

FAMILY COURT OF NOVA SCOTIA

Citation: B.H. v. C.L.H., 2013 NSFC 14

Date: 20130628

Docket: F. No. 070815

Registry: Yarmouth

Between:

B.H.

Applicant

v.

C.L.H.

Respondent

Editorial Notice

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

Judge: The Honourable Judge John D. Comeau, JFC

Heard: June 11, 2013 at Digby, Nova Scotia

Counsel: Oliver Janson, Esq. for the Applicant, B.H..
Mitchell LeBlanc, Esq. for the Respondent C.L.H..

The Application and Introduction:

[1] There have been a number of court applications by the parties. The last proceeding was started on September 28, 2012 by the Applicant, B.H. requesting primary care of the parties children, R., born May [...], 2006 and D., born January [...], 2010. This is technically an application to vary requiring proof of a change in circumstances as there was an order dated May 15, 2012 providing for joint custody to the parties. Parenting times were provided.

[2] The May, 2012 order provided commencing in September, 2012 the Applicant, who is the father of the children, was to have parenting time with D. on a week on, week off basis, and with the child R. three weekends a month, beginning Friday after school, until Sunday at 6 p.m. Other access or changes were to be negotiated between the parties. The order made the Respondent, C.L.H., who is the mother of the children, primary caregiver. The custody access arrangement is still ongoing.

Issues: custody, access, primary

Facts:

[3] Relevant issues are those which have existed from May 15, 2012 to the present. The Applicant, B.H., lives with B.M., who has three children. They range in age from 13 and 11, to two years old. They live in a home in [...], Nova Scotia, that will shortly be renovated. Although it is B.M.'s matrimonial home, it is anticipated it will shortly be transferred in her name as a matrimonial property settlement.

[4] The details of what the Applicant is asking the Court to order include primary care of R., with the Respondent mother C.L.H. having access every second weekend. He wants the existing alternating weeks (week on, week of) with D. to continue until September, 2015, (starts school) at which time he would have primary care and the Respondent mother would have access every second weekend.

[5] The Respondent mother C.L.H. lives in [...], N.S and although a common law relationship she had with E.T. broke down, they have a positive relationship

for the benefit of their daughter who was born December [...], 2011. The home in which she resides is large with five bedrooms and is in good repair.

[6] She advised the assessor she was asking that the order giving her primary care of both children remain in effect and the Applicant father have parenting time every second weekend. In her evidence in the Court she requested that the status quo should be maintained.

[7] Most of these cases that go to trial tend to require (or they believe it is necessary) to be critical of the other parent. This one is a rare exception, except for evidence of a lack of communication, which pertains to both parties. The Applicant did express concern about the Respondent's vehicle safety in transporting the children. They did manage to come to an agreement in the May 15, 2012 order that has been referred to earlier and sets out the present parenting arrangements.

Professional Report, Custody and Access:

[8] The parties consented to a custody and access report prepared by Neil Kennedy, MSW, M.Ed., RSW, Social Worker. He makes the following recommendations:

“In conclusion, it would appear that B.H. would be the parent who would be more likely to offer the best long-term plan for R. as well as to follow through with required services.

RECOMMENDATIONS:

1. **THAT**, the children R., date of birth: May [...], 2006 and D., date of birth: January [...], 2010 be in the joint custody of both parents with respect to decision making.
2. **THAT**, the child R. be in the primary care of his father Mr. B. H..
3. **THAT**, the child D. continues to reside with each parent on an alternating weekly basis until the start of **school in September 2015 at which time hopefully the parents will be able to come to an agreement.**
4. **THAT**, the children be in the care of their father on Father’s Day and their mother on Mother’s Day.
5. **THAT**, the parents have the children on alternating years at Christmas and March Break.

6. **THAT**, both parents remain actively involved with professionals to address behavioural issues in relation to R..

[9] One of the reasons he makes these recommendations is behavioural problems with R. (does well academically) but does such things as choking other students and generally aggressive. He indicates both parents understand this and have been cooperative. Donna Raxlin, a social worker at Digby Mental Health has been involved with the family concerning R.'s behaviours and she noted both parents were cooperative. He (the assessor) points to two appointments scheduled for R. which were missed by the Respondent. January 17, 2013 was to be with Dr. Melville, psychologist who is now no longer willing to make herself available because of missed appointments. It is conceded there was a snow storm that day. Another day, (January 22, 2013) was missed with no explanation.

[10] Donna Raxlin indicated R. requires structure and routine and would benefit by a psychological educational assessment which school boards are reluctant to do for a younger child.

[11] The assessor believes the Applicant father has a better understanding of the behaviour problems of R. as per his discussion with the Respondent mother.

“When we discussed R.’s behaviour she believed that it was greatly improved since she changed his bedtime to 7:00 pm from 7:30 pm. **This indicates to me a very real lack of appreciation for the extent of the concerns for R.’s behaviour and does not bode well for her commitment to addressing this with professionals.** There is also a concern with the missed appointments with Ms. Raxlin and I am cognisant of the bad weather on January 17, 2013.”

[12] He also indicates there is something positive in relation to the Respondent mother’s understanding of R.’s problems.

“On one occasion when I was present C.L.H. handled a situation quite well with R. when she gave him a time-out before his behaviour worsened. She also showed me a scribbler which goes back and forth between home and school in relation to work and behaviour.”

[13] The Respondent mother is concerned about the large number of people in the Applicant’s home and R. would have to share a room with an older child. At her home he has his own bedroom.

[14] She explains the Applicant’s complaint about not knowing what school R. was going to in that she had to move him to [...] school because of the area in which she lives.

[15] The advice Donna Raxlin gave her is followed in that she concerns herself with giving R. a structured day, including diet. Although the Applicant expressed concern over her moves (four times in the past year) she plans to stay where she is.

The Law:

[16] The *Maintenance and Custody Act* provides for the variation of custody and access orders:

“Powers of court

37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.”

[17] The Supreme Court of Canada in *Gordon v. Goertz* (199) 19 R.F.L. (4th) 177, [196] 2 SCR 27 referred to a “material change in circumstances” as a prerequisite to vary custody or access.

[18] In *Allen v. Malden*, 2003, Carswell Sask, 632 an application to vary had a two step process, first the Applicant must prove a material change and following this, it has to be shown the prior order no longer reflects the child's best interests.

Conclusion/Decision:

[19] In the case before the Court, Counsel for the Respondent mother raised the issue of change in circumstances. These changes must be material which means going to the merits and ultimately to the children's best interests.

[20] The parties have an order most recent as May, 2012. At this time, the evidence discloses the parties were aware of R.'s problems and both were cooperating with the school and Donna Raxlin.

[21] They are both concerned and caring parents who want the best for their children.

[22] The Applicant knew of the Respondent's residence moves at the time the previous order was made and there is no proof that the move to [...] was a material

change in circumstances. Maybe a change, but not one that goes to the merits or affects the children's best interest.

[23] Considering the evidence as a whole, including the custody access assessment, there is no material change in circumstances to provide the Court with jurisdiction to vary the May 15, 2012 order.

[24] The application is dismissed.

JOHN D. COMEAU
Judge of the Family Court of Nova Scotia