SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Webb v. Webb, 2008 NSSC 415

Date: 20081216
Docket: 1201-060497, SFHD 060497
Registry: Halifax

Between:

Christopher John Webb

Petitioner

v.

Joelle Kristi Webb

Respondent

Judge:	The Honourable Justice R. James Williams
Heard:	December 3 & 4, 2008, in Halifax, Nova Scotia
Oral Decision:	December 16, 2008
Written Decision:	February 27, 2009
Counsel:	Terrance Sheppard, for the applicant/respondent Mary Jane McGinty, for the respondent/petitioner

By the Court:

[1] Maddalena Webb was born on October 5th, 2007.

[2] Her parents, Christopher John Webb and Joelle Kristi Webb met in 2003 when Mr. Webb travelled to Saskatoon from Nova Scotia to speak at a conference. Joelle Webb moved to Nova Scotia in approximately May of 2003. They married on September 18th, 2004. They separated June 28th, 2008, after Mr. Webb disclosed that he had an extra-marital affair.

[3] Christopher Webb is an artist. He grew up in Nova Scotia. His extended family is here in Nova Scotia. Joelle Webb is an emergency room nurse. She grew up in Saskatchewan. Her extended family is there. She has made an interim application seeking custody of Maddalena and, more specifically, the authority to move with Maddalena to Saskatchewan.

[4] Mr. Webb petitioned for divorce on September 9th, 2008. Ms. Webb filed an Answer September 30th, 2008.

[5] Mr. Webb's divorce petition seeks the following relief: divorce, custody, child support, division of property and pension and costs.

[6] Ms. Webb's answer and counter-petition seeks a divorce, joint custody of Maddalena, access, child support, division of property, a change of her name to her maiden name of Schoenfeld and costs. Ms. Webb's parenting statement, dated September 8, 2008, filed September 12th, 2008, asserts that she wishes to move home to Saskatchewan with Maddalena.

[7] There are two previous orders in this proceeding. An order made under the *Maintenance and Custody Act* was taken out before Justice Lynch and is dated August 5th, 2008. The order recites:

> 1. The parties will share joint custody of the child of the marriage, Maddalena Webb, born October 15, 2007.
>
> 2. That Maddalena Webb shall not be removed from the Province of Nova Scotia by either party without the written permission of the other.

[8] The order deals with occupancy of the matrimonial home and provides that due to Maddalena's then feeding schedule, that Mr. Webb would "enjoy contact with Maddalena on alternate days for a period of eight hours " at a time.

[9] The second order, an interim order under the *Divorce Act*, was issued under the authority of Associate Chief Justice Ferguson of this court on October 2nd, 2008. That order provides for interim joint custody and sets out a shared parenting schedule between Joelle Webb and Christopher Webb that was to commence October 16th, 2008. That parenting plan provides that Mr. Webb have Maddalena approximately 45% of the time and Ms. Webb, 55% of the time. The change from the previous order was triggered primarily by Ms. Joelle Webb's return to work as an emergency room nurse following a one-year maternity leave. The October 2nd, 2008 order also provides that neither party shall remove Maddalena from Nova Scotia without the written permission of the other or an order of the court and provides that Ms. Webb may travel to Saskatchewan for a vacation period from September 17th to September 25th, 2008.

[10] Ms. Webb, as I have indicated, has filed an interim application seeking authorization of a move to Saskatchewan with Maddalena.

[11] The statutory provisions applying to this application are those of the *Divorce Act*.

[12] The *Divorce Act* gives the court the authority to make interim orders of custody. Section 16 (8) of the *Divorce Act* provides:

> 8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

[13] Here the relevant circumstances include the fact that Maddalena was primarily cared for by Ms. Webb during significant portions of the maternity leave and especially prior to August of 2008; Maddalena's young age (being scarcely 14-months old) and the shared parenting arrangement that has been in place since mid-October.

[14] Sub-section (9) of s. 16 of the *Divorce Act* provides:

> (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

[15] It has not been suggested that there is such conduct by either parent here.

[16] The evidence is consistent in indicating that both Ms. and Mr. Webb are capable parents. There has been, obviously, trouble in their marital relationship, arising in no small part from Mr. Webb's admission of his affair or infidelity to Ms. Webb in June of 2008 while she was in Saskatchewan. Certainly the evidence indicates that this disclosure was news or events that was very difficult (not surprisingly) on her emotionally and required some adjustment. I have no doubt that both of these parents are still adjusting to the events that led to, and to their separation (which is only months old at this time).

