IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Bourque v. Lemire, 2005 NSSC 84

Date: 20050411
Docket: SFHMCA-17373
Registry: Halifax

Between:

Christopher Thomas Lemire

Applicant

v.

Stephanie Nicole Bourque

Respondent

Judge:	The Honourable Justice R. James Williams
Heard:	April 8, 2005, in Halifax, Nova Scotia
Oral Decision:	April 11, 2005
Transcribed and Edited:	April 19, 2005
Counsel:	Timothy Gabriel, for the Applicant Respondent, self-represented

By the Court:

[1] This proceeding concerns Eleri Bourque-Lemire, born November 29, 1994, and Aiden Bourque-Lemire, born May 4, 1997. These are the children of Stephanie Nicole Bourque and Christopher Thomas Lemire. Ms. Bourque and Mr. Lemire married on October 2, 1993 and separated in or around May 5, 2002.

[2] On November 27, 2003 a contested interim application was held before Justice Dellapinna of this Court. Justice Dellapinna ordered as follows:

> IT IS ORDERED THAT pending further order of this Court:
>
> a. The parties shall share joint custody of the children, whose primary residence shall be with the Applicant, Stephanie Bourque;
>
> b. The Respondent, Christopher Lemire, shall have access with the children as follows:
>
> I. Every Tuesday and Wednesday from after school until between 9:00 to 8:1;5; p.m. each day and
>
> ii. Every second weekend from Friday after school to between 5:00 and 5:30 p.m. Sunday, beginning Friday December 5, 2003 and every second weekend thereafter.

[3] Additional access was provided for during holiday periods and specified.

[4] The affidavit and other evidence before me indicates that there has been some history of access difficulties between Ms. Bourque and Mr. Lemire. This is referred to in material that was filed before Justice Dellapinna and in the subsequent materials filed.

[5] Most recently Mr. Lemire suggests (and I am quoting from paragraphs 6 and 7 of his Affidavit of February 8, 2005):

> 6. Around Christmas time this year Ms. Bourque indicated to me that she was not prepared to follow the Interim Court Order and was going to cut back my

Christmas access. I reluctantly contacted the police to find out what their policy was in terms of enforcement of Orders under such circumstances, and when I called her back and relayed to Ms. Bourque the information with which the police had provided me, I found that I was able to have the children over Christmas for the proper time.

7. However, on January 4th, 2005 Ms. Bourque contacted me (after I dropped off the children from an access visit), and told me that she and the children were moving to Bridgewater at the end of January and that was "all there was to it". She also told me that she plans on driving back and forth from Bridgewater with the children to take them to their regular school, which is Rockingham School, in Halifax every day. I was concerned and asked her if the children could stay in town with me during the week to go to school and minimize the back and forth. She just laughed and said "no way". Perhaps naively, I hopped she was just trying to get a "rise" out of me, and I didn't act on this immediately. I was devastated to learn that she followed through on it and that she indeed moved with the children, at the end of January to Bridgewater.

[6] Ms. Bourque, in her affidavit of March 15th states:

7. I contacted Mr. Lemire, not on January 4th, 2005, but on January 5th, 2005. The children and I discussed moving to Bridgewater many times, and I did not make this move without their consent and support. They are both very happy in Bridgewater, and have transferred to Bridgewater Elementary School. They have made friends and are enjoying their new surroundings. They are enrolled in the YMCA after school program in Bridgewater and often say "Bridgewater is so much better than Halifax" as they have adjusted extremely well to a new school and a new start.

8. Mr. Lemire does not take an active role in the children's lives, on any level. Homework was more often than not, not completed on Tuesdays and Wednesdays. Mr. Lemire has only attended one parent teacher meeting since our separation in 2002. Eleri is in grade 4 now, and Aiden is in grade 2. Their education and medical and dental health have rarely been addressed by Mr. Lemire. Despite knowledge of their appointments, which I initiate, Mr. Lemire does not attend nor inquire about later.

[7] The evidence from Mr. Lemire would indicate that he attended a significant number of the parent-teacher meetings.

[8] The children were moved to Bridgewater by Ms. Bourque and registered in school in Bridgewater. Bridgewater is an hour or more from Halifax. Mr.

Lemire has applied to vary the existing order. He seeks interim custody of the children. Ms. Bourque replies, seeking sole custody of the children herself.

