

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: V. H. v. B. L., 2010 NSSC 202

Date: 20100526

Docket: SFSNMCA58479

Registry: Sydney, NS

Between:

V. H.

Applicant

v.

B. L.

Respondent

Editorial Notice

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

Judge: The Honourable Justice Darryl W. Wilson

Heard: May 17, 2010 and May 18, 2010

Oral Decision: May 25, 2010

Written Decision: May 26, 2010

Counsel: Gus Postlewaite, Counsel for the Applicant
Alfred Dinaut, Counsel for the Respondent

By the Court:

[1] V. H. (the mother) and B. L. (the father) are the parents of Z. L., age six. In December, 2008, the mother applied pursuant to Section 18 of the Maintenance and Custody Act, R.S.N.S. (1989), c. 160, for an order for sole custody of Z.. In November 2009, she applied for an order for child maintenance pursuant to Section 11 of the Maintenance and Custody Act and the *Child Maintenance Guidelines*.

[2] The father responded to the mother's initial application by requesting an order for joint custody with the child residing during the week with the mother and on weekends with him. After the proceedings were initiated, the mother indicated an intention to relocate with the children to *. The father opposes the children's relocation.

ISSUES

- [3] The issues to be decided are:
- (1) The appropriate parenting order;
 - (2) Children's relocation;
 - (3) Amount of child maintenance, if any.

BACKGROUND

[4] The parties met in January, 2003. Z. was born in November, 2003. When the parties met, the mother was living in her own accommodations with a son, D., from a prior relationship. The parties' personal relationship, which lasted approximately five years included periods of commitment as well as periods of conflict and argument. The relationship ended because of constant arguing and fighting in the presence of the children.

[5] The parties had different views on their living arrangements after Z.'s birth. The mother said the father resided at his parent's home and visited her apartment three to four times a week. The father said he resided full-time with the mother after Z.'s birth. The mother agreed the father spent a lot of time with Z. at her place during the week and at his parents' home on weekends. The father assumed the role of a father to D., and took him with Z. to his parents' home on weekends. D. does not have any relationship with his own father.

[6] The mother was not employed during this relationship. The father worked as a labourer. He earned minimal income. The mother was Z.'s primary care provider, assuming responsibility for meeting his basic needs, attending to medical appointments, arranging his schooling and child care if necessary. Although the father spent time with Z. and occasionally provided care, most of the parenting responsibilities were left to the mother. The father's parents assumed primary care responsibilities for Z. when he visited their home on weekends. The father spent more time with D. in leisure and recreational activities. The father acknowledged that Z. spends more time with his parents than himself and looks to them rather than himself to have his needs met. The father has attended to Z.'s needs when requested. The father and his family enrolled Z. and D. in hockey. D. attends hockey regularly with the father, but Z. does not like to get up early on Saturday mornings and, therefore, missed most of his hockey games and practices.

[7] According to the mother, the father is not suited to be a custodial parent. She does not believe he has the requisite parenting skills. He is unable to control his anger and lacks patience when dealing with the children. She observed him yelling at the children and spanking Z.. He did not immediately make himself available to take Z. to hospital when it was reported that Z. hurt himself falling from a tree. She described him as emotionally unstable because he threatened suicide on two occasions during arguments. On another occasion, he grabbed her by the throat during an argument. A neighbour reported the incident to the police. He was charged but the charges was dismissed when the mother did not attend the court hearing. After separation, he broke into her home, which frightened her. She has observed the father using "weed" and is afraid her children will eventually be exposed to this habit. She would not be agreeable to the father having extended contact with the children, if he was not residing with his parents.

[8] The father denies the mother's claims that he attempted suicide. He also said that, although he was charged with assault, the mother assaulted him. He was prepared to take his son to hospital but could not respond immediately because he did not have transportation.

[9] The mother has an excellent relationship with the father's parents. She has called upon them on a number of occasions in emergencies and they have always assisted her. They have provided school lunches, clothing and child care. The paternal grandmother is listed as an alternate school contact in case the mother cannot be located. Z. has a close bond with his grandparents. He visited them on a

weekly basis, both before and after the parties' separated. The mother and grandmother communicate with each other in a cooperative and cordial manner when it comes to Z.'s care.

