IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Peters v. Peters, 2005 NSSC 97

Date: 20050426
Docket: SFHMCA 036866
Registry: Halifax

Between:

Joseph James Sheldon Peters

Applicant

v.

Michelle Helen Peters

Respondent

Judge:	The Honourable Assoc. Chief Justice Robert F. Ferguson
Heard:	April 22, 2005, in Halifax, Nova Scotia
Written Decision:	May 19, 2005
Counsel:	Tanya G. Nicholson, for the Applicant Kim A. Johnson, for the Respondent

By the Court:

[1] Sheldon and Michelle Peters were married in June of 2000. They are the parents of Jessica, two years old, and Julia, nine months of age. They separated in early September of 2004. Approximately two months after their separation, they were parties to a Partial Separation Agreement that dealt with most issues of their relationship, including Ms. Peters' retaining ownership of the family home and Mr. Peters' providing for child support. A somewhat unusual aspect of this agreement is that, while providing child support for Ms. Peters thereby acknowledging the children remain in her care, this agreement was silent as to any custody or access provisions.

[2] On March 5, 2005, Mr. Peters made an application pursuant to the *Maintenance and Custody Act* seeking to be a joint custodian of the children and to have specific access with them. His accompanying documentation indicated the children would reside primarily with Ms. Peters and he would have access on alternative weekends and during holiday periods. This application did not progress as on April 6, 2005, he made a further interim application requesting Ms. Peters not be allowed to relocate to another province with the children and to provide him with specific access to the children.

[3] It is this interim application and the resulting reply application of Ms. Peters that are the subjects of this decision.

[4] The parties originally appeared on April 11, 2005, and the hearing was held on April 22, 2005. On April 21, 2005, Ms. Peters, in a reply to this interim application, sought custody of the children with the ability to relocate with the children to Alberta and, in the alternative, requested she be allowed to retain custody of the children in the Province of Nova Scotia.

RELEVANT LEGISLATION

[5] Relevant legislation in this instance is the *Maintenance and Custody Act*, particularly s. 18(2) and 18(5):

> **18(2)** The court may, on the application of a parent or guardian or other person with leave of the court, make an order
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> (a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or

> (b) respecting access and visiting privileges of a parent or guardian or authorized person.
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> . . .
>
> (5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration.

[6] The court has authority to make an interim order.

EVIDENCE

[7] The following testified:

- Sheldon Peters, the Applicant
- Cathy Peters, mother of the Applicant
- Michelle Peters, the Respondent

[8] By consent, the affidavits of Dawn Peters, the sister of the Applicant; Natalie Horne, the common-law partner of the Applicant; and Wayne Myers, the father of the Respondent, were also made available to the court for consideration without cross-examination.

[9] Ms. Peters submits the evidence supports the following conclusions: The marriage was not "idyllic." Mr. Peters was verbally abusive and controlling. Both parties were employed. Ms. Peters provided most of the day care and child care. Very shortly after the birth of their second child Mr. Peters announced that there was another woman in his life and he was leaving the home and the relationship. Ms. Peters begged him to stay and remain responsible to the relationship and the children. Mr. Peters vacated the home leaving Ms. Peters to provide for the residence and the children. During the post-separation discussions, Mr. Peters was more preoccupied with regaining his possessions – down to his fridge magnets – than hammering out an appropriate agreement out living their interaction with their children. Despite her efforts to create access arrangements, Mr. Peters was

unresponsive to that issue preferring to verbally abuse her as to minor property items. Accordingly, it was left to her to provide an access schedule which she did after consulting with a specialist in this field. While on parental leave, she became aware her current position would not be available to her on return to work. She found, as a single parent, she was not able to maintain the family home and sold it. She sought other employment in Nova Scotia and has been unsuccessful. She would have accepted a local position similar to those that she had when she went on parental leave if such had been available. Through discussions with her sister in Edmonton, she learned employment was available to her in that area. On reflection, she believed she would personally benefit from a new start away from the area and acquaintances that were familiar with her husband having left her for another woman. She visited Edmonton and received an offer of employment. Her sister has purchased a home there that will provide for she and her children. She has financially contributed to this home and is a joint owner of that property. Ms. Peters made arrangements to move to Edmonton. She notified Mr. Peters close to the date of departure. Given his lack of interaction in making arrangements to see his children in excess of two hours a week, she was legitimately surprised by his resistence to her pending relocation. Accordingly, should be allowed to relocate with their children.

[10] Mr. Peters suggests the evidence should support the following conclusions: Ms. Peters, following the separation and maybe before, was as verbally abusive as he was. He has constantly been making efforts to create arrangements to provide him with more access and input with his children. His alleged preoccupation with matrimonial possessions, including the fridge magnets, was because he gave or left all of the other matrimonial property, including the home, to his wife. He has accepted the current limited access provisions because that was all that was available to him while he constantly sought to increase such involvement. The lack of custody and access provisions in the Partial Separation Agreement should signify his concern as to having more involvement with his children by agreement – not a lack of interest on that issue. Ms. Peters was aware of his interest in involving himself with his children when she chose to leave the province and create a situation that would drastically reduce his opportunity for such participation. She should be denied the opportunity to relocate with the children.

