

SUPREME COURT OF NOVA SCOTIA

Citation: Porter v. Porter, 2013 NSSC 437

Date: 20131021

Docket: 1207-003406

Registry: Truro

Between:

Joseph Ray Inglis Porter

Petitioner

v.

Stacey Grace Porter

Respondent

Decision

Judge: The Honourable Justice Gerald R. P. Moir

Heard: October 15, 2013

**Decision transcribed
and released:** January 30, 2014

Counsel: Catherine Hirbour, for the petitioner
Stacey Porter, on her own

Moir J. (Orally):

[1] *Introduction.* The Porters were married in 2005. They have two children, Anastasia, who soon turns nine, and Zoey, who is seven. They separated in 2009 and Mr. Porter petitioned for divorce. This decision follows the divorce trial.

[2] Grounds for divorce and residency have been proved. A finding was made about reconciliation. I will grant a divorce judgment.

[3] The primary issue is custody, and child support is secondary. I heard the evidence and must now decide those issues.

[4] *Adjournment.* At the start of the trial, Ms. Porter requested an adjournment to hire a lawyer.

[5] In the beginning, both parties were represented by counsel. They were represented when an interim order was granted early in 2010. After that, Ms. Porter's counsel obtained permission to withdraw, and Mr. Porter filed a notice of intention to act on one's own.

[6] Mr. Porter requested trial dates last June, and shortly after the request the parties consented to a variation order that confirmed changes the parties had made to custody and access arrangements two years earlier. Justice Scanlan granted the variation order in July. Under the arrangements and the order, Mr. Porter has primary care of the children.

[7] The date assignment conference was held in early September. Mr. Porter retained Ms. Hirbour. Ms. Porter acted on her own. By then, the central issue was whether Mr. Porter would be permitted to move to Alberta with the children. Ms. Porter disagreed and stated that she wanted primary care.

[8] Justice Scanlan set the hearing for October 15 and 16, 2013 and he made this note:

Ms. Porter may get counsel, if so and the dates cannot be used will advise ASAP.

[9] Ms. Hirbour filed a brief and prepared for the trial. Mr. Porter does not intend to move to Alberta, unless he can take his children with him. He has an

employer on standby holding a position for him. In the meantime, he and the children have to rely on welfare because it takes the government months to decide whether people desperately in need are entitled to the employment insurance benefits they paid towards.

[10] This proceeding has been outstanding for four years. Despite the requirement noted by Justice Scanlan, no lawyer contacted the court to reschedule the trial. To wait until the trial began to ask for more time to look for a lawyer risks severe prejudice to Mr. Porter because of the cost of preparations and the conditions under which he and the children would live during the consequential delay. In those circumstances, I denied the request for an adjournment.

[11] *Evidence.* I heard from Mr. Porter's mother, Ms. Shirley Nickerson, and from Mr. Porter. I heard from Ms. Porter's new partner, Mr. Daniel LaChance, and from Ms. Porter. A letter by an audiologist concerning Zoey Porter's hearing problem was admitted by consent. Mr. Porter tendered a letter from his Alberta employer and arrangements were made for the employer to testify by teleconference, but, after Mr. Porter was questioned, Ms. Porter consented to the introduction of the letter. It is uncontroversial.

[12] I record my gratitude to Ms. Hirbour for fairness in the cross-examination of Ms. Porter. Ms. Porter gave a general presentation for her own direct. Ms. Hirbour made sure that Ms. Porter covered the specifics there were in the evidence Ms. Porter needed to answer. Often, the cross-examination was more in the interest of getting out the full story than in challenging what Ms. Porter had to say or advancing Mr. Porter's self-interest.

[13] *Marriage and Separation.* Mr. Porter was 32 and Ms. Porter was 26 when they were married. Ms. Porter had a daughter, Raylee, from a previous relationship and, as I said, the couple had two daughters of their own. The couple broke up only four years after the marriage.

[14] When the Porters separated, Raylee went with her mother. Anastasia and Zoey were five and three. Their parents agreed to splitting day-to-day care fifty-fifty, week on and week off. The parties, through their counsel, consented to an interim order that reflects that arrangement. The even split remained the rule but it was not always possible for Ms. Porter to take the children for all of her weeks.

