1999 S.F.H. No. 1201-51961

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Cite as: *Lariviere v. Lariviere*, 1999 NSSC 138 (Formerly 1999 NSSF 1)

BETWEEN:

Monique Louise Lariviere (now Yurkiw)
- Petitioner

- and -

Joseph Rolland Raymond Lariviere
- Respondent/Applicant

DECISION
(Orally)

HEARD BEFORE: The Honourable Justice F.B. William Kelly
DATE: November 26, 1999
PLACE: Supreme Court (Family Division) Halifax, Nova Scotia
COUNSEL: Sheree Conlon, counsel for Mr. Lariviere

[1] This is an application under section 17 of the *Divorce Act* to vary custody, access and child support on a Corollary Relief Judgment dated April 20, 1998. Stated in the brief of counsel for the applicant father, Mr Lariviere, is an indication that the applicant here is seeking an interim order granting him custody of the children until after Ms. Yurkiw moves to Ontario.

[2] Before I proceed further in the facts, I wish to comment I am satisfied that notice was served on the mother several days before this hearing. I am advised by counsel for the applicant that she has been in contact with counsel for the mother in

Alberta. The nature of that contact is that they would not be responding to the jurisdiction of this court and some consideration was being given to making an application in relation to the children in Alberta. I therefore have not received evidence or submissions on behalf of the mother, Ms. Yurkiw.

[3] The parties were married on July 7, 1990, after living together from 1986. There were two children of the marriage, Christopher Eric Lariviere born […], 1993 (who is six years old) and Chantal Louise Lariviere born […], 1995 (who is four years old). The Corollary Relief Judgment sets out a parenting plan by way of the schedule of a Separation Agreement which is incorporated into the Corollary Relief Order. Basically, Schedule B provides the parties are to have joint custody with primary custody to the mother, Ms. Yurkiw, who is to have a *de facto* responsibility for the care and control of the children. It also provides that the father is to be consulted on all major decisions and specifies matters such as serious discipline problems, religion, education and non-emergency health care. Schedule B also provides that the father is to have reasonable access with considerable details to that access, including extended vacation time and a period of vacation during the summer.

[4] Somewhat unusually, the Agreement provides that the mother is entitled to move with the children to Edmonton, Alberta. A move which apparently then was anticipated to take place in February of 1998 to satisfy a posting that she had. Both applicant and respondent are members of the Canadian Armed Forces and are, of course, subject to postings or moves within the discretion and judgment of the Department of National Defense. The schedule also seems to indicate that if there is some delay on her posting that she could move the children to other locations within Canada, as a result of a posting to such locations by D.N.D.

[5] The father, Mr. Lariviere, has a common-law relationship with a partner that has existed for over a year. This partner has a daughter aged five from a previous marriage and she shares custody of that child with her ex-husband. The mother is a pharmacist at Canadian Forces Base in Edmonton, and I am advised by the affidavit of the father that her income is supplemented by work in the private sector as a pharmacist.

[6] Ms. Yurkiw was married in June of this year after a common-law relationship with her present husband, which apparently has existed since February of 1998. I am advised that when she left the matrimonial home in January of 1997, that the father had the primary care of the children until an interim consent order was entered into between the parties in August of that year, which at that time gave her exclusive possession of the matrimonial home and primary care of the children. Following this, a separation agreement was reached in January of 1999 and that is the document which I have indicated is appended to the Corollary Relief Judgment as Schedule B.

[7] In July of 1999 the mother advised the father that she was posted to Bosnia for a period of six months and was required by that posting to be in Ontario for some months by way of training and preparation for the Bosnia posting. At that time she presented the father with a child care agreement to deal with this deployment and training period. Essentially, the agreement indicates that the children would reside with him during the fall, winter and spring of 1999 and the year 2000. As I understand the explanation it was to enable the children to be with their father as opposed to residing with their step-father in Alberta. However, a number of conditions and clauses were part of that agreement which I will discuss

later. Essentially the agreement said that the children would reside with him during that period and that she would be entitled to exercise access and that after the period of basically one year matters would then return to the status quo.

[8] The agreement also made compensory support arrangements that provided the child support the father was obliged to pay under the divorce judgment that he would no longer pay that, and some other compensory arrangements were made requiring some financial assistance from her. The children then came to Nova Scotia and they established a home with their father. The oldest child entered grade one the youngest child was placed in a day care arrangement which I understand her older brother also attended after school hours.

