SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Landry v. MacArthur, 2014 NSSC 107

Date: 20140324
Docket: SFSNMCA 076477
Registry: Sydney

Between:

Brian Kenneth Landry

Applicant

v.

Nancy Michelle (Rudderham) MacArthur

Respondent

Judge:	The Honourable Justice Darryl W. Wilson
Heard:	January 16, 2014, in Sydney, Nova Scotia
Written Decision:	March 24, 2014
Counsel:	Jason Boudrot, for the Applicant Alan Stanwick, for the Respondent

By the Court:

[1] On February 1, 2013, Kenneth Landry filed a Variation Application seeking to change the table amount of child maintenance, the percentage of child care expenses and the percentage of R.E.S.P. contributions he was ordered to pay pursuant to the Consent Order dated December 9, 2011.

[2] On April 12, 2013, Kenneth Landry filed a Notice of Motion for interim relief seeking to change the supervised access provision set out in the Consent Order dated December 9, 2011. The Variation Application and the Interim Motion to change the supervised access provision were heard in one final hearing.

[3] The Consent Order provided that the Respondent, Nancy Rudderham, would have sole custody of the parties' child, Maggie Gabriele Rudderham, born June 27, 2012. The provision dealing with Mr. Landry's access stated:

> Brian Kenneth Landry shall exercise supervised access to the child at such locations as the parties may agree to from time to time, and at such times as the parties may mutually agree to. It is understood by the parties that when the Respondent has relocated permanently to Nova Scotia and the child is older that the issue of supervised access will be revisited.

[4] Based on an annual income of $200,000.00 for Brian Landry and $60,000.00 for Nancy Rudderham, Brian Landry was ordered to pay the monthly table amount of $1,735.00 as well as 77% of child care expenses. He was to set up an education trust fund and contribute the minimum of $250.00 monthly to this fund.

[5] At the time the Consent Order was filed the Applicant was working at the Syncrude Plant in Fort MacMurray, Alberta. He continued to work there until September 27, 2012, at which time he took a leave of absence to seek employment in Cape Breton. He had earned $181,560.83 as of September 27, 2012, when he decided to relocate to Cape Breton.

[6] He decided to relocate to Louisdale, Richmond County, to be closer to his daughter and to play a more active role in her life. He is 48 years old and unmarried and has no other children. His parents reside in the Louisdale area. He

owns his own home in Louisdale which is approximately a 1-1/4 to 1-1/2 hours drive from Sydney where his daughter resides.

[7] On January 4, 2013, he began employment with the Port Hawkesbury Paper LP in Point Tupper, Richmond County, where he earned an annual salary, including overtime, of $66,251.28 in 2013. His base salary was $62,407.20.

[8] The employment with the Port Hawkesbury Paper Mill is secure, full time employment and the highest paid employment he was able to obtain in Cape Breton given his education and training.

[9] The Application to Vary requests the new order be effective February 1, 2013, which is the date the application was filed. The Applicant requests any overpayment resulting from the variation be returned to him from funds on hold with the Maintenance Enforcement Program and/or as a credit against future child maintenance payments.

[10] The Applicant was working and residing in Alberta at the time of Maggie's birth. Before relocating to Cape Breton, he had four access visits with his daughter in October, 2011 and two access visits in July, 2012.

[11] Since relocating from Alberta to Nova Scotia in September, 2012, the Applicant has visited with his daughter in October, November and December of 2012. In 2013 he had visits in January, twice in March, once in May, twice in June, once in July, twice in August, once in September, October and November and on December 23rd. According to the Respondent, the total duration of these visits was 33 hours and 40 minutes.

[12] The Respondent's position is that the court should impute income to Mr. Landry of $200,000.00, which is the approximate amount he earned while employed in Alberta and the amount reflected in the Consent Order.

[13] Section 19(1)(a) of the *Federal Child Support Guidelines* provides:

> Imputing income
> 19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

> (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

[14] Counsel for the Respondent claims the Applicant is attempting to avoid his child maintenance obligation by a self induced reduction of income. The test to be applied in determining whether a person is intentionally underemployed is reasonableness which does not require a specific intent to undermine or avoid his child maintenance obligation. See **Gould v. Julian**, 2010, NSSC, 123.

