FAMILY COURT OF NOVA SCOTIA

Citation: S.M.S. v. M.D.T., 2012 NSFC 18

Date: 20121012
Docket: FYMCA - 078638
Registry: Yarmouth

Between:

S.M.S.

Applicant

v.

M.D.T.

Respondent

Judge: The Honourable Judge John D. Comeau, JFC

Heard: October 12, 2012, at Yarmouth, Nova Scotia

Counsel: Mitchell LeBlanc, for the applicant
Sara Allen , for the respondent

SUMMARY:

[1] This is an application to vary custody and access. The Applicant father is asking for shared custody on a 50 / 50 basis, while the Respondent mother is requesting sole custody, with the ability to move to Alberta where she has a place to stay and a job. There is a relationship between her and a man who has a home in Grand Prairie Alberta and there is evidence he is attentive and has good parenting skills. She plans to move with two of her three children (the third lives with his father in Halifax).

[2] The Applicant father has had sporadic access and very seldom spontaneously asked for Alaska, their child who was born July 6, 2011. He has never formally paid child support, although there is evidence he may have purchased some diapers and milk for the child.

[3] There is evidence of domestic violence on the part of the Applicant father having struck the Respondent. A trial is pending in Provincial Court. He advised her mother that he did this and there was evidence of bruising.

[4] The parties led evidence that both parents are good with the child, but the mother has parented Alaska since birth with little, if any, help from the father. Mother and daughter have a very strong bond.

[5] The inquiry is what is in the best interests of the child Alaska. Reference to the decision of Justice Goodfellow in ***Foley*** v. ***Foley***, 1993 CANL II 3400(S.C.) sets out guidelines for the Court when considering custody. These have been considered in the context of the paramount consideration with particular emphasis on the fact that the Applicant father has not played a significant role in the child's life to date. The mother has had the care of the child since birth.

[6] In the decision of ***Gordon*** v. ***Goertz*** [1996] 2 SCR 27 of the Supreme Court of Canada was dealing with an application to vary with a request by the mother to move to Australia. The case before the Court is an application to vary and it is necessary to determine a material change in circumstances to provide the Court with jurisdiction to change the order that now exists, applicable to the parties. There is no presumption in favour of the custodial parent. However, a considerable amount of weight is given to the parent that has that status and in the case before the Court, it is the Respondent mother.

[7] The decision of Justice Oland in ***Rafuse*** v. ***Hanspiker***, (2001) 190 N.S.R. (2d) 64 made reference to this issue:

> "The trial judge did not mention that case or any other mobility case in his decision. In ***Gordon*** v. ***Goertz***, the Supreme Court of Canada rejected any legal presumption in favour of the custodial parent but indicated at § 48 that:
>
> '... the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration.'
>
> While the trial judge cited ***Foley*, supra**, that decision did not include this principle among the factors enumerated for determining the best interests of a child.
>
> The failure by a trial judge to afford proper respect to the views of a custodial parent can constitute an error in principle: ***Burns*** v. ***Burns***, reflex, [2000] 3 R.F.L. (4th) 189 (N.S.C.A.) at p. 205. Here the child of the appellant and the respondent was eight years old when custody proceedings commenced in Feburary 2000. She had lived with the appellant, her mother, and with the appellant's two other daughters since her birth. There is no indication in the decision that the judge gave the views of the appellant as the custodial parent the degree of respect and consideration required by ***Gordon*** v ***Goertz.*** Rather, as his reasons show, the judge disagreed with the move itself."

[8] The Court has considered the summary of the law set out in paragraph 49 of ***Gordon*** v. ***Goertz***, supra. and conducted a fresh inquiry into the best interests of the child.

CONCLUSION/DECISION:

[9] This is an application to vary custody and access. The Applicant father is requesting 50 / 50 custody and the Respondent mother is asking for sole custody with reasonable access to the Applicant father. She is seeking permission to move to Alberta where she has a residence and job awaiting. She has planned child daycare. It is her belief there is a better life awaiting there and it would be in the best interests of her children.

[10] The Applicant father has had very little participation in parenting the child.

[11] There is a change in circumstances which is the mother's request to move and the plans she has made. A fresh inquiry of the child's best interests indicates that there is nothing to compel the Court to set up a shared parenting plan. The child has been in the mother's care since birth with little access or participation by the father.

[12] The mother's plans are real and valid and in the child's best interests. She will be granted sole custody with the right of mobility with the child.

[13] When the Court arrives at this type of decision, it is necessary that every effort is made to keep contact with the father. In determining this, the Court considers the availability of electronic communication and the fact that the Respondent mother has extended family here that she will visit (as witnesses they were very emotional about the mother and child leaving). Access shall be by whatever means is available to the parties and the onus shall be on the Respondent mother to communicate with the Applicant father to set up electronic contact by such means as Skype. She shall make the child available for access in Nova Scotia for the Applicant father in the summer. He will have access whenever he is in Alberta and whenever the child is in Nova Scotia, other than that referred to above.

[14] Child support is appropriate and the Applicant father has asked to pay it, something he has been hesitant to do until now. The parties have agreed that for child support purposes, his annual income is $30,000.00. The table amount for one child is $252.00 a month. This will be payable through the Director of

Maintenance Enforcement. The Applicant father asked to pay child support in his application which started in January, 2012. However, there is no evidence he has paid anything. He needs to remedy this and help the Respondent mother financially, which is in the best interests of the child. Considering this and his income, the first payment will be retroactive to June 1, 2012.

[15] Counsel for the Respondent mother shall prepare the order.

____

JOHN D. COMEAU
JUDGE OF THE FAMILY COURT FOR
THE PROVINCE OF NOVA SCOTIA