[9] On or about November 6, 1999, the mother arrived in Nova Scotia for a scheduled access visit which apparently was to run from approximately that date to mid-November. At this time, according to his evidence and for the first time, she advised him that she was not going to Bosnia, that there had been a change of posting and a change of plan. He believes that part of the reason for this was that she was missing her time with the children and that she was looking for other alternatives and thus had made an application to take medical training at university.

[10] The mother announced that as a consequence she felt the children should be returned to her and suggested that an appropriate time for them to be returned to her would be after the son had completed his term ending in December 1999, about one week prior to the actual closing of school. The father's first reaction was that he felt it would be more appropriate that the children should stay with him at least until the end of the school year as it would be less disruptive to the children and their educational process. The father indicated that he pointed out that if she in fact

succeeded in going to university the following year, it would mean a third change of school within a short period of time. The mother disagreed with this proposal and the father indicates he suggested mediation. Apparently some further discussion took place in regard to this topic very late in the visit perhaps on Friday prior to the weekend of the completion of access which was to be the following Monday.

[11] In the interim, the father attempted to seek legal counsel and made an appointment for the Monday. He did not advise the mother of this but did indicate that he wanted time to review the matter. His evidence is that the mother was abrupt in rejecting it, that she felt that it was within the terms of an interim parenting agreement that the children not stay until the end of the year and she could remove them immediately. Then on or about November 14th , about the time that the mother was to leave and return the children, she phoned the father and advised that she was in Toronto and that she was on her way back to Edmonton. He subsequently believed that she was in Ottawa at the particular time although that does not appear to have too much relevance to the situation. He indicates that she asked him to forward the November support payment and she also indicated that she would be getting advice from her lawyer in relation to the application of the interim agreement.

[12] I should expand somewhat on the children while in Nova Scotia and their relationship to Nova Scotia. They were both born in Halifax and lived here until February of 1998 and then returned, of course, on the basis of the parenting agreement that they return with him in the summer of this year as explained above. They have relatives in the area including the maternal grandmother. They obviously have some significant ties to the jurisdiction of Nova Scotia. Christopher

is in grade one and was doing reasonably well in school. He has had some minor difficulties, particularly in relation to reading, and his father had arranged some additional assistance for him through the school and generally the father advises that he has adjusted well to the school and has developed friendships. He also reports that his step-daughter has developed friendships and relationships with both Christopher and Chantel. They had made plans for other activities in the area prior to the children being removed. As well, the father, in anticipation of the children coming to live with him, had made an application to his superiors that he not be posted to sea or related duties during the year so that he would be available for the children at all times.

[13] Returning to the interim parenting agreement entered into between the parties, clause 8 of that agreement provides that "If plans change at any point in the year, i.e. cancellation of deployment, then the children are to be promptly returned to Edmonton and prior arrangements are to be reinstated." This agreement constituted a change in the parenting role of the partners as specified in the Corollary Relief Judgment. The father protests that it was a "take it or leave it" situation and that it was thus forced on him. However, I feel that he did have some choices. He could have of course refused it or he could have made an application to contest the alternate proposal of the mother that the children stay with the step-father in Alberta. Arguably, the mother's proposal was not consistent with the theme and sense of the court order which encouraged considerable access to the father or a parenting role that was in the best interests of the children. Under such circumstances he may well have been granted a day-to-day care and custody role for the year in question.

[14] Assuming therefore that the document entitled "Child Care Agreement

During Monique's Deployment" is valid and enforceable, and setting aside for the moment any best interest of the children consideration, then it is appropriate to ask whether clause 8 of the agreement would be triggered by the situation that developed. Did the mother's plans change at any point during the year? This would strike me as the factual issue that would be appropriate in determining the applicability of that clause. Obviously they did. She advised the father, on very short notice admittedly, that she was going to Bosnia and intended to take medical training possibly in another province. I believe he indicated she referred to an Ontario university commencement of the fall term of 2000 and that she wanted the children returned in December 1999. As I stated, at this point, the parties disagreed as to what should take place. The father suggested mediation and the mother apparently argued clause 8 and indicated that he basically had no choice in the matter. Then the unfortunate incident occurred of her taking the children at the end of her access period without notice.

[15] The father submits, with some merit, that this action was not in the best interests of the children as it was extremely disruptive of the settled lives that they had established in Nova Scotia. He pointed out that it was an interruption of their education and an abrupt end to friendships and other bonds that they had established during their residence with him in Halifax. The father also protests that any move back to Edmonton and then subsequently to Ontario would make two numerous moves, which would be disruptive to the children.