[15] The Respondent says it was not reasonable for the Applicant to leave his employment in Alberta for a lower paying job in Nova Scotia since the rationale he gave for leaving was to spend more time with his daughter and to build a relationship with her. The Respondent states that the Applicant has only spent 33 hours and 40 minutes with his daughter since relocating to Cape Breton. Since he has not spent more time with his daughter, the rationale for him leaving Alberta and his $200,000.00 a year job is not reasonable and the court should deem that he is intentionally underemployed earning an income of $66,000.00 in Cape Breton.

[16] The Respondent has married since the Consent Order was filed. She is a paramedic and her husband is a nurse. The work schedules of both include shift work. The Respondent's income for 2013 was $46,600.00. She was on sick leave for part of the year. Since returning to work, Maggie has been attending day care five days a week. There are times when child care is required outside the day care hours due to gaps in the work schedules of the Respondent and her husband. The Respondent pays her 16 year old step-son for child care at these times.

[17] Based on an imputed income of $200,000.00 for the Applicant and $46,600.00 for the Respondent, the Respondent claims the Applicant should pay 81% of the child care expenses as well as continuing to pay the table amount of child maintenance for a person earning $200,000.00 a year. Since September 2013, she incurred child care expenditures totalling $1,270.00, including $500.00 paid to her step-son. She is requesting the Applicant reimburse her for his appropriate share of these expenditures.

[18] The Applicant is seeking a change to the supervised access provisions of the Consent Order. The Applicant states the pre-conditions set out in the Consent

Order for a review of supervised access have been met. He has relocated permanently from Alberta to Nova Scotia and his daughter is older. Maggie was six months old at the time the order was filed and is now approximately 2-1/2 years old.

[19] The Applicant and the Respondent have filed affidavits describing the existing access arrangements and providing their perspective on the elimination or continuation of supervised access.

[20] The Applicant resides approximately one hundred kilometres from the Respondent's and Maggie's residence in Sydney. According to the Applicant, he must contact the Respondent by text message to arrange an access visit. Some visits are indoors and some outdoors. In either case, the Respondent is always nearby.

[21] According to the Applicant, the existing supervised access schedule is not working in Maggie's best interest for the following reasons:

a. He is a shy person who suffers from stuttering. He finds interactions with the Respondent and her husband intimidating and frustrating and has a great deal of difficulty expressing his opinions with regard to Maggie. He finds the Respondent difficult to talk to and domineering in their interactions. Therefore, both before and during most access visits he is extremely nervous and suffers a great deal of anxiety.

b. The Respondent has never encouraged the development of a bond between Maggie and himself. The Respondent encourages Maggie to call her husband "daddy" and on occasion has insisted that Maggie call him "Kenny" and not daddy. The Respondent has not done anything to inform Maggie that the Applicant is her father or support a positive relationship with him.

c. The Respondent has family in the Louisdale area where his parents reside. She has never contacted them, or taken Maggie

for a visit to their home or asked them to visit with her relatives when she and Maggie are in Louisdale.

d. The Respondent has discouraged the development of a bond between him and Maggie by constant supervision and frequent negative, unsolicited comments on his interactions with Maggie including his inappropriate choice of toys and food. She does not allow him to change a diaper and schedules visits close to Maggie's nap time, when she is likely to get tired and cranky.

e. The Respondent has created a catch 22 situation for him whereby she feels that he should have supervised access because he has not developed a strong bond with Maggie but by insisting his access be supervised he is not able to develop this bond. The Applicant is a volunteer fireman and has taken a first aid course. Maggie will be safe and well cared for when she is with him. The Applicant believes the current access arrangement prevents him from establishing a strong and loving relationship with Maggie. From his perspective the only way he can develop a strong and loving bond is for the visits to occur in an unsupervised environment where he can relax, be himself and allow Maggie to enjoy her time with him and his family.

f. The Applicant has taken family members with him on access visits because his time has been limited and this is the only time they are able to visit their granddaughter and/or niece. The Applicant did not see Maggie after January, 2013 for some time because of the pending court application and his anxiety about the Respondent's reaction to his application. Also, the Respondent was on sick leave as a result of an operation, and he did not want to impose on her to supervise an access visit.

g. His available time after he returned to Cape Breton from Alberta was limited as he was busy looking for a job and

renovating his home to accommodate future visits with Maggie.

h. He works Monday through Friday and there have been occasions when he's been on call for work which has limited his ability to visit with Maggie on the weekends. There was also a three week period when his phone was not working. He was unable to communicate with the Respondent because of a problem with the texting capability of his phone. The Respondent insisted that he text her to arrange access visits. He had assumed the Respondent was not answering his texts before he realized there was a problem with his phone.