[15] About June 2011, the arrangement changed. Ms. Porter says that her work life was going nowhere. She took a year to complete high school. Then she took Tourism and Management at the Dartmouth Community College, where she learned how to operate a restaurant. She says it was a hard decision to make, but she decided it was better for the girls to stay with their father while she improved her position.

[16] So, for over two years, Anastasia and Zoey have been living with their father and staying with their mother every second weekend.

[17] *Struggles After Separation.* The Porters were living in Truro when they separated. Both parents were under severe financial pressure. As I said, Ms. Porter needed to complete high school. According to Mr. Porter, whose evidence on this point I accept, Ms. Porter was too strapped to see the children as often as she wanted. For his part, Mr. Porter was laid off and he survived on employment insurance. He says, and I accept, that he was looking for work but little was available to him in the Truro area. When employment insurance was running out, Mr. Porter decided to move to Amherst. His mother and stepfather live there.

They could provide temporary accommodation and help with child care when Mr. Porter got a job. His brother also lives in the area.

[18] Mr. Porter and the children moved in with Mr. and Ms. Nickerson. He got a job with Oxford Fine Foods. He moved from there to IMP. Both are major employers in Cumberland. Mr. Porter was twice part of a general layoff. He went on employment insurance the first time. Mr. Porter was forced onto welfare by the long delay people endure when employment insurance entitlement is processed. There were times when he could only afford to feed the children properly, and he lost weight himself.

[19] He was laid off again last spring. It is Mr. Porter's understanding that he is so far down the seniority list at IMP that recall is hopeless. He understands unemployment in rural Nova Scotia exceeds fifty percent. Indeed, it is notorious that the economy outside of Halifax is depressed.

[20] *Recent Successes.* After graduating from community college last spring, Ms. Porter landed a job operating a deli in Burnside. She has one employee under her. She earns \$24,648 or more a year from that job.

[21] She also works casually for the community college invigilating exams. This pays \$12.50 an hour but it is impossible to say how many hours she will get. It is a way for her to keep in touch with the college. Someday a position may arise there, but she is very happy with her position at the deli.

[22] When he was laid off from IMP last spring, Mr. Porter posted a notice about his misfortune on Facebook. A friend from Alberta offered him a job out there.

[23] Mr. Porter is a welder. He graduated at the top of his class and obtained some of his certificates, but failed one. He did not keep up his certificates, but many kinds of industrial welding can be done without a ticket.

[24] Mr. Porter is also an experienced mechanic. He has never qualified for a specialized licence. Like many others in industry, he is permitted to work on machines in plants and other things that do not require a specialty license.

[25] The call came from an old friend with whom Mr. Porter had competed for first place in trade school. The friend had become shop foreman at Titan Tough Contract Welding in Wardlow, Alberta.

[26] Mr. Porter made arrangements for the children to stay with Ms. Porter for most of the summer and with Ms. Nickerson for the rest of the time. Wardlow is a village in southeastern Alberta, an area rich in oil fields. Titan serves customers from a shop in Wardlow and through mobilization.

[27] Mr. Porter says, and I accept, that Titan is very busy and is about to get busier because of two recent multimillion dollar contracts.

[28] Mr. Porter much impressed his employer in the weeks he worked at Titan. His work expanded from welding to include mechanical work. He is promised a raise. He has prospects for becoming shop foreman.

[29] Satisfied that he had a secure job and arrangements under which his children could live comfortably in rural Alberta, Mr. Porter returned here to see if he could

get permission to move the children there. Otherwise, he intends to remain with his children here in Nova Scotia.

[30] *Criticisms.* As is often seen after a marital breakup, the parties are unduly critical of one another.

[31] The criticisms against Ms. Porter concern infrequency of telephone calls during the twenty days or so the girls lived with their grandmother last summer, looseness with bedtime routines, supposed inattention to health, and not supplying the right clothes. I do not intend to go into details. Based upon the cross-examination of Ms. Nickerson, the evidence of Mr. Porter, and that given by Ms. Porter in cross-examination, I am satisfied that Anastasia and Zoey are well looked after by their mother when she has them.

