

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Hunter v. Hunter*, 2013 NSSC 417

Date: 2013-12-23

Docket: No. 1201-066735; SFHD-084422

Registry: Halifax

Between:

Jeffrey Gordon Hunter

Petitioner

v.

Francyne Filion Hunter

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Heard: December 12, 2013, in Halifax, Nova Scotia

Counsel: Patrick H. MacMillan, for Jeff Hunter
Jennifer M. Kooren, for Francyne Hunter

By the Court:

Introduction

[1] In this interim motion Jeff Hunter seeks a shared parenting order with regard to Lindsay, who will turn eight in less than two months' time. Francyne Hunter opposes this and seeks an order allowing her to move Lindsay to New Brunswick in January 2014.

[2] The Hunters have agreed that they will have joint custody of Lindsay.

Family background

[3] Mr. Hunter is a high school teacher. Ms. Hunter is trained as a lawyer. She works three days each week as an insolvency practitioner.

[4] The Hunters first married in 1986 and divorced in 1988. They remarried each other in 1992 and Lindsay was born in February 2006. The couple separated in November 2007 when Mr. Hunter moved out of the family home in Stillwater Lake. In early 2009 he returned home. Their final separation occurred in November 2009 when Mr. Hunter again moved out. Mr. Hunter says that while he and his wife lived together in 2009, they divided parenting responsibilities so that each spent ample time with Lindsay.

[5] Lindsay began pre-school at the Sacred Heart School in September 2010 when she was four. At the time, she and her mother commuted to Halifax from Stillwater Lake. Shortly after Christmas in 2010 they moved to Halifax to be closer to the school and Ms. Hunter's workplace.

[6] Ms. Hunter says she "usually agreed" with Mr. Hunter's requests to see Lindsay unless something else was planned, such as a play date or a birthday party. In contrast, Mr. Hunter claims that she would cancel his access or change arrangements to suit herself. According to Ms. Hunter, in mid-2011 Mr. Hunter started to spend time with Lindsay on a regular basis on Friday evenings.

[7] After Lindsay and her mother moved to Halifax, the Stillwater Lake home was rented. Later Mr. Hunter moved in, and he remained in the home until it was sold in June 2013.

[8] At first, Ms. Hunter rented a home in Halifax. More recently, she bought a home in the city. During the summer of 2013, Mr. Hunter lived with a friend in Timberlea, a fifteen minute drive from Ms. Hunter's home. He says this was a temporary move; he was concerned that Ms. Hunter would change her residence in Halifax, and he didn't want to buy a home until he knew it was near where she was living. He's since moved from Timberlea and now lives with his partner and her child in Dartmouth.

[9] According to Ms. Hunter, Lindsay is very out-going, fun-loving and social. She enjoys meeting other children and making new friends. Lindsay is good at school and athletic. She's in her fourth year at the Sacred Heart School and is in grade two.

[10] Mr. Hunter filed his petition for divorce on January 15, 2013. In it, he specifically asked that he and Ms. Hunter have equal access to Lindsay. He noted that they were already alternating weekends and that this would be revisited:

. . . once [Mr. Hunter] has moved into his own house with the intention of increasing the time that the child spends with [Mr. Hunter] to the point where the child will spend fifty percent of her time with [him] and fifty percent of her time with [Ms. Hunter].

[11] Ms. Hunter was personally served with the petition at her home on January 15, 2013. Regardless, she testified that she was unaware of Mr. Hunter's desire for a shared parenting arrangement until she received this motion late last summer.

[12] Ms. Hunter says that in early 2013, Lindsay started spending time with her father overnight on Friday nights. Lindsay had to be returned to her mother in time for a theatre class on Saturday morning. According to Mr. Hunter, he offered to take Lindsay to this class so he could spend the whole weekend with her but Ms. Hunter wasn't receptive to this. Ms. Hunter says that she was open to Mr. Hunter taking Lindsay to her class and she would meet Lindsay at the class. It's unclear from this whether Ms. Hunter was willing to allow Lindsay to spend the entire weekend with her father.

