NOVA SCOTIA SUPREME COURT
(FAMILY DIVISION)
Citation: *Boone v. Boone*, 2014 NSSC 227

Date: 2014-06-19
Docket: SFSNMCA 083775
Registry: Sydney

Between:

Blair Boone

Applicant

v.

Helen Boone

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Heard: June 17, 2014, in Sydney, Nova Scotia

Counsel: Darlene MacRury, for Mr. Boone

Theresa O'Leary for Ms. Boone

Introduction

[1] This is an interim motion by Helen Boone to move Danielle and Michael Boone from New Waterford to Sydney River. It comes pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160. Ms. Boone also seeks an order for interim child maintenance.

[2] Blair Boone opposes the motion, and asks that I award him primary care of the children or place the children in a shared parenting arrangement.

Family history

[3] The Boones married in October 2004. They lived in River Ryan. Danielle was born in September 2004 and Michael followed in March 2006. Blair Boone was disabled from work in 2006 and has not been employed since. Helen Boone remained at home for a year after each child was born. When she returned to work, the children were able to remain at home because their father was there to care for them. Michael did attend daycare on a part time basis prior to starting school.

[4] Mr. Boone says the marriage was "troubled". The couple separated in August 2012, when Ms. Boone moved with the children from River Ryan to New Waterford. She had leased a home adequate to the needs of herself, her children from a previous relationship, and Danielle and Michael.

[5] Following the separation the children were with their father on alternate weekends, from Friday until Monday, and every Wednesday evening, overnight until Thursday morning. This has continued from 2012 to date.

[6] In November 2012, Mr. Boone filed an application for custody of the children. In his testimony, he said he objected to the access arrangement, that he never agreed to it, but that he took the time dictated by Ms. Boone. In his affidavit, he said that there was a verbal agreement to this access arrangement: he said that he didn't want to put the children in the middle of a disputed custody battle and he abided by the agreement "until such time as my application for custody could be heard in the courts."

[7] Following the filing of his application in November 2012, Mr. Boone took no steps to advance his application until he became concerned, in 2013, that his wife might move the children to Sydney. He filed a motion to prevent this in May 2013. The parties consented to an order that Ms. Boone would not move the

children from New Waterford without Mr. Boone's written permission or a court order. From the filing of that motion in May 2013 until now there have been no further steps by Mr. Boone to advance his claim for custody. This motion comes at Ms. Boone's initiative.

[8] Helen Boone is a social worker who works both in a clinical practice and in a management position. She has a full-time job and a number of part-time positions which work around her full-time employment at Cape Breton University and the children's time with their father. She is accomplished and hard-working.

[9] Prior to becoming disabled, Blair Boone worked in the mines and was active in the community as a volunteer and leader.

[10] While the parents have personal qualities which have enabled them to be positive contributors in the community, they have not been able to channel these qualities into their relationship with each other. They seldom speak: when they do, they fight. They communicate by text messages, emails and notes. While this is certainly preferable to arguing, I expect both parents recognize that this is a sad example to their children.

[11] According to Ms. Boone, her plan to relocate the children to Sydney has long been known by her husband. It was known in 2013 that she intended to move, once she could make appropriate arrangements. These arrangements came together this spring, as her lease in New Waterford was reaching its end and she and her mother planned to purchase a home in Sydney River. She notified Mr. Boone of her intention to move on March 13, 2014.

[12] On May 1, 2014, Mr. Boone wrote to Ms. Boone, telling her that she did not have his consent to move the children. She then brought this motion.

Interim parenting motions

[13] The test to be applied on a motion for an interim parenting order is that stated by Judge Daley in *Webber*, (1989), 90 NSR (2d) 55 (FC) at page 57:

> . . . what temporary living arrangements are the least disruptive, most supportive and most protective for the child. In short, the status quo of the child, the living arrangements with which the child is most familiar, should be maintained as closely as possible.

[14] Children's parenting arrangements are determined on the basis of the children's best interests, according to subsection 18(5) of the *Maintenance and Custody Act*, and, in determining a mobility request, the principles of *Gordon v. Goertz* 1996 CanLII 191 (SCC) apply.

[15] The considerations which relate to original mobility motions, rather than variation applications, were identified by Justice Bateman in *Burgoyne v. Kenny*, 2009 NSCA 34 (CanLII), at paragraph 23. According to Justice Bateman, I'm to consider:

> (a) the desirability of maximizing contact between the children and both their parents;
>
> (b) the children's views, if appropriate;
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> (c) Ms. Boone's reasons for moving, only in the exceptional case where they are relevant to her ability to meet the children's needs; and
>
> (d) the disruption to the children resulting from their removal from family, schools and the community they've come to know.