[32] The main criticism of Mr. Porter is that he is unstable and irresponsible. My assessment is just the opposite. Listening to him testify, I heard a person who is balanced and deliberate. Plainly, he is not unstable, emotionally or psychologically. On the evidence as a whole, I find that he cares for his children, daily and in long-range planning, in such a way that puts the children's interests

first. He is a highly responsible parent. The charge of instability and irresponsibility rests entirely on loss of employment several times over the years. This is unfair. It blames Mr. Porter for the financial problems of IMP. The criticism is irrational. I find Mr. Porter acted reasonably in moving from Truro to Amherst for work and, once settled in Amherst, in moving from Oxford Fine Foods to IMP.

[33] *Mobility*. The decision of a majority in the Supreme Court of Canada in *Gordon v. Goertz*, [1996] S.C.J. 52 guides the determination when a custodial parent seeks to move children a distance away from the other parent.

[34] The *only* consideration is the best interests of the children: *Divorce Act*, s. 17(5), and *Goertz*, para. 19. Therefore, the custodial parent's reasons for moving are usually irrelevant: para. 23.

[35] The principle of maximum contact with both parents must be borne in mind in all mobility cases, but the judge should permit the move, and not vary custody, if the children's needs are best served by remaining with the custodial parent: para. 25.

[36] There is no presumption in favour of the custodial parent in mobility cases. Once the threshold of a change in circumstances is established (here, the layoff) "the judge must embark on a fresh inquiry in light of the change and all other relevant factors to determine the best interests of the child" para. 47. However, "the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration" para. 48.

[37] At para. 49, Justice McLachlin, as she then was, suggests these factors that a judge should consider in a mobility case:

- (a) the existing custody arrangement and relationship between the child and the custodial parent;
- (b) the existing access arrangement and the relationship between the child and the access parent;
- (c) the desirability of maximizing contact between the child and both parents;
- (d) the views of the child;
- (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
- (f) disruption to the child of a change in custody;

- (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

[38] *Determination.* This is one of those cases in which the custodial parent's reasons for moving are relevant. Since they were preschoolers, Anastasia and Zoey have lived in households, both their mother's and their father's, that were strapped, sometimes severely strapped, for money. Even when he was working at a good paying job with IMP, Mr. Porter was under the pressure of job insecurity. The girls know what it is to live on welfare waiting for employment insurance payments or rehire.

[39] Mr. Porter did not seek out the job with Titan in Alberta. It found him. Titan paid him \$23 an hour as a welder during the exploratory employment. Now, it offers him \$26 if he returns at a promised forty-four hours a week, he can expect to earn about \$60,000 a year. Also, Titan offers a health benefits plan and "a compressed work week in order to increase Joseph's ability to return his daughters to Nova Scotia to visit family".

[40] This is not a case in which the choice is between maintaining custody to accommodate a move or changing custody to the access parent. Mr. Porter will

not go to Alberta without his children. The choice is three-way: approving the move to Alberta and continuing Mr. Porter's custody, not approving the move and recognizing that custody will remain unchanged, or changing custody to Ms. Porter.

[41] It is very much in the interests of the children that Mr. Porter obtain secure employment and a comfortable income. Mr. Porter's reason for moving is a factor in favour of maintaining custody and giving permission to move.

[42] In this case, disruption of a change in custody can be compared with disruption of the proposed move. In either case, the children would move away from Amherst and their school, friends, paternal grandparents, and uncle.

[43] Ms. Porter and Mr. LaChance have been living together for a year, and they recently purchased a large residence in Silverside subdivision in Waverley, about a two-hour drive from Amherst. The children spent most of last summer there. Should it become their primary residence, they would live with their stepsister as well as their mother and Mr. LaChance, and Mr. LaChance's children during their access visits.

[44] In Waverley, the children have some new friends. They have ready access to recreational spots, such as a lake and a park with a tennis court. They would go to Waverley Elementary, which is a five-minute drive from Silverside.

[45] I find that a move to Waverley would place Anastasia and Zoey in a familiar environment with people with whom they already get along. I am satisfied that material comforts would be provided.

[46] The primary disruption of moving to Waverley for day-to-day care would be the change in custodial parent. For all their lives, Anastasia and Zoey have been primarily cared for by Mr. Porter at least half the time. For the last two years, he has cared for them primarily. Excluding holidays, they were in his direct care over 85% of the time. Two years is a very long time in the life of a seven-year-old and in the life of a nine-year-old. We must not underestimate the resilience of children, their ability to adapt and survive, but we cannot ignore the effects of a change in primary care.