[16] While recognizing the validity of such concerns, I would note some relevant factors in relation to those concerns and particularly to clause 8 of the agreement of the parties. Any schooling change made during the school year is going to be disruptive to children. But such changes are now becoming

commonplace in a very mobile society. Both parents here are longstanding members of the military forces of our country and have an expectation that such duties and such employment means very often that moves will take place from time to time and may take place even during the school year regardless of how much the military authorities attempt to avoid this. In other words the parties entered into their separation agreement and this interim agreement with the understanding that such moves may take place in their service.
As well, of course, the separation agreement anticipates moves by references in the schedule that relate to the move of the children to Edmonton and as well the possibility of delayed postings and what to do in such circumstances if there is a move to any other location in Canada if so posted by D.N.D.

[17] These are very young children and at the beginning of their educational process. An interruption at that level is in most cases less significant educationally then at a higher level of education. I have no indication to suggest that they are not adaptive children, other than the comment with reading problems which I have referred to above and which is being dealt with, that they have any educational difficulties. The daughter's report from her day care is very positive.

[18] The mother could have clearly effected the move in a less abrupt manner and in a manner more appropriate for the circumstances. The children should have given an opportunity to say an appropriate farewell to their father and their friends and notice given to their school and day care centre. However, the evidence that I have does indicate that the mother acted in the face of a claim of the father that the children should remain in Nova Scotia into the year 2000. The discussions between them may have lead her to a belief that she had little choice other than to face a court struggle in Nova Scotia on the subject. Such a belief under the pressured

circumstances that both parties were subject to the at the time does not validate her actions but it does to some extent explain the possible concerns and stresses she was facing. She may well have felt that it was a reasonable action to take in the circumstances even recognizing the effect it may have had on the children.

[19] I received a useful brief from counsel for the applicant. It has referred to a number of authorities *Hjorleifson v. Gooch* (1986), 73 N.S.R, (2nd) 271. The Court of Appeal held that both Nova Scotia and Alberta had jurisdiction in the circumstances. Referring to the head note for the summary of the facts, in part it states "the facts are briefly that the parties became acquainted during the summer of 1978 and a daughter was born to them in July of 1979. Subsequently they remarried in Edmonton, Alberta. In February 1981 where they resided until unhappy differences arose between them and they separated in August 1984. The wife left the matrimonial home without the husband's knowledge or consent and took the child with her to Nova Scotia. Shortly after her arrival in Nova Scotia she made an ex parte application to the Family Court requesting interim custody of the child which she was granted." The facts indicate that several days later the wife notified the Family Court that she no longer desired the custody of the child. A situation that seems unusual in all of the circumstances. In any event, when the husband became aware that the wife was in Nova Scotia, he reached her and made some attempts at reconciliation. She apparently encouraged this to some extent so that he eventually came to Halifax and it was agreed that the husband take the child back to Alberta, which he did. No formal agreement regarding the custody was executed, however, but it was clear that the parties did form an agreement that he have the children on a day-to-day custody basis in Alberta.

[20] The husband was then invited to come to Nova Scotia by the wife. He was

greeted on his arrival with a planned arrangement involving a summons for him to appear at Family Court a week later. At the same time the mother took the child and with the aid of others, left rapidly in a vehicle. Up to this time the parties had no formal agreement regarding custody earlier without notice, but the wife had received the *ex parte* order which she had decided not to enforce.

[21] After the incident, the matter of custody was considered in the Family Court and it was there determined that the forum convenience was Alberta and that the child should be returned to the father. This matter was then appealed to the County Court where the judge considered the great disruption that would occur by the children being returned again to Alberta and the absence of any evidence of a court application in Alberta and concluded the move was not in the best interests of the children and set aside the trial court decision. The matter was then appealed to the Court of Appeal where Pace, J.A., speaking for the court, allowed the appeal and found Alberta to be the proper forum. At page 275 the Court of Appeal found that the welfare of the child was the paramount consideration and that the trial judge was not in error as that was the basic consideration of the trial judge. In addition, the Court concluded that it was appropriate to the administration of justice that the hearing should take place in Alberta.