[13] According to Mr. Hunter, from mid-March until mid-June 2013, all the parents' communication with regard to Lindsay had to go through Ms. Hunter's

mother, Sandy Wile. Initially this was because Mr. Hunter had been charged with assaulting Ms. Hunter and was not permitted to have any contact with her. After the charge was dropped, Ms. Hunter maintained her refusal to communicate with him for a period of time. She says his communication was negative, and she felt “stress-free” when she wasn’t required to deal with him.

[14] In early June 2013, Ms. Hunter met and began dating Randy Myers, a widower who lives in New Brunswick with his daughter. At the time, Lindsay’s visits with her father were occurring on alternate weekends, from Friday after school until Sunday afternoon when Lindsay was returned to Ms. Wile’s home. Mr. Hunter thinks his weekends coincided with Ms. Hunter’s weekend trips to New Brunswick.

[15] Mr. Hunter says he was denied access during one weekend in June, and he later learned that Ms. Hunter had taken Lindsay to New Brunswick that weekend. Ms. Hunter has no recollection of this and says that it would have been “inadvertent” and their wires must have gotten crossed.

[16] Since meeting Mr. Myers, Ms. Hunter has been spending many weekends in New Brunswick. Lindsay goes to New Brunswick with her mother on the weekends when she isn’t with her father. She met Mr. Myers and his daughter during the summer.

[17] Mr. Hunter was offered two weeks with Lindsay this summer. He didn’t use the entirety of this time. Mr. Hunter says he wasn’t given sufficient notice of the dates, and he had existing plans which conflicted with the dates Ms. Hunter provided. Rather than request alternate dates, he accepted what was offered. This is a recurring theme with the parents: Mr. Hunter says that he takes whatever he is offered, and Ms. Hunter says she agrees to any requests.

[18] Ms. Hunter and Mr. Myers became engaged in late September 2013. In her September 24, 2013 Parenting Statement, Ms. Hunter refers to Mr. Myers as her fiancé.

[19] Mr. Hunter says that since September, Ms. Hunter has required all his communication with her take place through her fiancé. Ms. Hunter did not explain why she’s required this. She says it lasted only for two or three weeks and it stopped when Mr. Hunter indicated he would bring Mr. Myers to court.

Interim parenting motions

[20] Ms. Hunter says that the test to be applied on a motion for an interim parenting order is that stated by Judge Daley in *Webber* (1989), 90 NSR (2d) 55 (FC) at page 57:

. . . what temporary living arrangements are the least disruptive, most supportive and most protective for the child. In short, the status quo of the child, the living arrangements with which the child is most familiar, should be maintained as closely as possible.

[21] She asks that I address her request that Lindsay be allowed to relocate first because, if this is successful, I won't need to consider Mr. Hunter's request for a shared parenting arrangement.

Interim mobility motions

[22] A child's parenting arrangements are determined on the basis of the child's best interests, according to subsection 16(8) of the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3 and, in determining a mobility request, the principles of *Gordon v. Goertz* [1996] 2 SCR 27 (SCC) apply.

[23] The considerations which relate to original mobility motions, rather than variation applications, were identified by Justice Bateman in *Burgoyne v. Kenny*, 2009 NSCA 34, at paragraph 23. According to Justice Bateman, I'm to consider:

- (a) the desirability of maximizing contact between Lindsay and both her parents;
- (b) Lindsay's views, if appropriate;
- (c) Ms. Hunter's reasons for moving, only in the exceptional case where it is relevant to her ability to meet Lindsay's needs; and
- (d) the disruption to Lindsay resulting from her removal from family, schools and the community she's come to know.

[24] These principles originate in *Gordon v. Goertz* [1996] 2 SCR 27 (SCC) and have been adapted for original mobility motions.

[25] Decisions since *Gordon v. Goertz* [1996] 2 SCR 27 (SCC) have highlighted judges' reluctance to make fundamental changes to children's lives on interim motions. This was identified in *Plumley*, 1999 CanLII 13990 (ON SC) where, at paragraph 7, Justice Marshman identified three factors that "are or ought to be important" in deciding interim mobility requests:

1. A court will be more reluctant to upset the status quo on an interim basis and permit the move when there is a genuine issue for trial.
2. There can be compelling circumstances which might dictate that a justice out to allow the move. For example, the move may result in a financial benefit to the family unit, which will be lost if the matter awaits a trial or the best interests of the children might dictate that they commence school at a new location.
3. Although there may be a genuine issue for trial, the move may be permitted on an interim basis if there is a strong probability that the custodial parent's position will prevail at trial.