[47] I find that their experience these last few years cemented a very close bond between Anastasia and Zoey and their father. I make that finding based on the testimony of Mr. Porter's mother, as well as his evidence. The bond is not surprising. He follows his children closely.

[48] A move to Waverley would be disruptive for that reason.

[49] In Alberta, the children would live in a small, closely knit, rural community called Cessford. It is a few minutes from Wardlow, where Mr. Porter would be working and where his boss resides. Mr. Porter secured a three-bedroom home in Cessford that backs on what would be the girls' school. He is enthused about class size and aids for Zoey's hearing problems.

[50] Whether Mr. Porter or Ms. Porter has custody, the children will be cared for by a working parent. Mr. Porter's plan is to have his mother come with him for the first month. She is close to the children and would provide the required child care. That would continue if Ms. Nickerson and her husband decide to move nearby. Ms. Nickerson does not want to be far from her grandchildren, and she says she would move if she can stand the cold. Otherwise, the children would be cared for

by a nanny in the home of the President of Titan for a few minutes before the school bus takes them back to Cessford and for a time after school.

[51] As with Silverside, there are many attractions for children in the Cessford area. For example, the girls like livestock. They would be enrolled in 4H and they would have access to a farm.

[52] The primary disruptions of moving to Alberta are that the girls would not see their mother regularly and they would be away from extended family. To some extent, this would be alleviated by terms for access offered by Mr. Porter, which I shall discuss.

[53] We can treat the relationships between the children and their parents together. I have already explained the existing arrangements. The children have good relationships with both parents, but the evidence makes it clear that they depend primarily on their father. Difficulties they had when separated from him last summer are not surprising since he is a very good parent who has the children most of the time and responsibility for them all of the time.

[54] We have evidence from Mr. Porter about the wishes of his daughters. They do not want to move to Alberta. However, they would rather that than to be separated from their father. Mindful of the self-interest at play, I do not believe that Mr. Porter misrepresents what his children have said.

[55] Finally, I have to consider "the desirability of maximizing contact between the child and both parents". The proposed move to Alberta would change the regularity of the children's contact with their mother but it would not seriously diminish their time with her, if Mr. Porter's terms for access are accepted. I cannot say the same for the proposed change in custody.

[56] Mr. Porter offers access during March break, Christmas, one long weekend, and most of the summer each year. He offers to pay for the flights and he suggests Ms. Porter keep her child support payments to help with the cost of access. He will set up video calls whenever Ms. Porter wishes to communicate with the children that way.

[57] Ms. Porter's proposal is not so generous. She proposes that, if she gets custody, Mr. Porter take the job in Alberta anyway. He could take up Titan's

suggestion of compressed hours so as to visit the children in Nova Scotia when he can afford to do so.

[58] Mr. Porter's plan better respects the principle of maximum contact.

Conclusion

[59] The factors are not to be given independent weight. Most prominent for me is the disruption either proposal would cause, and particularly separation from the primary caregiver if custody were to change. Next is the alleviation of disruption that Mr. Porter's terms for access would provide, which terms well serve the principle of maximum contact. The children's views and the benefit to them of stable employment for their father are also considerations, but they are less important.

[60] Remaining in the custody of their father and moving to Alberta is in the best interests of Anastasia Porter and Zoey Porter. I will grant an order giving Mr. Porter permission to make that move.

[61] The order will recite Ms. Porter's income to be \$24,648. Child support is to be ordered in the table amount. I believe that to be \$357 per month, but am open to correction. For so long as access is being exercised in accordance with the order and income remains at that level, Ms. Porter may pay the amount into an account controlled exclusively by her and used exclusively to defray access expenses.

[62] Ms. Porter will have access as the parties may agree and, unless otherwise agreed, from the second week of summer vacation until the last except for one week in the middle, from Christmas Eve until New Year's Eve, during the children's March break, and for one long weekend of Ms. Porter's choosing on three months' notice to Mr. Porter. Mr. Porter will provide travel for the children as soon as possible after an access period begins and as late as possible when an access period ends.

J.