[9] Since Justice Dellapinna's Order was made in November of 2003, I conclude that both parties have been involved in the parenting of these children. I conclude that Mr. Lemire has in large part exercised his access, has been involved in the extra-curricular activities of the children, including specifically soccer and parent-teacher programs. Until Ms. Bourque's move in January both parents resided in the same area, relatively proximate to the children's school and after-school programs. There are some difficulties in their (the parents') communication, particularly with respect to the event of May 4, 2004, for which I conclude both have some responsibility. Ms. Bourque has indicated that she has concerns about movies, video games and some other aspects of Mr. Bourque's parenting. On the whole, her concerns, when put in the context of her move seem, in a word, exaggerated.

[10] At or near the end of January, Ms. Bourque unilaterally moved the children to Bridgewater, one hour from Halifax, changed their school, changed their after-school care and as a result of the commuting time now added to the parties' situation. She effectively eliminated and frustrated Mr. Lemire's ability to exercise access as ordered by Justice Dellapinna, particularly the weekday access. She significantly altered his ability to be involved with the care of the children as contemplated by Justice Dellapinna's Order.

[11] There has been a change in circumstances since Justice Dellapinna's Order. There has been in effect a unilateral action by Ms. Bourque that frustrates the terms of the existing court order. These are, in my view, exceptional circumstances. It is an exceptional occurrence. It is an exceptional action that Ms. Bourque has taken. These children went to school, had after-school care and had their activities in an area that both their parents lived in. They had significant contact with both parents. The children's doctor remains in Halifax; their dentist remains in Dartmouth, which is certainly within the Halifax municipality. Ms. Bourque works in Halifax at Chain Lake Drive. Ms. Bourque has until January attended Mount Saint Vincent University in Halifax. She has indicated that she is postponing or

suspending her education or studies as a result of her move - a reflection, I conclude, of the difficulties the commute from Bridgewater involves.

[12] Ms. Bourque stated that she consulted the children about the move a number of times. She said they knew that it would mean they would "not see Dad as much". She spoke to them. She indicated in her viva voce testimony and asked them "not to tell Dad of the move". Despite all of this, she then criticizes Mr. Lemire for, in the aftermath of her move, making reference to the Court Order with the children. I have evaluated her evidence of the wishes of the children as being less than independent.

[13] Ms. Bourque has indicated that she moved to Bridgewater to live with Kirk Solomon, a gentleman who she apparently met October 19, 2004, less than two months, well less than two months, before the move was planned and raised with the children (in early January). She says now, in defence of her move, that the children have their own rooms and a yard to play in. She has concerns that Mr. Lemire has only a two-bedroom apartment, that there have been incidents of lost clothing and mittens and concerns about his reaction to that. I am satisfied that his explanations for those events are reasonable.

[14] Ms. Bourque has general, non-specific concerns regarding Mr. Lemire's parenting, which betray a rather negative attitude to him and his role with the children. My impression of Ms. Bourque is that she feels that she and she alone is entitled to make decisions concerning the children, irregardless of the impact on Mr. Lemire, Justice Dellapinna's order and the children. She did not.

[15] The hearing in this matter took place on March 29th, 2005. Near the end of her testimony Ms. Bourque indicated "I'll move back to Halifax", or words to that effect. She queried whether the Court would order her back to Halifax. She was told by this Court that "no, the Court would not order an adult to move". As a result, I adjourned the matter from March 29th to give her an opportunity to think about her position and if she felt it appropriate, to consult with legal counsel. The matter was adjourned to April 8th. She returned to the Court. She indicated that she was staying in Bridgewater. She gave brief further evidence and the matter was concluded.

[16] We have here a situation where there is a very specific Court order, a joint custody order, a provision that primary residence would be with Ms. Bourque and specific frequent access by Mr. Lemire. She has unilaterally changed that. The steps she has taken frustrate the access contained in the Order and the contact Mr. Lemire may reasonably have with the children with their after-school caregivers, parent-teacher programs, etc. Her actions were unilateral. She has moved herself and the children from the community she continues to work in, a community in which the children have their medical and dental care, the community in which their father is in, the community in which she went to University.

[17] The application before the Court is to change the primary residence of the children. I am satisfied that there is a change in circumstances in this case that warrants a review of the existing Interim Order. I am satisfied that, that said, the responsibility of the Court is to consider what appropriate interim order should be made at this time. I am cognizant of the fact that in a circumstance such as this, the Court must focus on the best interests of the children and not the rights of the one or the other parent. I am also cognizant of the fact that the wishes and concerns of a parent who has the responsibility of primary residence of the children is entitled to have her concerns, wishes and views considered very seriously.