[22] It is the Applicant's position that it is in his daughter's best interest to develop a strong and loving bond with him and the only way for that to develop is for him to spend time with her unsupervised and on his own terms. The Applicant's position is that supervised access is not required and is not a normal circumstance. He requests unsupervised access immediately with a phase in period to overnight access. He proposes four consecutive Saturdays in Sydney from 10:00 a.m. to 5:00 p.m., followed by 2 one day visits to his home in Louisdale from 10:00 a.m. to 5:00 p.m. followed by 2 overnight visits to his home in Louisdale with the intent that these would be on Saturdays through Sunday. He believes a regular specified access schedule consisting of every second weekend from 8:00 a.m. on Friday to 5:00 p.m. on Sunday with additional time during the Christmas and Easter holidays as well as the child's birthday would be in Maggie's best interest.

[23] The Respondent's evidence is that:

a. She has told the Applicant he could see Maggie whenever he wanted.

b. The Applicant's access visits have been infrequent and sporadic. He has only visited with Maggie for 33 hours and 40 minutes since her birth.

c. Maggie sees the Applicant as a stranger and not her father.

d. The Applicant had the opportunity to develop a bond with Maggie but has not done so. He did not follow through on a proposal in September 2013, for five hour visits on Saturday.

e. The Applicant does not interact with Maggie during visits. She has observed Maggie reacting negatively to the Applicant on occasion, including her struggling to get away from him when he picks her up, cowering behind her when she sees him, and wanting to leave visits early.

f. The Applicant takes family members along for access visits which limits his ability to develop a bond.

g. It is harmful for Maggie to go with the Applicant who is a stranger to her.

h. She agrees that it's alright for Maggie to call the Applicant and her husband "daddy".

j. She has never denied the Applicant an access visit when he has requested one.

k. Maggie requires child care. Initially she was enrolled in the Sydney Daycare. She attended for two months. She did not enjoy it. She is now enrolled in the Health Park Daycare Centre and attends five days a week. She is enjoying this daycare setting.

[24] The Respondent's position is that the Applicant's access should continue to be supervised in the short term. She is not opposed to unsupervised access in the future. She believes supervised access is in their daughter's best interest at this time because there is essentially no relationship between the Applicant and Maggie due to his limited contact with her. The Respondent's position is that the Applicant had an opportunity to develop a bond with his daughter since returning to Cape Breton but did not do so. She has not prevented him from developing this bond. She stated her husband has a closer bond with Maggie than the Applicant.

The Respondent's position is that the Applicant should exercise regular and consistent access before he moves to unsupervised access. She is agreeable to a third party such as the YMCA supervised access program or another person agreeable to both of them to be present during access visits.

Law and Analysis:

[25] The first issue to be determined is whether the Consent Order provides for a review of the order at a future date or is it a final order subject to variation. This issue was not directly discussed by counsel in their submissions.

[26] The order dated December 9, 2011, was a Consent Order. As such, there was no judicial determination of the issues between the parties. The order contains the following wording "it is understood by the parties that when the Respondent has relocated permanently to Nova Scotia and the child is older that the issue of supervised access will be revisited".

[27] The issue of whether the current hearing is a review hearing or a variation hearing is significant. Jollimore, J. had the following comments to say on review hearings in her recent decision - **L.E.S. v. M.J.S.,** 2014 NSSC 34 beginning at paragraph 62:

> Review hearings
>
> 62 Parties sometimes resolve litigation by agreeing to review orders. Often they do this without clearly defining the scope of the review. Here, the parties frequently returned to court for reviews, indicating nothing more in the orders than that there was to be a review.
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> 63 While decided in the context of spousal support under the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3, the Supreme Court of Canada's decision in Leskun, 2006 SCC 25, explains review hearings. According to Justice Binnie, who wrote the reasons for the unanimous court, at paragraph 39, wherever possible, a judge should determine all the parties' claims and make an order that is permanent, subject to variation upon proof of a change in circumstances. In some cases this may not be possible because a particular circumstance is unknown. If the judge thinks it's essential to identify an issue for future review, that issue should be tightly circumscribed. This is necessary because in a review hearing neither party bears the burden of proving a change in circumstances, while this is necessary in a

> variation application pursuant to section 17 of the Divorce Act. If the scope of the review isn't constrained, either party may try to use the review to re-litigate.