[10] The mother said she is not able to communicate with the father because their discussions usually result in arguments and emotional outbursts by the father. They have not discussed the mother's relocation. The mother said the father does not want to talk about it. The father said the mother told him it was none of his business.

[11] Z. was four years old when the parties separated. He is now six years old and a Grade 1 student at a local elementary school. He has been bullied at school but the parents have been able to deal with this issue. He is in the Resource and Reading Recovery Program at school. Several months ago he became very angry with his brother, took a knife and threatened to harm himself. He began hitting his mother. School authorities noticed an increase in angry outbursts. As a result, he was taken to the Emergency Department of the Cape Breton Regional Hospital and referred to Child and Adolescent Services. He was seen by Psychologist, Dr. Stephen McEachen. Both parents attended the first appointment and the mother has attended three subsequent appointments. Dr. McEachen concluded that there were no underlying mental health issues and it was unlikely that he would harm himself. Dr. McEachen intends to make a referral to Family Services of Eastern Nova Scotia for the parents to attend counselling to discuss any underlying family conflict that may have been at the root of Z.'s behaviour. The mother and grandmother have agreed on common parenting practices to maintain consistency in parenting Z. in both homes. Both parents report that Z.'s behaviour has calmed in the last few months and he has not been angry at his brother or physical with his mother.

[12] The father has some concerns about the stability of the mother's residence and her need for support in caring for the children. After their separation, the mother resided in several locations including the homes of his parents, her brother, her mother and Transition House, until eventually she settled in her current apartment, approximately a year and one-half ago. He helped the mother get the apartment ready for occupancy by painting and laying carpet.

[13] In November, 2009, the father was able to obtain full-time employment with a *, earning \$15.00 an hour for a 44-hour week. The mother receives Social

Assistance and works at * on a casual basis earning minimal income. The father has voluntarily been paying child maintenance according to his income. He is willing to increase his child maintenance payments based on an increase in his income.

[14] The mother doesn't believe the location of her current apartment is suitable for the children, since her older boy is being bullied by older kids in the neighbourhood. Her children are unable to possess bikes in this neighbourhood because they will be stolen. She would like to relocate from this area but is limited by her finances.

[15] The mother has supportive family members in the local area, including her mother, brother, father and step-mother. After the parties' separation, she met S. B. through mutual friends. Mr. B., who is from N., has been working as a * in * for the last 10 years. He is 34 years of age. He was never married and does not have any children. He resides in a three-bedroom duplex in B.. He works 10 days on and four days off. She has known him for approximately two years. They have been able to maintain a relationship through phone calls and email. He visits her in Cape Breton every three months and she has been to his home in * on two occasions. The father and his family looked after the children when she visited Mr. B. in *. Mr. B. has met her children on two occasions - once in the summer of 2009 and again in April of 2010. The mother has mentioned to the children the possibility of a move to *.

[16] Mr. B. did not testify because he was working in *. The mother said they have discussed marriage, having children and purchasing a home. She indicated Mr. B. earns approximately \$66,000.00 a year and is prepared to support her and her two children without help from the father. She will attempt to find work when she relocates but will limit her working hours to when the children are attending school, unless she can find appropriate child care. She is agreeable to block access several times a year in Cape Breton for the father, including six weeks in the summer, a week at Christmas, and a week during March Break. She will forego her claim for child maintenance in order to assist the father with the cost of transporting the children for access visits in Nova Scotia.

[17] The mother said that a move to * was in the children's best interest because it will provide more material things and a better life for them. Her family supports

her decision to relocate. Schools for both children are within walking distance of Mr. B.'s duplex.

[18] The father's concern with Z.'s move to * is that he and his parents will not be available for him if needed because of the distance between their residences.

[19] The mother said she will remain with Z. in Nova Scotia if relocation is not in his best interest. The father plans to continue living with his parents but he is considering taking an apartment in S. He is dating a lady from *. He takes D. on visits to her home as she has a son close in age to D..