[18] The case of Gordon v. Goertz (1996) 2 S. C. R. 27 (S. C. C.) contains, in my view, the applicable law. Chief Justice McLachlin stated (starting at paragraphs 49 and 50):

> [49] The law can be summarized as follows:
>
> 1. The parent applying for a change in custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
>
> 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.

6. The focus is on the best interests of the child, not the interests and rights of the parents.

7. More particularly the judge should consider, inter alia:

(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;

©) 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.

[50] In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[19] Here these children are school aged. Their school and after-school care has been changed once already in the past few months. I am concerned and take the circumstances before me very seriously. I have attempted to focus on

the best interests of the children. I have attempted to focus on the wishes and concerns of the residential parent under the existing order. I have attempted to consider the factors enumerated by Chief Justice McLachlin that I have referred to.

[20] The Court must recognize that there was an Order in place from the hearing in November of 2003, that that Order was based on the best interests of the children, that that Order has been effectively unilaterally altered by one parent. I conclude that Ms. Bourque's decision to move was not in the best interests of these children, not carefully made. The decision to move was clearly done in the early weeks of a new relationship. I conclude that it was done either to frustrate or with a rather callous indifference to the children's relationship with their father. The question of what is in the best interests of these children in these circumstances must be seen not only in terms of their day to day care, but in the context of how Justice Dellapinna's Order has been changed in a de facto way by Ms. Bourque.

[21] I have had an opportunity to see both of these parents. I am satisfied that they are both capable parents. I am satisfied that they are both entitled to a meaningful relationship with their children. I am satisfied that Ms. Bourque has unilaterally taken steps that significantly disrupt not only the quantity but the quality of the relationship that Mr. Lemire has with the children. She has done so in the face of an existing Court Order.

[22] I have examined the circumstances of these children as closely as I can based on the evidence that is available to me.

[23] I conclude that it is not in their best interests to again switch schools this school year. I conclude, as I have stated, that both parties are independently capable of caring for these children, that both parties have been involved in their care in a meaningful way, that both parties have been involved with the children in an active way.

[24] I do not find the evidence of Ms. Bourque that attempts to diminish the parenting abilities of Mr. Lemire persuasive in any way. I conclude that Ms. Bourque, through her actions, has demonstrated an inability to separate the children's needs from her own. She has, as I have indicated,

demonstrated a disregard, or perhaps even antipathy, for the relationship of the children with their father.

[25] I conclude that it is not in the children's best interests to remain in Ms. Bourque's residential care beyond the end of the school year. I conclude that it is in their best interests to be in the primary care of their father effective the last day of June of 2005, that is at the end of the existing school year. They will remain in his primary care until further order of the Court. Ms. Bourque will have access each second weekend in the summer from 5:00 p.m. Friday to 8:00 p.m. Sunday evening. She will be responsible for the transportation of the children. She will have the right to two weeks' of block access provided that it is not within the first two weeks of the month of July. Her each second weekend access will be suspended during two weeks of block holiday time that Mr. Lemire may designate for the children to be with him. Her access will include such other time as the parties may agree. If it becomes necessary for the parties to return to the Court to specify further access, I will reserve the right to so consider such a motion.

[26] The children's extracurricular activities from June 30th forward, until further order of the Court, will be in the Halifax municipality. The terms of the existing Order will be continued (in the Variation Order) until June 30th. Effective July 15th Ms. Bourque will pay child support as follows: the table amount of support based on income of $15,888.00 per annum, being $238.00 per month for two children, which will be payable on the 15th day of each month commencing July 15, 2005. Secondly, she will make a contribution to child care based on her income of $15,888.00 as disclosed by the documentation before me and his of $33,996.00. She will contribute 30% of child care costs, slightly less than the actual ratio of 32%.

[27] Finally, I would vary the existing Order for child support payable by Mr. Lemire to Ms. Bourque to reflect his current income. His current income, as indicated in the February Statement of Financial Information, is $33,996.00 per annum. The table amount for this amount of support for two children is $481.00 per month. The existing child support Order will be terminated as of January 1, 2005 and replaced by a provision that commencing January 15, 2005 and the 15th day of each month through and including June 15,

2005, Mr. Lemire will pay Ms. Bourque the table amount of child support for two children based on $33,996.00 (or $481.00 per month). It would be my expectation that this Order would be brought current by no later than April 30, 2005. There will be no adjustment to the child care expenses contained in Justice Dellapinna's Order. It will be shared by the parties until the end of June.

[28] There is no order for costs requested. I have directed that Trial dates and an organizational pre-trial be set so that this matter may move forward from an "interim" stage.

J. S. C. (F. D.)

Halifax, NS