via Skype or some other application. This may occur daily. Contact, whether by phone or by Skype, won't exceed thirty minutes each day. My concern here is that the boys have frequent contact with their father. I don't expect it will occupy vast amounts of their time.

[51] Having regard to clause 18(6)(e) of the *Maintenance and Custody Act*, I order that if the boys attend church while in their mother's care, it will be the Catholic church. Brandon has made his first communion and this is the church in which both boys have had their religious upbringing to date.

[52] I order that by end of September 2013, Ms. Park provide Mr. Murray with the name and address of the school the boys will attend, the name of its principal and each boy's teacher. She shall also provide the name and contact information (an address and telephone number) for their doctor and dentist. When the boys are registered for activities (including Sunday school), Ms. Park must provide Mr. Murray with the name and contact phone number for the coach or activity organizer within two weeks of the registration. If there are websites for the school, an activity or the boys' health care providers, she must provide website URLs by the applicable deadlines. Mr. Murray will have the same obligation when the boys come to stay with him during the summer. His deadline shall be within two weeks of boys coming to stay with him in the summer.

[53] For so long as Mr. Murray lives in an Atlantic province, Ms. Park may not move the boys from the Atlantic provinces without Mr. Murray's permission or a court's authorization.

[54] My order is pursuant to the *Maintenance and Custody Act*. Within the near future, both parents will be living in other provinces. I direct that the order resulting from my decision be registered in Prince Edward Island and in Newfoundland and Labrador for enforcement purposes.

Financial matters

[55] The parents have reached an interim agreement regarding the boys' financial support. In addition to their agreement, I add the requirement that, if there is a change in either employment status or income, each is to provide the other with notice of that, within two weeks of it happening.

[56] Annually each must provide the other with copy of his or her complete tax return as it would be filed by mail with the Canada Revenue Agency, even if it is not filed, including all schedules and attachments.

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia