FAMILY COURT OF NOVA SCOTIA
Citation: A.V.A. v. M.M., 2010 NSFC 12

Date: 2010-05-06
Docket: FKMCA-062540
Registry: [community]

Between:

A.V.A.

Plaintiff

v.

M.M.

Defendant

Judge:	The Honourable Judge M. Melvin, J.F.C.
Heard:	April 6, 2010, in [community], N.S.
Written Decision:	May 6, 2010
Counsel:	Donald A. Urquhart, Esq., for the Applicant, A.V.A. Lynn M. Connors, for the Respondent, M.M.

By the Court:

[1] This is a motion by the Applicant, A.V.A., to dismiss the Respondent, M.M.'s, application for shared custody on the grounds that this Court does not have the jurisdiction to hear the issue.

[2] The original application before the Court was brought by A.V.A., and sworn January 22, 2009. It requested the following:

> **1. Sole custody of my children, E.O.V.A., A.W.M.V.A., and C.L.V.A.M., subject to access to the Respondent every other weekend from Friday at 5:00 p.m. until Sunday at 5:00 p.m.**
>
> **2. I will meet the Respondent at a mutually agreed upon location to facilitate the transfer of the children for access.**
>
> **3. That even though the Respondent is not the biological father of E.O.V.A., he has always acted in the "parental" role since she was 1 ½ years old. E.O.V.A. has no contact with her biological father.**
>
> **4. I am also asking for maintenance from the Respondent for all three children pursuant to the [community] Child Maintenance Guidelines retroactive to August 1, 2008.**
>
> **5. This application is made subject to the *Maintenance and Custody Act*.**
>
> **6. Costs as may be assessed by the Court.**

[3] Following numerous Court appearances and a subsequent request by the Applicant for Section 7 expenses, the Applicant was directed to file proper documentation which was done on January 18, 2010. It requests the following:

> **1. I am requesting a review in the child maintenance order noted above.**
>
> **2. I am requesting the court to award special expenses per Section 7 of the [community] Child Support Guidelines relating to the following children:**
>
> **- A.W.M.**
>
> **- C.L.V.A.**

> **3. The special expense I am requesting relates to child care expenses of $1296.00 per month for both of the above noted children as supported by my appended documentation pursuant to the Child Maintenance Guidelines.**
>
> **This application is being made pursuant to the *Maintenance and Custody Act.***
>
> **Costs may be assessed by the Court.**

[4] The Applicant was self-represented for a number of Court appearances, but is now represented by Donald Urquhart.

[5] The Consent Order of July 22, 2009 sets out as follows:

> **1. M. M. shall be and is hereby ordered to be the natural father of the children, A.W.M. and C.L.V.A.M.**
>
> **2. A.V.A. shall have primary care of the children and the children shall reside primarily with her.**
>
> **3. M.M. shall have parenting time with the children as follows:**
>
> **(a) every second weekend from Friday at noon until Sunday at 5:00 p.m. commencing on Friday, June 12, 2009.**
>
> **(b) an equal sharing of the school Christmas holiday period, and in particular, from December 25th at 2:00 p.m. until December 26th at 6:00 p.m. The Respondent shall exercise the balance of his parenting time after December 26th to accommodate his fishing schedule provided however that the children shall be returned to the Applicant on or before December 30th at 6:00 p.m. just prior to A.'s birthday.**
>
> **(c) commencing in the summer of 2010, every alternate week through the months of July and August with each week to run from noon on Sunday to noon on the following Sunday, or at such times as the parties may otherwise agree upon.**
>
> **(d) the parties shall alternate the Easter weekend with the Respondent in 2010 having the children from Saturday at supper hour until Monday at supper hour, and with the Applicant having the children from Thursday at supper hour**

until Saturday at supper hour. In 2011 and every alternate year thereafter, the Applicant shall have the children from Saturday at supper hour until Monday at supper hour, and the Respondent shall have the children from Thursday at supper hour until Saturday at supper hour.

(e) One-half of the school March break period by extending the Respondent's normal weekend access to begin or end at noon on the Wednesday midway through March break.

(f) the children shall be with the Respondent on each Father's Day and with the Applicant each Mother's Day.

(g) from September 1st until June 30th of each year, the Respondent may have the children in his care in for a period of 24 hours; provided however, he give the Applicant 48 hours notice of his coming as well as take the children to any of their scheduled activities which may occur during his time with them.

(h) at such other time as the parties may mutually agree upon.

4. Each party hereto shall be entitled to make the day-to-day decisions involving the children while the children are in their respective care. In the event of an emergency each party shall endeavour to reach the other party, but if the other party cannot be reached, then the party who has the children at the relevant time may make the necessary decision.

5. In the event of poor roads and/or weather conditions, whether in [community] or in [community], then the Respondent's bi-weekly access will be rescheduled to the following weekend.

6. The parties will split the driving between [community] and [community] with each party to provide round trip transportation to a maximum of 13 weekends per year. The actual schedule shall be as agreed to by the parties and computed from May 1, 2009.

7. Neither party shall remove the children's residence from the Province of [community]. Moreover, the children's residence shall not be located further east than the [community] without the written consent of the other party, or by Court order.

8. The child, E.O.V.A., while not the Respondent's child, shall be included in parenting time provided the child wants to go.

> **9. The Respondent, a resident of [community], has a 2008 annual income in the amount of $60,700 for the purpose of determining the guideline amount of child maintenance.**
>
> **10. M.M. shall pay child maintenance to A.V.A. in the amount of $860 monthly beginning May 1, 2009 and payable on the first day of each month hereafter unless otherwise ordered.**
>
> **11. All child maintenance payments shall be made directly to A.V.A. unless either party registers the Order with the Director of Maintenance Enforcement at which time all further maintenance payments shall be made to the Director of Maintenance Enforcement, P.O. Box 803, [community], [community], B3J 2V2, while the Order is filed for enforcement with the Director.**
>
> **12. The payor shall provide the recipient a copy of his Income Tax Return and Income Tax Assessment on or before the 1st day of June each year commencing June 1, 2010. Such obligation shall continue until there is no longer a child of the union as defined by the Maintenance and Custody Act.**
>
> **13. The issue regarding s. 7 expenses shall be adjourned to Tuesday, October 13, 2009 at 10:00 a.m.**

[6] On March 10, 2010, the Respondent filed a counter application to vary and summons.

[7] The relief he requests is as follows:

> **1. To vary the child support being paid by the Respondent to the Applicant. Child support is currently being paid based on the Respondent's 2008 income tax amount of $60,700.00 which the Respondent would like to vary the amount so that the Respondent will be paying child support based on his 2009 income tax return which shows an annual income of $47,644.10;**
>
> **2. To vary the last Consent Order dated July 22nd, 2009 and issued September 16th, 2009, so that the Respondent will receive direct access to information regarding the children, A.W.M. and C.L.V.A.M., health and education and to also require consultation with the Respondent on major medical decisions and educational decisions;**

> **3. To vary the last Consent Order dated July 22nd, 2009 and issued September 16th, 2009, so that the Respondent will have a shared parenting arrangement for A.W.J. and C.L.V.A.M. as opposed to specified access.**

[8] All matters were consented to on April 6, 2010, with the exception of the Respondent's application for shared parenting.

[9] At that time, the Applicant, A.V.A., made application for a change in venue from [community] to [community]. The Respondent, M.M., contested the application.

[10] D.U., on behalf of his client, argued:

> **At the time A.V.A. originally filed her application for custody and child support in January 2009, she was residing in [community] with the two children from her relationship with M. M. A.W.M., who is currently 3 years old and C.L.V.A., who is 1 year old. In the spring of 2009, A.V.A. moved to [community] with A. and C., and her 6 year old daughter, E., who is not M. M's biological daughter. After three interim orders dealing with custody and Guideline child support (dated March 2, 2009, April 27, 2009 and June 8, 2009), the parties reached an agreement on custody and parenting times and *Guideline* child support in July 2009. (Consent Order dated July 22, 2009). The only outstanding issue from A.V.A.'s application dealt with section 7 expenses. The parties reached an agreement on the sharing of the section 7 expenses on April 6, 2010. Therefore, all of the issues that were brought before the court while the children lived in [community] have now been resolved.**
>
> **In April 2010, Ms. Connors, on behalf of M. M. filed a counter application for shared custody. It is our position that the counter application should be dismissed by Your Honour because there is no nexus between [community], the children, or the parents. If M. M. wants to bring his application he can do so in the Supreme Court Family Division in [community].**
>
> **The children are ordinarily resident in [community], having resided there for over 12 months. M.M. resides in [community]. There is no nexus or connection to [community]. It should also be noted that the children, A. and C. only resided in [community] for less than one year.**

As well, M.M.'s application to vary the parenting times specifically related to his concerns about the children's care in [community], primarily with A.'s medical condition and treatment. As outlined in the Affidavits on file with the Court, A. was treated initially in the [community] Hospital and then at the IWK Health Centre. He was discharged from the IWK Health Centre on March 5, 2010 but he continues to receive follow-up and treatment by [community] area physicians.

I would also refer Your Honour to my previous letter to Your Honour dated April 5, 2010 in which I noted that Ms. Connors has also requested a custody and access report. If a Court were to order one, it would make much more sense to have it ordered in the jurisdiction where the children actually reside, and where the assessor would have access to information.

It should also be noted that the [community] Children's Aid Society have had some limited involvement in this matter. My client understands that in March/April 2010, M.M. or his mother contacted Children's Aid to express concerns regarding the health of the children, especially A. I understand from my client that an investigation occurred and the file has now been closed. However, given the involvement of the [community] Children's Aid Society, again it would make much more sense to have this matter dealt with in [community].

I would refer to paragraph 16 of Your Honour's recent decision in *N.R.R. v. D.E.A.F.* 2009 NSFC 4 in which you concisely reviewed the factors and weight afforded to those factors that a Court must take into consideration when determining a jurisdictional issue. It is submitted that an application of those factors to the current circumstances demonstrate that it is in the children's best interests to have this matter heard in [community]. The proper forum is [community], which is where the children have the most 'real and substantial connection' at this time. The children only resided in the [community] area for a short period of time after the parties separated. The best evidence can be brought forward in [community] where the children have resided for almost one year. [community] allows for a "full and sufficient" inquiry into the issue, whereas [community] does not. M.M.'s application to vary primarily deals with his concerns about A.V.A.'s ability to care for A. and his medical condition, which is currently being treated by [community] area physicians. As stated in paragraph 39 of *N.R.R.*, the best evidence available" will be the evidence that is "most recent in time".

> **Apart from the fact that there is no nexus to the [community] area with respect to the children, there is also no benefit or convenience for M.M. in keeping the application in [community]. The travel time from [community] to [community] via Highway 103 is approximately 3 hours. That is also the same approximate time from [community] to [community]. Therefore, either way M.M. will have a three hour drive.**

[11] L.C., on behalf of M.M., argues:

> **This matter commenced in the Family Court in [community] because A.V.A. unilaterally moved to [community] from [community] and removed the children with her. At the time of the initial Court application, she was represented by Mr. Thomas and represented by him until approximately September of 2009.**
>
> **It was approximately May of 2009, A.V.A. again unilaterally moved the children to [community]. Representations were made to the Court on the issue of transfer of the file to [community]. It was noted by Your Honour at that point-in-time, that is was more convenient and a quicker Court date would be obtained if the matter remained in the [community] Family Court.**
>
> **The matter continued to make its way through the docket of the [community] Family Court. There has been some delay in resolving the Section 7 expenses which is well documented on file. In the meantime, there has been a deterioration of the health of one of the two children and M.M. has had some significant concerns about their care while in [community]. This is the reason for the application for shared parenting.**
>
> **If the matter were transferred to the jurisdiction of the unified Family Court, the result would be that M.M., who is a fisherman, would be forced to drive approximately three (3) hours for any Court appearances or any hearings in the matter. There will be a waiting period before the matter is heard. M.M. will have to cover the additional expense of having his counsel travel to and from [community] for Court appearances.**
>
> **As Your Honour pointed out, the only individuals who are still in [community] are the lawyers. However, no one is forced to have their lawyer travel to [community] if the matter starts in the Family Court in [community]. It is far more cost effective for the parties to have to travel than their counsel. It certainly is an inconvenience for A.V.A. to have to drive an hour and a half to [community] for a docket**

> **appearance. However, it is a significantly greater inconvenience for M.M. to drive three (3) hours one way for a Court appearance in the Unified Family Court in [community]. Counsel for M.M. is well aware of the usual practice to have matters heard in the jurisdiction where the children reside. However, the circumstances of this particular case are unique and the Application to Vary was commenced for the conclusion of the outstanding Section 7 application.**

[12] This Court has recently reviewed the factors a Court must look at to determine a jurisdictional issue, in the case referred to by Mr. Urquhart, above, and in a recent case, ***C.J. v. R.A.M.***, heard before this Court. They are:

> (1) is the child ordinarily or habitually resident in the jurisdiction?
>
> (2) is the child present in the forum?
>
> (3) does the child have a real and substantial connection with the forum?
>
> (4) which province or jurisdiction is the most convenient forum?
>
> (5) would the child be at risk if jurisdiction not assumed?
>
> (6) where is the best evidence available?
>
> (7) which venue allows for a full and sufficient Inquiry of the issue?
>
> (8) what is the status of the relationship between the parties?
>
> (9) has a party to the proceedings consented to the child being in another jurisdiction?
>
> (10) has a party to the proceedings acquiesced in the child's remaining in another jurisdiction?
>
> (11) is there any evidence of abduction?
>
> (12) how much time has passed with the child being in another jurisdiction?

> (13) what is the age of the child as it pertains to the child's familiarity with the competing jurisdictions?
>
> (14) if applications have been filed in concurrent jurisdictions, taking into account any administrative difficulties, whose application was first in time; and
>
> (15) avoidance of multiplicity of proceedings;
>
> (16) what are the wishes of the child, when applicable and appropriate, taking into account the maturity of the child to appreciate to gravity of her or his wishes?
>
> (17) what was the intent of the parties, if any, with respect to where the child would live and how does that impact upon the best interests of the child?
>
> (18) considering all of the foregoing, as applicable, what is in the best interests of the child taking into account all aspects of the case before the Court?

[13] Having taken into account the foregoing, the Court has determined that the children are ordinarily resident of [community], are present in [community], have resided in [community] for more than a year, so have a substantial connection with [community]. The best evidence is undoubtedly available in [community]; and M.M. has acquiesced in the children remaining in [community]. It is therefore in the best interests of the children that the matter be heard in the jurisdiction in which they reside. There is no connection for the children to [community]. Only the lawyers reside in [community].

[14] However, this court has no known jurisdiction to order that the Supreme Court Family Division must hear a matter. All this Court can do is to decline jurisdiction. Based on the foregoing, this Court declines jurisdiction.

_____

M. Melvin
A Judge of the Family Court
for the Province of Nova Scotia