[22] In many of the cases considered by the courts on the matter of jurisdiction the situation is where there is a kidnaping that is contrary to an existing order or agreement. In *Hjorleifson* the Court of Appeal found, as I mentioned above, that both Nova Scotia and Alberta had jurisdiction and discussed some authority in relation to the role of a court in determining jurisdiction. They referred to power and divorce at page 273, paragraph 12 as follows:

Power on Divorce and Other Matrimonial Causes (3rd Ed.), Vol. 2, at pp. 259 - 260 states

the matter thusly:

> The place where the child is ordinarily resident is, in most cases the most convenient forum to hear the case. Yet, the place where the child presently is also has jurisdiction. In determining whether to exercise its jurisdiction the court where the child is physically present will bear in mind two considerations: the administration of justice and the welfare of the child. Clearly, abduction of children should be discouraged from the point of view of proper administration of justice and it is in the best interests of the child that the case be heard by the forum convenience which, as is stated above, is generally the place of ordinary residence. Recent cases would seem to go so far as to say that, unless there is proof that harm will result to the child, the court where the child is physically present should decline to hear the custody issue. If the court does decline to hear the custody issue then it should not leave the matter in vacuo but should make an order directing the child to be returned to the place of ordinary residence.

[23] I would note in the present case, Nova Scotia is not the jurisdiction where the children frequently reside, although it is argued that it is their place of "ordinary residence". Counsel has also referred me to *Sutton v. Sodhi* (1989), 94 N.S.R.(2nd) 126 Family Court) which was a situation where the parties lived in Ontario. The mother came to Nova Scotia with the daughter to visit family and did not return to Ontario. She made an application in Nova Scotia for custody of the child and the father appeared and argued that the matter should be heard in Ontario. The court considered whether, even if it had jurisdiction, it should decline that jurisdiction. In a decision by Judge Sparks. She stated at page 128, paragraph 12:

> Jurisdiction to deal with custody matters flows from the physical presence of the child or the child's ordinary domicile or residence. Before a court can assume jurisdiction, one or both of these must be present. These two jurisdictional requisites often clash, with two different courts having rightful jurisdiction over the same custody matters. This is precisely the problem in the so-called kidnaping cases. It is stated in Studies in Canadian Family Law by D. Mendes da Costa (sic) vol. 2 at pp. 557 and 558:
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> > When custody dispute has contacts with two or more provinces or states, the jurisdictional question takes on another dimension. Two questions arise: first, does the court have jurisdiction and then secondly, if the court has jurisdiction,

should the court exercise its jurisdiction.

[24] The conclusion in that was that the trial judge determined that the child's physical presence in Nova Scotia gave jurisdiction to hear the matter. However, she did determine that the situation was such in relation to the child's birth and time of living in Ontario, that she should decline jurisdiction. The matter was then referred to Ontario.

[25] At paragraph 16 at page 129 of *Sutton v. Sodhi*, Judge Sparks gave an excellent list of useful references and then concluded by discussing the role of the administration of justice factor at paragraph 17 on the same page as follows:
In my opinion, the proper administration of justice is simply a factor becomes a weighty consideration with kidnaping cases especially when one parent is choosing a more favorable jurisdiction for their custody claim. Basically, the courts try to discourage the unilateral movement of one parent with a child. This factor becomes less important even in kidnaping cases, if there is an outstanding custody order, see *Horliefson, supra*, or if the child may be harmed, see *Burgess v. Burgess*, *supra*.

[26] I have found both of these cases useful in considering this matter. Here of course there is an existing order in relation to the daily care and control of these children and that is with the mother. There is no contest or question that her place of ordinary residence is in Alberta. As well, there is no evidence before me that the children will be harmed in any way by their presence in that jurisdiction. Although, as I acknowledged earlier, the action of the mother was precipitous and certainly was probably upsetting to the children by moving them back to Alberta from Nova Scotia. It will also be considerably upsetting to them to move them again in this brief period back to Nova Scotia for a custody tug of war. Such is

more likely not to be in their best interests. In these circumstances, especially that of the apparent right in section 8 of the temporary parenting agreement reached between the parties, the mother had some reasonable color of right to return the children to Alberta, a place where there is no suggestion that they will be less comfortable or more comfortable as they would be in Nova Scotia.

[27] I acknowledge that there is a considerable connection between the children in Nova Scotia including their birth and particularly their most recent few months here. But in the circumstances, I decline to exercise that jurisdiction. The most unfortunate aspects of the actions of the mother is probably to poison the communication between the mother and the father in relation to the access in the future of the children. If it does, then to some great extent she would be responsible for that poisoning and I would suggest and urge the parties to try and set aside any such unfortunate development in the best interests of the children, to ensure that they would continue to have considerable access with their obviously very caring father in Nova Scotia.

[28] In the circumstances as the children are not in Nova Scotia at this time and thus, nothing further flows from my decision and reasons by way of an order. The matter in my opinion should be dealt with in Alberta and not in Nova Scotia.

J.