[28] In my view, these comments are relevant to proceedings under the *Maintenance and Custody Act* as well.

[29] Section 18(5) of the *Maintenance and Custody Act* provides that the children's best interest are the paramount consideration in parenting proceedings. Subsection 18(6) identifies various factors for the court to consider when making this determination. In **Blois v. Blois** (1988) 83 N.S.R. (2d) 328 NSCA, the Nova Scotia Court of Appeal held that subsection 18(5) requiring a court to give paramountcy to the best interest of children gives the court the right under the *Maintenance and Custody Act* to place conditions on custody orders.

[30] In my opinion the current proceeding regarding the Applicant's supervised access is a review hearing. The issue has been tightly circumscribed to decide whether supervision is necessary. Neither party has the onus of proving a material change of circumstances but each party must show that his or her plan for access is in Maggie's best interest. The preconditions set out in the Consent Order have been met. The Applicant has relocated permanently to Nova Scotia and Maggie is older.

Child Maintenance:

[31] Child maintenance was not specifically identified as an issue for review in the Consent Order. The Applicant's work history prior to the time the order was filed was not discussed. It appears he owned a home in Louisdale. At the time the Consent Order was filed the Respondent understood the Applicant may relocate permanently to Nova Scotia. Neither the Respondent nor the Applicant knew when this would occur. In my opinion, by agreeing to review the Applicant's access on certain conditions being met, the Respondent by inference agreed to a review of child maintenance when those conditions were met.

[32] Having considered all the evidence, I am satisfied the Applicant relocated to Nova Scotia to develop a positive relationship with his daughter. A number of factors including his own personality and demeanor, the distance between his residence and his daughter's residence, the child's level of development and the attitude of the Respondent have made this transition challenging. In my opinion,

the Applicant's relocation is a genuine effort to develop a relationship with his daughter and not meant to reduce his child maintenance obligation.

[33] If I am incorrect and there was no agreement to review child maintenance when the Applicant relocated to Nova Scotia, I find his permanent relocation to Nova Scotia, the obtaining of full time employment and his genuine attempts to establish an ongoing relationship with his daughter are material changes in circumstances.

[34] The Applicant's income earning capacity in Nova Scotia is substantially less than his income earning capacity in Alberta. The Applicant is not looking for a reduction in his child maintenance obligation during the time he was on leave of absence from his employment in Alberta. The Applicant has obtained full time employment in his field commensurate with his training and education. He is earning the maximum income he is capable of earning in the area where he resides. The parties contemplated the Applicant's permanent relocation to Nova Scotia. The measure of whether he is intentionally underemployed for purposes of determining his income pursuant to the *Guidelines* should be his income earning capacity in Nova Scotia and not Alberta. By this measure he is not intentionally underemployed.

[35] The significant reduction in the Applicant's income since the issuance of the Consent Order is a change of circumstances that warrants a variation of his child maintenance obligation. I fix his income for purposes of determining the table amount of child maintenance and for sharing of section 7 child care costs at $66,000.00. Effective February 1, 2013, the Applicant shall pay monthly child maintenance of $558.00. I fix the Respondent's income for purposes of sharing section 7 child care expenditures at $60,000.00 per year. Her income in 2013 was $46,600.00 which was less than the income specified in the Consent Order. This reduction was due to time off work because of illness. There was no evidence she is unable to earn $60,000.00 going forward.

[36] The amount of child care expenses to be shared is the net amount after taking into account any tax savings received by the Respondent related to child care tax deductions or credits. The Applicant is to pay 58.6% of the net child care expenditures in 2013 and the Respondent 41.4% based on an annual income in 2013 of $66,000.00 for the Applicant and $46,600.00 for the Respondent.

Effective January 1, 2014, the Applicant is to pay 52% of the net child care expenditures and the Respondent 48% based on an annual income of $66,000 for the Applicant and $60,000.00 for the Respondent.

[37] I am not prepared to make any changes to the Applicant's contribution to the R.E.S.P. The order requires a minimum contribution of $250.00 per month. There is no indication this contribution was to be shared based on income. Presumably the funds accumulated will be disbursed by the Applicant as his contribution toward Maggie's post secondary education needs at the appropriate time.

[38] Any overpayment of child maintenance which occurred as a result of the variation is to be repaid from funds on hold with the Maintenance Enforcement Program or as a credit against future child maintenance payments.