[11] There is currently no order or agreement in place that speaks directly to the issue of Mr. and Ms. Peters as separated parents and their ongoing relationship and interaction with their children. The agreement signed in November of 2004, by implication, acknowledges the children reside with Ms. Peters. The facts disclose that, since the September, 2004 separation, the children have remained in the primary care of Ms. Peters.

[12] Currently, we have an application of Mr. Peters to deal with the custody and access issues relating to their children. This initial application acknowledged the children remain in the primary care of their mother with the issue of joint custody and the specific access to be determined. The issues are now more obvious, detailed and varied given Ms. Peters' notice of her intention to move to Alberta. Mr. Peters is now seeking custody of his children. Ms. Peters is now seeking to be allowed to be designated as the custodial and primary care giver of the children and (a) to relocate to the Province of Alberta or (b) in the alternative, allowed to remain with them in the Province of Nova Scotia.

[13] Both parties have submitted the reasoning of the Supreme Court of Canada in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 as relevant to the issue of mobility, and suggest that this case and its findings are supportive of their stance. It has been previously suggested this decision relates to an application to vary an existing order and is not applicable to an initial application as is the case in this instance.

[14] In *Handspiker v. Rafuse*, [2001] N.S.J. No. 1, Justice Oland of the Nova Scotia Court of Appeal, in a somewhat similar situation, stated at paragraphs 10, 11 and 12:

> ¶ 10 The first two grounds of appeal have their basis in Gordon v. Goertz, [1996] 2 S.C.R. 27, 19 R.F.L. (4th) 177. The Supreme Court of Canada set out the principles and enumerated several factors to be considered in a case in which the custodial parent proposes to move with the child resulting in a material change in circumstances. In that case, a court order pursuant to a divorce proceeding had determined custody.
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> ¶ 11 The respondent pointed out that in this case, no court had granted an earlier custody order and that the application for custody

> was the original proceeding and not an application to vary. He submitted that accordingly, Gordon v. Goertz does not apply. With respect, I am unable to agree.
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> ¶ 12 The parties had voluntarily entered into an agreement in 1993 which reflected their decision as parents on the matters of custody, access and maintenance. Each of them honoured its terms. Neither the appellant's day-to-day care nor the respondent's enjoyment of access was challenged or disturbed for some six years following their agreement. While there was no indication that it had ever been made a court order, the agreement was long-standing and respected. In these circumstances, the absence of a formal court order does not have the effect of excluding the application of the principles in Gordon v. Goertz.

[15] Similarly, Justice Williams, in *Kerr v. Baltazar*, 2004 NSSF 85, on the same issue, stated at paragraphs 28, 29 and 30:

> ¶ 28 As I have indicated this is not a mobility case involving the variation of an existing order or an existing long standing status quo where parents have physically separated and the children are in the primary care of one parent or the other.
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> ¶ 29 This is an application of first instance. Professor Rollie Thompson has, in examining Carter v. Brooks (1990) 30 R.F.C. (3d) Ont. CA suggested that a mobility issue in an application of first instance reduces to the question of "does the benefit or necessity of the move outweigh the impact upon the access relationship". Even this discussion or analysis assumes people have already separated.
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> ¶ 30 I have attempted to consider the question posed by Professor Thompson in his article Relocation and Litigation: After Gordon v. Goertz, NFLP 1998. I have also attempted to consider more than this because this is a custody case, of first instance. Clearly the mobility issue is layered into the circumstances here.

[16] A primary concern is the interim nature of the relief being requested. There is an application before this court seeking a final determination of the issues of custody and access to the children of Mr. and Ms. Peters. In the interim, I am

being asked by Mr. Peters to consider changing the primary care being provided to the children; and by Ms. Peters to consider changing the province where the children reside.

[17] Dealing with the question of mobility, on an interim basis, Justice DesRoches of the Supreme Court of Prince Edward Island, in *Scott v. Scott* (1993), 49 R.F.L. (3d) 405, at paragraphs 5, 6, 7, 8 and 12 stated:

> 5. The respondent opposes the removal of Bianca from this jurisdiction. He says that if the applicant leaves this jurisdiction he should be granted interim de facto custody of Bianca until the issues of custody and access are finally determined.
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> 6. In support of her motion the applicant relies on s. 6 of the *Canadian Charter of Rights and Freedoms*, which guarantees to every citizen of Canada the right to move to and take up residence in any province. She also relies on the Ontario Court of Appeal decision in *Carter v. Brooks* (1990), 30 R.F.L. (3d) 53, in which Mordem A.C.J.O. sets out the various factors to be considered by a court when deciding whether there should be a restriction on the removal by one parent of a child from the jurisdiction in which the other parent resides. The other decisions relied upon by the applicant all follow and apply the principle enunciated by Morden A.C.J.O. in *Carter*.
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> 7. I am of the opinion that there is a significant distinction between the instant case and the facts in *Carter* and the other cases filed on behalf of the applicant. In those cases the issue of custody had been decided, and there was a permanent order pertaining to custody and access in effect. In this case, on the other hand, the issue of permanent custody awaits determination. In these circumstances I prefer to follow the decisions which have held that a court should exercise caution before rupturing a child's relationship with one parent by eliminating or substantially reducing access pending the final determination of the question of permanent custody. Given that the respondent in the instant case is unemployed, it is unlikely that he would be able to maintain any real or meaningful relationship with Bianca if she moved to Toronto.
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> 8. In *Rawlinson v Rawlinson* (1988), 46 R.F.L. (2d) 378 (Sask.Q.B.), Matheson J. held that no compelling reason had been submitted as to

> why it would be in the best interests of the children that they be moved from Regina to Vancouver pending determination of the question of permanent custody. The learned justice ordered that until determination of that question, neither party could remove any of the children from Saskatchewan except by order of the court.
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> . . .
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> 12. For the above reasons I would deny the motion for a variation of the existing custody and access order to facilitate the applicant's removal of Bianca from this province pending final determination of the question of permanent custody and access. It may be that the question of the removal of the child from this jurisdiction could be more fully explored and answered at the trial in February. However, at this time it has not been shown that it would be in Bianca's best interest to be removed from this jurisdiction before the questions of permanent custody and access are determined.

[18] Mr. Peters chose to start a new life at a time and under circumstances that, at the very least, were contrary to the best interests of his children. In making this decision, he was not, by court order, restricted as to where or with whom he could reside. Ms. Peters is intending to start a new life that would entail her removing herself and their children from the province without any meaningful consultation with Mr. Peters or any court order. This intention, under the circumstances, is also contrary to the long-term interests of their children. A full examination of all of the issues may provide Ms. Peters with such an opportunity to, as has happened with Mr. Peters, begin a new life in a location of her choosing and, further, to have the children remain in her primary care. However, given the interim nature of this request to relocate, I adopt the reasoning of Justice DesRoches in *Scott v. Scott*, supra, and conclude such a relocation of the children, on an interim basis, is not, at this time, in their best interests.

[19] The particulars of Ms. Peters' new position in Alberta are somewhat vague. Further, she submits there are similar job opportunities – maybe even better ones – that she is thinking of pursuing. She acknowledges purchasing a home in Alberta. It would appear the home is to be occupied by her sister who currently resides in that area and there was no evidence as to the extent of her involvement in the purchase.

[20] Ms. Peters is currently on parental leave that does not require her to return to work for the next three to four months. Further, her previous position remains in effect until October and even, after that date, she has continued unemployment if at a substantial reduced salary.

[21] Ms. Peters, as I said, may well be accorded the opportunity to relocate and begin a new life as a custodial parent, but her ability to do so should only occur after a full hearing as to the issues of custody and access. I have found no compelling reason to suggest why I should grant the order in this instance or why it would be in the children's interest. There is a time available to Ms. Peters to remain in the area in spite of her wish to relocate and to allow this matter to be heard. If the issues of custody and access are not advanced in a timely manner and Ms. Peters' ability to have sufficient income available to provide for the primary care of the children prior to the court's determination, she may be able to obtain an order, even on an interim basis, to allow her to relocate with the children.

[22] On an interim basis, Ms. Peters shall retain custody and primary care of the children. She has, at this stage, a history of being able to provide very appropriately for her children while they were in her primary care.

[23] Mr. Peters' access should be in excess of what he has currently been provided. This should not be difficult to arrange between the parties in the interim as Ms. Peters has constantly indicated she had pressed Mr. Peters to have more involvement. I leave it to the parties, through their counsel, to make the necessary arrangements. Given the discrepancies in the children's ages, it may not be in their interest that they are subject to the same access provisions.

[24] Accordingly, I am ordering that the children remain in the primary care, in the interim, of their mother and not be removed from the Province of Nova Scotia by either party on a permanent basis without a further order of this court.

[25] I will further adjourn the original application, subject to counsel, for a period of up to three or four weeks which will allow the parties an opportunity to

consider and reflect on their positions with the input of their counsel. Within a month I require that the parties reappear before me for a pre-trial as to the final hearing of the issues of custody and access. I will undertake at that time to facilitate an early hearing of this matter in an effort to resolve the issue. I am well aware that I have restricted Ms. Peters' movement. The time required for the hearing having been established, I will assist in attempting to have the matter heard prior to October, 2005, when Ms. Peters' ability to support herself and the children could be compromised.

J.