[17] In making an order under this section, the *Divorce Act* provides that the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact. (s. 16(10) *Divorce Act*)

[18] Both counsel have referred to case law concerning mobility cases, and more particularly, mobility cases involving shared parenting arrangements and/or interim applications.

[19] This is an interim proceeding. Mr. Sheppard and Ms. McGinty agree that the court is to be guided primarily by the principles enunciated by the Supreme Court of Canada in *Gordon v. Gertz* (1996) 2 SCC 27. At para. (49) of that decision the Supreme Court of Canada indicated that the law can be summarized as follows:

> (49) 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.
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> 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;
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> (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.

[20] Maddalena is currently in her parent’s shared care, spending approximately 45% of her time with her father, 55% of the time with her mother. The evidence indicates she is doing well.

[21] I am satisfied that in these circumstances I should not treat this application as an application to vary. That said, I believe both counsel are agreed in any event that the circumstances warrant, under the case law, a fresh or new inquiry into the

best interests of the child. These are circumstances where a shared custody arrangement was entered into. At a time when everybody knew that Ms. Webb was going to be seeking (from the court) the ability to move to Saskatchewan with Maddalena. Perhaps it was not known exactly when she would seek that, but it was certainly known that she would.

[22] While Maddalena was primarily in Ms. Webb's care up until August, 2008 and even for a period of time after August, it is clear that she has been in her parent's shared care since mid-October, 2008. That shared care arrangement, as I indicated, appears from the evidence before me to be working well for Maddalena.

[23] The case law as enunciated in *Gordon & Gertz, supra* makes it clear that it is the best interests of the child that the court is to consider, not the individual interests and rights of the parent (except insofar as those impact upon the best interests of the child). The existing custody arrangement and the relationship of the child to both parents is to be considered. The desirability of maximizing contact, as I have indicated, is to be considered. The views of the child here are not attainable. Maddalena is only 14-months old. The custodial parent's reason for moving is to be considered only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child. Here certainly it is Ms. Webb's assertion that she has more of her family support in Saskatchewan and that, in her view, being there would enhance in a broad sense her ability to meet the needs of their child. The evidence before me indicates that Ms. Webb is a capable adult, a capable parent, a capable nurse, a capable young professional.

[24] Disruption to the child is a factor to be considered. Disruption to the child consequent to a removal from family, schools and/or the community may be considered. Again, Maddalena is very young. The primary disruption to her arising from a move would clearly be the disruption of her existing and developing relationship with her father.

[25] Ms. Webb asserts in her affidavit at paras (9), (10) and (11) as follows:

> (9) I wish to return to Saskatoon with Maddalena to attend University. I applied to enter the Master of Nursing at the University of Saskatchewan. I received a response to my application a letter from Lynnette Leesebert Stambler, assistant

> dean, acknowledging my application and categorizing me as a "strong candidate" for the program.

[26] Ms. Webb expects to hear on that application some time in January of this year. In para. (10) she states,

> (10) There is not much support for me here." (*Referring to Nova Scotia*.)

[27] Paragraph (11) says:

> (11) Maddalena and I have a strong support system for both of us in Saskatoon --"

[28] Ms. Webb is an emergency room nurse. She hopes to teach in the future. Her plan is to return to Saskatchewan, do a Master's degree, work part-time, have a friend and family care for Maddalena. She said Mr. Webb could move to Saskatchewan. She has not explored the Master's program available at Dalhousie University.

[29] Mr Webb says he cannot move. His work as an artist is established here. He has flexible hours and is available to parent when Ms. Webb works shift work or were she to attend school.

[30] Maddalena appears to be thriving. The test to be applied is Maddalena's best interests. She is an infant, 14-months old. The court does not need expert evidence to conclude that she is forming attachments to both parents and them to her. She was in Ms. Webb's primary care prior to Ms. Webb's return to work in October of 2008. At the time of this hearing, however, Maddalena is unquestionably in the shared care of her parents.

