Date: 20020404
Docket: 95sb0031

IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA

[Cite as: W.M.A.L. v. G.F.L., 2002 NSFC 8]

BETWEEN:

W.M.A.L

APPLICANT/RESPONDENT

- and -

G.F.L.

APPLICANT/RESPONDENT

DECISION

Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

Before the Honourable John D. Comeau, Chief Judge of the Family Court for the Province of Nova Scotia

HEARD AT: Shelburne, Nova Scotia

DECISION DATE: April 4, 2002

DATES HEARD: September 17, 2001, October 4, 2001, December 3, 2001, February 11, 2001, March 18, 2002

COUNSEL: Dell Wickens Esq. for the Applicant
Timothy Landry Esq. for the Respondent

THE APPLICATION:

[1] The Respondent/Applicant G.F.L. is the father of C., born May [...], 1994 and J., born January [...], 1996. He is requesting shared custody of the children and that

the children not be removed from the Courts jurisdiction without his or the Court's written consent. This is an application to vary an order dated March 22, 1999.

[2] On February 11, 1999 a Consent Order was entered into granting joint custody to the parties with the mother the Applicant/Respondent being the primary caregiver and liberal access to the father. The main issue before the Court is whether the mother can move within the jurisdiction of the Court (Nova Scotia) and take the children with her. As to shared parenting the Respondent/Applicant wants more access, a fifty-fifty split.

THE FACTS:

THE MOTHER'S PLAN:

[3] The mother presently lives in S. and the father is close by in [...]. She wants to move to K. with the children. She is thirty-three years of age, completed grade twelve and attended University for a time. In 1999 she took a five week [...] course and an eight week [...] course in April - May 2001. Her sister lives in K. and she believes job opportunities are better in the K. area. At the present time she has no job prospects but her sister has offered her employment babysitting her two children while she is at work. Because of the uncertainty concerning this court action she has not applied for employment nor made a deposit on an apartment. If allowed to

move there things would fall into place, there has been some preliminary work done by her.

[4] The mother's boyfriend lives in the K. area but she indicates this is not the main reason for the move. In her evidence there appeared to be uncertainty as to whether they would be living together.

MOTHER'S HEALTH:

[5] In 1998 the mother was diagnosed with schizophrenia and was hospitalized. Since that time she has done well on medication and takes it as required. Her psychiatrist Dr. Elliott indicates (in a letter dated November 28, 2001) that she sought help for parenting and followed the advise given.

[6] An interview with her psychiatrist on November 20, 2001 resulted on the following comments from the doctor:

> **"I last saw her on November 20, 2001. There was no evidence of psychotic thinking or delusions. She was coping with the stress of her separation and was feeling confident about her parenting abilities. There were no positive symptoms of her psychiatric illness. Her schizophrenia is well treated with her current medication. She has insight inot her need for medication and is willing to follow medical advice.**
>
> **At this point, given her three years of remission of her illness, there is every reason to think that her good health should be maintained."**

[7] The mother has support from her extended family and her mother visits her daughter presently in K.. She would be available for transportation to facilitate access if the move were made to K..

THE FATHER'S POSITION:

[8] The father does not want his children to move from S. to K.. It is a three hour trip and would make it difficult for him to have a more active role in their upbringing and influence their behaviour. He points to the behaviour of C. to make his case stating that the child fights with his mother and sister resulting in physical violence. That the children have difficulty socializing with people outside the family and C. has been in detention in school for fighting. The mother denies these allegations and indicates that the child is doing well. A child evaluation concerning J. done in June 2001 ended with the following comments:

> **"J. is a very humorous and talkative child. It has been a great couple of years having her and she will have no problems in shcool."**

[9] The father points to possible problems with the children to indicate that if they move to K. he will not be able to be actively involved in helping with changing and promoting a more positive behaviour particularly when it comes to C.. At the present time he helps him with school work.

[10] If the children move to the K. area he cannot afford to go there, time and travel are a problem. He has no driver's license since he was seventeen years old. He does not believe that she has made positive efforts to find a job in K. nor has she attempted to make it easier on the children by introducing her boyfriends children to them. There is always a concern in his mind with respect to the mother's health.

Pointing to access problems at Christmas, he believes his access be limited and he wants to play a larger role in the children's lives.

[11] The father's extended family plays a significant role in the children's lives and moving three hours away would sever the relationship.

ISSUE:

[12] Whether a condition to custody should be ordered preventing the Applicant/Respondent mother from removing the children's permanent residence from S., Nova Scotia?

[13] A consideration of further and extended access to the Respondent/Applicant father.

THE LAW:

[14] An application to vary an existing order will inevitably deal with a change in circumstances to warrant reconsideration and adjustment.

[15] There is no specific statutory provision providing the Court with jurisdiction to impose a condition on custody, however, Section 18(5) of the **Maintenance** and **Custody Act**, dealing with the best interests of the child gives the Family Court the right to place conditions on Custody Orders. (See **Blois** v. **Blois** (1988), 83N.S.R (sd) 328 (N.S.S.C. App. Div.)

MOBILITY RIGHTS:

[16] The leading case concerning the right to move with the children was decided by the Supreme Court of Canada in 1996 (see **Gordon** v. **Goertz** (1996) 19 R.F.L. (4^{th}) 177, [1996] 2 S.C.R. 27 (McLachlin, J.)

[17] This case reiterates that there must be a material change in circumstances affecting the children and once that threshold met, the Court must embark on a fresh inquiry into the best interests of the children considering the facts of the case.

[18] McLachlin J. gives a summary of the law at p. 201:

> The law can be summarized as follows:
>
> 1. The parent applying for a change in the 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;
>
> (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.
>
> 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 the best interests of the child in all the circumstance, old as well as new?

[19] In Nova Scotia two cases considered **Gordon** v. **Goertz** and although these were heard within days of each other, they come to diametrically opposite. Conclusions as to the deference to be shown to the findings of the trial judge. (see **Doiron** v. **Mahoney** (200) N.S.R. (2d) 33, 3 R.F.L. (5^{th}) 206 (Prugsley J.A.) and **Rafuse** v.**Handspiker** (2001), 190 N.S.R. (2d) 64, 11 R.F.L. (5^{th}) 363 (Oland J. A.)

[20] Justice Prugsley deferred to the decision of Judge Wilson, who ordered joint custody with day to day care by the father where the mother moved from new Glasgow to Halifax. In rendering his decision Judge Wilson considered that the child had lived with his mother most of his life, but that a move to Halifax would result in reduced contact with extended family:

> "At this time, a permanent move to Halifax is a major change and disruption for Jeremy from the day to day life he has known. The plan proposed by Mr. Mahoney essentially maintains the status quo in terms of schooling and extended family and extra-curricular activities ..... while Jeremy may adjust well to the move, it is never wise to interfere with an established successful life style unless there are compelling reason for doing so."

[21] In this case Justice Pugsley on appeal referred to the summary of the law by Justice McLachlin, in **Gordon** v. **Goertz** supra. He was satisfied that Judge Wilson gave due consideration to the seven point summary in light of the facts before him.

[22] Justice Oland in **Rafuse** v. **Handspiker** supra speaking for the majority came to a different conclusion than Pugsley J. A in **Doiron** v. **Mahaney** supra. This was a case where the mother had custody by separation agreement dated April 30, 1993. The trial judge in his decision dated May 30, 2000 awarded custody jointly fo her parents with the Respondent father having primary care and the Appellant mother liberal and generous access. In his decision the trial judge made no reference to **Gordon** v. **Goertz** which Justice Oland points out, made no legal presumption in favour of the custodial parent but indicates at paragraph 48:

> " ..... the views of the custodial parent who lives with the child and is charged with making decision with interest on a day to day basis are entitled to great respect, the most serious consideration ."

[23] In ordering a new hearing in case circumstances have changed, Oland referred to the trial judge's failure to consider **Gordon** v. **Goertz**:

> A judge must apply the most appropriate criteria to the case before him. yet there is no recognition in the reasons of the trial judge the Gordon v. Goertz, the leading authority on mobility cases, had any application to the case before him. It does not appear that the judge gave the views of the custodial parent the extent of the consideration required. Moreover, his decision does not review some

> other factors set out in Gordon v. Goertz (and also in Foley) such as the desirability of maximizing the contact between the child and both parents. Nor does he deal with other factors in the Supreme Court of Canada decision, such as the disruption to the child following a change in custody which here would include the separation from her siblings. It is not clear from the decision just what factors the trial judge did consider, he having underlined certain the Foley criteria for emphasis but not having made additional comment as to their relevance or weight in this particular case. It is clear that his decision improperly emphasized the reasons for the move. In these circumstances I cannot agree with the respondent that the judge simply failed to consider one relevant factor but considered most others.

[24] These decisions make it clear that the summary of the law in **Gordon** v. **Goertz** must be allowed. The facts of each case are to be applied to those principles. Although the primary care giver views are entitled to great respect, it is a combination of factors in the children's best interest to be looked at.

[25] A proposed move is a material change in circumstances and this requires the Court to embark on a fresh inquiry on the best interest of the children, having regard to the circumstance of the case. The reason for the move should not be overemphasized.

CONCLUSION/DECISION:

[26] Conclusion with respect to mobility of parents with children depends on the facts in each case in the context of what is in the best interest of the children. In the case before the Court the Applicant/Respondent mother has not made any specific plans, ie. does not have a job nor made a deposit on accommodations in the K. area. The reason for this is because of the uncertainty of the result of this Court hearing. She has the support of her sister who resides in the K. area and inquiries have been

made as school there for the children. Her mother visits K. from S. and can through transportation facilitate access to the father.

[27] The Applicant/Respondent's boyfriend works in the K. areas and say there are lots of jobs there. He has not made a commitment to live with the Applicant/Respondent mother nor has his children met C. or J., the children the subject of this application.

[28] The Respondent/Applicant father truly believes that if the children move he will be unable to play a significant role in their lives and his family will be denied appropriate contact with them.

[29] A fresh look at what is in the best interest of the children is what is required. The Court is not concerned about the reasons for the move, which is for better job opportunities for the mother. There has been no job found and little or nothing has been done to acquire one in the K. area. No accommodations have been acquired and although inquiries have been made about schooling, it would not be in the best interests of the children to remove them from the S. school system with only three months left in the school year. C. is in need of his father on a regular basis at this point in time. It appears that the reason for this is there is inappropriate behaviour on the part of C. and his father is in the process of resolving this ie. aggressiveness on the playground at school. A permanent move to K. would at this time not be in

the child's best interest. C. will be eight years old on May the 4th and has had three years in S. school. J. is now six years of age. Both the maternal and parental grandparents live in the S. area.

[30] As stated in the summary of the law in **Gordon** v. **Goertz** supra (33):

> "the focus is on the best interest of the children not the interests and rights of the parents."

[31] Also in the #7(b) the Court is compelled to consider:

> "The existing access arrangement and relationship between the child and the access parent."

[32] In the case before the Court the Respondent/Applicant father has joint custody and access every other weekend, under the 1999 Court Order, because the children are in school. Evidence indicates this access was modified to Thursday, Friday and Saturday every other weekend. In other words he has liberal access considering the children's schooling and he is an interested and caring parent.

[33] This fresh review applying the law in **Gordon** v. **Goertz** supra leads to the conclusion that as permanent move to K. would not be in the children's best interest. It would be taking them out of familiar surroundings and prevent contact with friends and extended family on a regular basis. More important it would make it very difficult for their father to play a meaningful role in their lives.

[34] The order for joint custody shall remain with the condition that neither parent shall remove the children "permanently" from the S. County area.

John D. Comeau

Chief Judge of the Family Court