[16] These principles originated in *Gordon v. Goertz* 1996 CanLII 191 (SCC), and have been adapted for original mobility motions.

[17] Decisions since *Gordon v. Goertz* 1996 CanLII 191 (SCC), have highlighted judges' reluctance to make fundamental changes to children's lives on interim motions. This was identified in *Plumley*, 1999 CanLII 13990 (ON SC), where, at paragraph 7, Justice Marshman identified three factors that "are or ought to be important" in deciding interim mobility requests:

> 1. A court will be more reluctant to upset the status quo on an interim basis and permit the move when there is a genuine issue for trial.
>
> 2. There can be compelling circumstances which might dictate that a justice ought to allow the move. For example, the move may result in a financial benefit to the family unit, which will be lost if the matter awaits a trial or the best interests

> of the children might dictate that they commence school at a new location.
>
> 3. Although there may be a genuine issue for trial, the move may be permitted on an interim basis if there is a strong probability that the custodial parent's position will prevail at trial.

[18] I turn now to the considerations outlined by Justice Bateman at paragraph 23 in *Burgoyne v. Kenny*, 2009 NSCA 34 (CanLII).

Maximizing contact between the children and both their parents

[19] Ms. Boone proposes that the children will continue to have alternate weekends with their father, from Friday after school until Monday morning. Additionally, there will continue to be mid-week access, every week, from Wednesday after school until Thursday morning. She offers additional access at times during the school year when the children aren't attending school (Professional Development days and snow days, for example). There would be phone and Facetime contact as currently exists. Mr. Boone could attend the children's activities.

[20] Ms. Boone's plan offers the children no less time with their father than they currently have.

[21] A move from New Waterford to Sydney River will not prevent Mr. Boone from attending the children's extra-curricular and school-based activities or create difficulty for him in participating in parent/teacher interviews. It will not eliminate the possibility of *ad hoc* visits.

The children's views

[22] The children's views have not been canvassed. Danielle is nine and Michael is eight.

Ms. Boone's reason for moving

[23] Ms. Boone is relocating to a community where the housing is more affordable for her. Her lease in New Waterford ends at the end of this month. She has offered uncontroverted evidence that the cost of operating the home in New Waterford is very high. As well, she believes the elementary school in Sydney River is better for the children and the junior and senior high schools are, also, of

higher quality. In the past, the parents' other children have attended these high schools. She said that New Waterford is an economically depressed community hit hard with drug abuse and youth crime, while Sydney River is a desirable residential neighbourhood, comprised of professionals. She said, as well, that the couple intended to move Danielle and Michael to Sydney-based schools when they got older, in any event. Mr. Boone disputes this. He said that, at this time, no such plan exists for Danielle or Michael to attend high school in Sydney.

[24] For both Ms. Boone and Mr. Boone, there are few, if any, family connections in New Waterford. Ms. Boone's mother currently lives there, but she is the co-purchaser of the home Ms. Boone has bought in Sydney River and intends to move there.

The disruption to the children

[25] Ms. Boone submits that relocation "will not result in a significant disruption to the children". The children are not being moved far: it is a fifteen or twenty-five minute drive, depending on which parent's testimony I accept.

[26] Mr. Boone is disabled from employment. Respiratory problems compelled him to leave his work in the mines and to withdraw from his community and volunteer activities. With this came a loss of self-identity and, not surprisingly, depression. His respiratory problems continue. He is treated for his depression which remains under control. He remains active however, he fishes, hunts and spends time at his cottage at Loch Lomond. He was, obviously, active in his care for the children when they were pre-schoolers and their mother worked.

[27] Mr. Boone remains able to drive and owns a four wheel drive vehicle. He has the time available for any additional commute required by relocation.

[28] The children have extra-curricular activities but none are so entrenched that they cannot be replicated in Sydney River, if the children wish to continue with them. At their ages, they are not completely committed to activities and some activities change each year.

[29] The distance from Sydney River to New Waterford does not prohibit the children from maintaining contact with their school or neighbourhood friends and from continuing with their religious instruction (and participation in sacraments) at their current church.

[30] The children's school will change and there may be some change to their child care arrangements. In the past parental child care has been supplemented by

care from the children's half-sister, Janelle (who lives with Ms. Boone), and their maternal grandmother. This will continue following the move, though their grandmother will not likely move to Sydney River for some time. Until then, she has a car and drives. She has COPD (chronic obstructive pulmonary disorder), but lives an active life, living independently. These, I find, are the greatest changes and, to my mind, they are not significant. The move is not a fundamental change to the children's lives.

[31] Ms. Boone argues that the change of schools is a benefit of this move. The new school is slightly smaller (in terms of student numbers) than the children's current school. Danielle appears to be in need of educational testing and this, it seems, will be available more quickly in Sydney River. Mr. Boone acknowledges Danielle's difficulty with math. While she is regularly an A and B student, her math mark is the only blot on her report card. The amount of time that he spends assisting her with her homework is beyond the level of support a child should need at her grade level. Mr. Boone says that Michael "has some problems with reading and speech". There's no suggestion his needs require educational testing.

[32] Mr. Boone argues that his wife works at many jobs, reducing her availability to the children. Her relocation will reduce her commute. Her employment is, I find, necessary given the financial responsibilities she has for the children.

[33] Since separation, Mr. Boone had not made regular child support payments. So, Ms. Boone would need to work to support the children.

[34] The parents agreed that Ms. Boone would receive the Canada Child Tax Benefit for the children (as is appropriate, since they live with her). They also agreed that Mr. Boone would continue to receive the children's payment relating to his Canada Pension Plan disability benefit. This payment has recently ended as it seems that CPP administrators have learned the children do not live with him.

[35] Ms. Boone provided documentation showing that Mr. Boone has given her approximately $830.00 toward the children's support in the twenty-two months since they separated. Mr. Boone said that he has provided school clothing and school supplies for the children, in addition. He said that he gave them gifts for their birthdays, at Christmas and for grading and that he gave them money directly for their needs. I don't know how much was spent in this fashion. Based on his tax returns, his monthly child support obligation since 2012 was in excess of $600.00 each month. There was no suggestion that the money he spent on the children or gave to them was equivalent to the amount of child support he should have paid.

[36] Returning to Justice Marshman's comments at paragraph 7 in *Plumley*, 1999 CanLII 13990 (ON SC), I find the children's status quo is not the circumstance that existed at separation. The Boones separated twenty-two months ago. Since August 2012, the status quo for the children has been living with their mother and spending time with their father on alternate weekends and every Wednesday overnight until Thursday.

[37] If twenty-two months had not passed since separation, I would not make this finding. However, the children have lived with this arrangement for a considerable period. This is their status quo, not their life almost two years ago. Remaining with their mother and continuing the current visiting schedule is least disruptive for the children.

[38] There are compelling circumstances which dictate allowing an interim move: Ms. Boone's lease is at an end. No other options for appropriate affordable housing have been identified. A move at this time allows the children to settle into their new community before school starts in September.

[39] As Justice Marshman says even where there's a genuine issue for trial, a move may be allowed if there's a strong probability that the claim would succeed at trial. I cannot predict the outcome of a trial in this matter. No trial is scheduled. No trial date has been requested. The parties are a very far distance from trial. Mr. Boone's claims for primary care or shared custody, if premised on his care for the children as pre-schoolers, are not enhanced by the passage of time.

[40] I grant Ms. Boone's request for permission to relocate the children to Sydney River. I find that the disruption to the children's relationship with their father and their community (which, in any event, is not the community in which their father lives) is modest and outweighed by the advantages of relocation.

Child support

[41] Ms. Boone has requested child support. Her counsel acknowledged that she was willing to sever this claim so the mobility application could be heard speedily.

[42] The hearing focused on the mobility request and I appreciate counsel's efforts to conduct the motion within the abbreviated time available to us. The limited time meant that counsel didn't address important considerations relevant to Ms. Boone's child support claim (whether some portions of Mr. Boone's income was tax-free and the after-tax cost of child care expenses for example).

[43] Accordingly, I am not dealing with the child support request. I am not dismissing it and Mr. Boone may anticipate that this request is something his wife will wish to deal with at a future hearing. I do encourage the parties to work toward an overall resolution of the issues that exist between them. These issues seldom resolve themselves and, more often, become aggravated with the passage of time.

[44] Ms. Boone's counsel will prepare the order. She shall also prepare a discrete order providing that each parent is entitled to speak directly with those who are involved with the children (teachers, doctors, dentists, coaches and others) and to obtain information about the children from them, without the need for the consent of the other parent.

[45] Ms. Boone has asked to speak to the issue of costs. She may file written submissions by June 30, 2014. Mr. Boone's submissions will be due by July 11, 2014. Please address these to me at the court in Sydney. The court administrator will relay them to me at the court in Halifax.

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

Sydney, Nova Scotia