LEGISLATION

[20] The relevant portions of the *Maintenance and Custody Act* are as follows:

9. Upon application, a court may make an order, including an interim order, requiring a parent or guardian to pay maintenance for a dependent child.

10. (1) When determining the amount of maintenance to be paid for a dependent child, or a child of unmarried parents pursuant to Section 11, the court shall do so in accordance with the Guidelines.

(2) The court may make an order pursuant to subsection (1), including an interim order, for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order or interim order as the court thinks fit and just.

(3) A court may award an amount that is different from the amount that would be determined in accordance with the Guidelines if the court is satisfied that

(a) special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses or common-law partners, or the division or transfer of their property, directly or indirectly benefit a child, or special provisions have otherwise been made for the benefit of a child; and

(b) the application of the Guidelines would result in an amount of child maintenance that is inequitable given those special provisions.

(4) Where the court awards, pursuant to subsection (3), an amount that is different from the amount that would be determined in accordance with the Guidelines, the court shall record its reasons for doing so.

(5) Notwithstanding subsection (1), a court may award an amount that is different from the amount that would be determined in accordance with the Guidelines on the consent of both spouses or common-law partners or parents if satisfied that reasonable arrangements have been made for the maintenance of the child to whom the order relates.

(6) For the purpose of subsection (5), in determining whether reasonable arrangements have been made for the maintenance of a child, the court shall have regard to the Guidelines, but the court shall not consider the arrangements to be unreasonable solely because the amount of maintenance agreed to is not the same as the amount that would otherwise have been determined in accordance with the Guidelines.

...

18. (1) In this Section and Section 19, "parent" includes the father of a child of unmarried parents unless the child has been adopted.

(2) The court may, on the application of a parent or guardian or other person with leave of the court, make an order

(a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or

(b) respecting access and visiting privileges of a parent or guardian or authorized person.

...

(4) Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise

(a) provided by the Guardianship Act; or

(b) ordered by a court of competent jurisdiction.

(5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration.

CASE LAW

[21] The “best interests” test has been elaborated on by the Supreme Court of Canada in **Young v. Young**, [1993] 4 S.C.R. 3. While discussing Section 16 of the *Divorce Act*, the Court stated at paragraph 17:

“... the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has been left to the judge to decide what is in the "best interests of the child", by reference to the "condition, means, needs and other circumstances" of the child. Nevertheless, the judicial task is not one of pure discretion. By embodying the "best interests" test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all legal tests, it is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do.”

[22] While **Young** (*supra*) was considering the best interests test in the context of the *Divorce Act*, the same test can be applied to a consideration of the “welfare of the child” test, pursuant to the *Maintenance and Custody Act*.

[23] Both counsel referred the Court to the decision of Goodfellow, J. in **Foley v. Foley**, [1993] N.S.J. 347, which is helpful for its’ list of factors for the Court’s consideration in assessing the “best interests” and “welfare” of the child.

[24] Counsel also referred the Court to a number of decisions on “mobility”. McLaughlin, J. (as she then was) in **Gordon v. Goertz**, [1996] S.C.J. No. 52, beginning at paragraph 49, stated:

49. 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.**
- 50. 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 in the best interests of the child in all the circumstances, old as well as new?**

CONCLUSION

[25] Z. is a six year old child whose academic needs and social interactions at school are at risk if not closely monitored and addressed in a timely manner. He is already exhibiting behavioural problems, which require intervention.

[26] I am satisfied the mother is cognizant of Z.'s difficulties and wants to provide more opportunities for him. Z. benefits from a positive relationship with his father's parents, which is facilitated by the mother. The father, although involved in a limited way with Z., defers to the mother and his parents to ensure that Z.'s needs are met.

[27] My assessment of the evidence indicates that, although the father has had regular contact with Z., it is the mother who has been his primary care-provider. She is more attuned to development issues in Z.'s life and better able to provide the emotional support necessary for Z. to develop self-esteem and confidence.