[31] This is an interim hearing. The issue of permanent custody awaits resolution. The comments of Justice Schuler in *Ivens v. Ivens* [2008] N.W.T.J. No. 1 appear relevant. Justice Schuler states:

> 28 A point that must not be lost sight of is that this is an interim application so the Court is considering what the best interests of the children are pending a final hearing. The Respondent argues that the decision to allow relocation should not be made on an interim application. While neither counsel referred to case authorities directly on that point, I find guidance in *Datars v. Graham*, [2007]

O.J. No. 3179 (Ont. Sup. Ct. Jus.), where the Court, after reviewing a number of cases, said:

> ... the general reluctance of the court to effect fundamental changes in a child's lifestyle on interim motions has resulted in a slightly more restrictive approach to interim mobility cases, one that recognizes the short-term nature of interim orders and the summary nature of interim motions. As well, since the decision on an interim motion in a mobility case will often strongly influence the final outcome, particularly where relocation is permitted, caution is called for, especially since even more disruption may be caused in a child's life if an interim order permitting the move is later reversed after trial ...

[32] I have considered the evidence put before the court, the evidence of parent's, grandparent's, friends and supporters, the evidence put forward through affidavits, attachments to affidavits, and through *viva voce* evidence.

[33] Maddalena is a lucky little girl. She will have a broad spectrum of support and love as she grows older. I have considered Maddalena's care since her birth and the fact that until August of 2008 she was primarily in her mother's care. That continued, although to a somewhat less degree, from August to mid-October 2008, when the shared care arrangement took effect.

[34] I have not considered myself bound by the interim arrangement or order that was made under the *Divorce Act* in early October. The parties have acknowledged that the planned move constitutes a change in circumstances warranting a fresh inquiry into Maddalena's best interests.

[35] I have considered Ms. Webb's feelings that she has great support in Saskatoon and the evidence of her friends and extended family. I have considered the fact that she felt betrayed by Mr. Webb's infidelity and undoubtedly still feels betrayed. I have considered her evidence that she is healthy and capable. I have considered her evidence with respect to her future professional hopes and aspirations. I have considered the nature and stage of this proceeding. It is an interim application.

[36] I have considered Mr. Webb's circumstances and the flexibility he has in adjusting his parenting time to Ms. Webb's work schedule and conclude that it constitutes a real benefit to Maddalena at her young age. She is cared for in the current circumstances for virtually all of the time by a parent.

[37] I have considered the provisions of the *Divorce Act* and case law I have referred to.

[38] I conclude that a move of Maddalena to Saskatoon would disrupt, significantly, her existing relationship with her father and given her age, the ongoing development of that relationship.

[39] I conclude it is in Maddalena's best interests at this time to maintain and enhance her relationship with both parents. I cannot identify benefits to Maddalena from a proposed move, that outweigh or even approach the benefit of continuing the shared parenting relationship she currently benefits from under the terms of the interim order.

[40] The interim application is dismissed as it relates to the requested move.

[41] The previous interim order remains in place. That order contains a provision that neither parent will remove Maddalena from the province of Nova Scotia for the purpose of residing outside of the province without the consent of the other party or permission of the court.

[42] In the absence of one or other counsel identifying a reason to make an adjustment in that interim order I see no reason to do so based on the evidence before me. The order is consistent with Maddalena's best interests. There has been reference to issues of support, but they were primarily in terms of the mobility issue and I do not feel at this time that I have sufficient evidence before me to make an order dealing with support. It is a shared custody relationship and any order dealing with support can be made retroactive if that is warranted in the future.

[43] This was, as Mr. Sheppard indicated, an interim application. Very clearly it would be inappropriate to award costs based on consideration of what has gone before the interim application, whether it be either of the previous interim orders or for that matter an assertion that discovery proceedings were slow to come about. I really do not have any evidence concerning that. This is a very discrete issue before the court on this, a very straight-forward question when all is stripped away, although based on obviously Maddalena's best interest, the issue for the court from the parties point of view was discrete and clear. Either there was to be a move authorized at this time or there was not to be.

[44] Mr. Webb has been successful in this proceeding. I share Mr. Sheppard's view that the interim proceeding, at least as it appears to the court, was conducted smoothly and in an uncomplicated way by both parties and that there appeared to be a reasonable approach taken to the admission of evidence, affidavits and examination and cross-examination by both parties through their counsel.

[45] In the end it is appropriate that there be some award of costs, where one party has had success and the other has not. I see little to be gained by leaving this to a costs in the cause order as Mr. Sheppard has indicated. This is, as I said, a discrete event and there are subsequent events costs can be dealt with there as appropriate.

[46] In my view the appropriate order of costs is $3,500, plus disbursements to a cap of $500.00, with the direction that that sum is to be paid through an adjustment in any final resolution of the support and property issues between the parties or by October 1st of 2009, whichever date is earlier.

J.