Access:

[39] While neither party has the burden to prove a material change of circumstances in a Review Hearing, the burden of proof is on the Respondent to show that supervised access continues to be in Maggie's best interest. There was an agreement that access be supervised until the Applicant permanently relocated to Nova Scotia and Maggie was older. The Respondent's position is that supervised access is necessary in order to introduce Maggie into the life of her father because of his limited contact with her. The Respondent does not raise any substance abuse or clinical issues involving the Applicant. She does not claim that Maggie requires protection from any form of abuse. She agrees that supervised access should not continue indefinitely.

[40] The law recognizes supervised access is an exceptional remedy. Justice Abella when a member of the Ontario Court of Appeal said at paragraph 33 of **M.(B.P.) v. M. (B.L.D.E.)**, 1992(42 RFL)(3d) 349 that "the purpose of supervised access, far from being a permanent feature of a child's life, is to provide 'a temporary and time limited measure designed to resolve a parental impasse over access. It should not be used [...] as a long term remedy'."

[41] The parties have not been able to resolve this impasse over access since the Applicant's relocation to Nova Scotia in the Fall of 2012. Both must accept some

responsibility for this failure. Both have an important role ensuring that Maggie develops a positive relationship with the Applicant so that access does not need to be supervised.

[42] I agree with the submission of counsel for the Respondent that the Applicant must spend more time with Maggie in order for her to feel comfortable with him. However the Respondent must do more than she is currently doing to ensure that Maggie knows the Applicant is her father and feels comfortable in his presence.

[43] It is clear that the Respondent has moved on with her life. She has remarried. It appears she perceives Maggie is part of her new family unit. From child care receipts, I note that Maggie's surname is MacArthur and not Rudderham, which was her surname in the Consent Order. The Respondent does not mention the Applicant to Maggie except when he calls to arrange a visit. She allows Maggie to call her husband "daddy" and the Applicant "Kenny". The Respondent has no difficulty enrolling Maggie in day care where she is left with strangers. She is also prepared to allow her sixteen year old step son to provide care unsupervised. However, she does not seem ready to extend the same courtesy to the Applicant.

[44] It is in Maggie's best interest that the Respondent prepare her for the change from supervised to unsupervised visits. It would be helpful if the Respondent spoke more about the Applicant to Maggie and why he is an important person in her life. The court recognizes and so should the Applicant, that it is difficult for a young child such as Maggie to understand the different family units in her life. The Respondent should recognize that the present access arrangement is awkward for the Applicant and Maggie and unlikely to be beneficial to Maggie if it continues in its current format. Any positive reinforcement the Respondent is able to provide Maggie would assist the transition from supervised to unsupervised greatly.

[45] The Applicant shall have weekend access on Saturdays and Sundays for 4 consecutive weekends for 1 - 2 hours per visit. These visits should occur at a time when Maggie is fresh and not tired. They are to take place in the Sydney area initially and are to be in the presence of a third party familiar to Maggie. This person may include the Respondent or her step-son but not her husband. The

Applicant will decide where the visits are to take place. The sixth and eighth visits are to be unsupervised.

[46] The Applicant shall then have an unsupervised access visit for 4 hours every weekend for the next 4 weekends either on a Saturday or Sunday in the Sydney area. The Applicant shall assess whether Maggie is able to handle the extended visits and may return her earlier if he feels it is in Maggie's best interest.

[47] The Applicant shall then have an unsupervised weekend visit on either a Saturday or Sunday from 10:00 a.m. to 5:00 p.m. for the next 4 weeks which may occur at his residence in Louisdale. Again, the Applicant should assess Maggie's ability to handle such visits and should not be afraid to terminate the visit early by returning Maggie to her residence in Sydney or the residence of the Respondent's relatives in Louisdale if that is agreeable to the Respondent.

[48] If the Applicant is on-call for work at the time of the scheduled access visits, he shall notify the Respondent and the access visit shall be cancelled. The cancelled visits will not be considered a failure to comply with the Order. The Applicant shall continue to have visits every second weekend either on a Saturday or Sunday from 10:00 a.m. to 5:00 p.m. in Louisdale until the Order is reviewed.

[49] There shall be no overnight access until such time as the Order is reviewed.

[50] If the parties are unable to agree on the final form of the Applicant's access, either party may contact the court to schedule a Review Hearing. The purpose of the review would be to assess whether any further adjustments are necessary to the access schedule.

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J.