[28] The father has not been the most positive role model at times. His behaviour has not been consistent and he can't be relied upon as an appropriate custodial parent. At times, he has been supportive and helpful of the mother, including assuming the role of a father to D.. Other times, his behaviour has been threatening and selfish. He is an interested parent, but not as involved in Z.'s care as the mother.

[29] Z. also benefits from the support his mother receives from her family in the local area.

[30] The mother's limited financial resources means she is unable to provide better accommodations and more opportunities for Z. and his brother. The father's parents have assisted financially as best they can when the mother is having difficulty meeting Z.'s needs. The father voluntarily pays child maintenance according to his income. The father and his parents have assumed the cost of Z.'s organized hockey activities, but Z. is not taking advantage of this opportunity.

[31] This proceeding is an original application for custody and unlike **Gordon**, (*supra*), does not require proof of a material change in circumstances. The mother's wish is to relocate to * with Z. and her older son but is prepared to assume custody of Z. in Cape Breton rather than see the father assume custody.

The mother's access proposal for the father if she is residing in * maximizes contact given the realities of the distance between the residences.

[32] The mother sees relocation to * and her relationship with Mr. B. as an opportunity to provide Z. and D. with better living conditions and opportunities as well as more opportunity for herself. I do not find she's motivated by any desire to restrict contact between Z. and his father and his father's family. She is willing to facilitate as much access as is possible given the distance between * and Cape Breton.

[33] A move to * would be extremely disruptive to Z.'s relationship with his father and grandparents who have played a major role in his development since birth. There will be less disruption to Z.'s schooling and community since he is just starting school and he is not that involved in community activities.

[34] The mother has no job and is relying upon Mr. B. to support her and the children when she relocates to *. There is very little evidence about how Z.'s needs will be met once he is residing in *. Mr. B. did not testify and the mother's reference to his finances and commitment to her and the children is hearsay. The mother has no family support in * if Mr. B. is unable to provide for them. I find the mother's evidence in support of how Z.'s needs will be met in * lacks detail and, therefore, is incomplete.

[35] Having reviewed all the relevant circumstances, I find it is in Z.'s best interest that his mother be granted sole custody. The father's conduct towards the mother and his threats to harm himself are factors which mitigate against a joint custody order. While there may be conflict and disagreements between the parties, and occasional interruption of access, I am satisfied the mother supports and encourages a relationship between Z. and his father and his father's family. In establishing an access order in Z.'s best interest, flexibility rather than rigidity is to be preferred. Therefore, the father is entitled to reasonable access at reasonable times upon providing reasonable notice.

[36] According to **Gordon**, (*supra*), in proceedings involving mobility issues, the Court's inquiry does not begin with a legal presumption in favour of the custodial parent, but a custodial parent's views are entitled to great respect. The Court in **Gordon**, (*supra*), also stated that each case turns on its' own unique circumstances

and the only issue is the best interests of the child in the particular circumstances of this case.

[37] The mother's ability to meet Z.'s needs in * is entirely dependant on Mr. B.'s financial resources, and his commitment to her and her children. The mother's ability to meet Z.'s needs will be compromised if Mr. B. is not available to support her and her family. A more stable parenting arrangement exists for Z. in Cape Breton. The mother can count on the support of her family, as well as the father and his family in addressing Z.'s needs when residing in Cape Breton. With very little reliable information about Mr. B. and his circumstances, I find there is much uncertainty surrounding the mother's planned relocation to * with Z. and his brother. Despite the views of the mother, based on the evidence presented at the hearing, I find it is not in Z.'s best interest to relocate to * at this time. The Court is prepared to review the order if additional evidence is forthcoming.

[38] The father testified that he has full-time employment, working approximately 44 hours per week at \$15.00 per hour. I fix his annual income for purposes of determining child maintenance at \$34,000.00. Child maintenance of \$300.00 per month, beginning June 1st, 2010 is ordered. The maintenance order will include the usual provisions requiring annual disclosure to the mother of the father's income while Z. continues to be a dependent child, as well as payment of the order through the Maintenance Enforcement Program.