[26] On some occasions an interim move may be allowed. In *MacKenzie v. Newby*, 2013 ONCJ 541, Justice Zisman found, at paragraph 48: "if this matter proceeded to trial it is **inevitable** that the mother would be awarded custody of this child and primary residence." I have added the emphasis to Justice Zisman's remarks.

[27] I turn now to the considerations outlined by Justice Bateman at paragraph 23 in *Burgoyne v. Kenny*, 2009 NSCA 34.

Maximizing contact between Lindsay and both her parents

[28] In her Parenting Statement, Ms. Hunter proposes that Lindsay will have alternate weekends with her father, from Friday after school until Sunday evening.

She says these will be weather dependent. She also wants Mr. Hunter to take Lindsay to Fredericton during certain of his weekends so that Lindsay will visit with her extended paternal family. Ms. Hunter proposes that Lindsay and her father have “Facetime” chats “every night (as long as Lindsay is available)” and she offers that since Mr. Hunter is a teacher, he may have “two weeks of vacation with Lindsay in the summer” in addition to the regular alternate weekends.

[29] Ms. Hunter describes her current work in Halifax as “a flexible three day schedule” revolving around Lindsay’s school activities and schedule and Ms. Hunter’s volunteer activities at Lindsay’s school.

[30] While Ms. Hunter has told her employer she is relocating, she expects to spend time in Halifax working for her current employer for some indefinite period. During this time, she expects that Lindsay will stay with Ms. Wile on weekdays.

[31] Currently, Lindsay is with her father on alternate weekends. Mr. Hunter has attended Lindsay’s swimming and piano lessons which were scheduled during the week. Ms. Hunter agreed that “absolutely” the move would make it difficult for Mr. Hunter to take part in parent/teacher interviews. She justified this by saying that Mr. Hunter had only ever attended two.

[32] This is a lengthy separation, and Lindsay is accustomed to her father’s involvement with her. Ms. Hunter says she’s acceded to requests for access unless they conflict with a prior commitment that Lindsay has. This prospect of *ad hoc* access is lost if Lindsay moves to New Brunswick.

[33] A move to New Brunswick will prevent Mr. Hunter from attending Lindsay’s extra-curricular and school-based activities and create difficulty for him in participating in parent/teacher interviews. It may reduce some of his weekends, since travel will depend on the weather. It will eliminate the possibility of *ad hoc* visits. A move does not maximize contact between Lindsay and her father.

[34] Given Ms. Hunter’s evidence that she will be travelling to Nova Scotia for work, relocating only maximizes Ms. Hunter’s contact with Lindsay if Lindsay is home schooled and travels with her mother to Halifax. If Lindsay attends public school, as Ms. Hunter says she will – since Mr. Hunter wants this – then Lindsay will be in New Brunswick with Mr. Myers and his daughter while her mother is working in Nova Scotia.

Lindsay's views

[35] Ms. Hunter says it isn't appropriate to seek Lindsay's views, but notes that Lindsay's developed a strong relationship with Mr. Myers and his daughter. I cannot compare this with her lifelong relationship with her father.

Ms. Hunter's reason for moving

[36] Ms. Hunter argues that this is an exceptional case where the reason for her move is relevant. She is relocating so she can cohabit with her fiancé and "become a family". She says this will provide a stronger support system for Lindsay which will come from Mr. Myers' family. She says that she will be self-employed, and this will give her flexibility and allow her to spend more time with Lindsay.

[37] In Nova Scotia, Ms. Hunter's support system includes Ms. Wile and Mr. Hunter. Mr. Hunter has not been fully utilized as a support. Mr. Hunter says that he's been asked to care for Lindsay with little or no advance notice, and he has only turned down these opportunities when he has a schedule conflict. He says he's learned that Ms. Hunter has called on Ms. Wile or others to care for Lindsay when he's been available and was requesting additional time with Lindsay.

[38] Ms. Hunter's plan, outlined in her affidavit, was to home school Lindsay. Ms. Hunter describes herself as "fairly well educated, bilingual" and she believes that she could provide Lindsay with a "very enriched six months" so Lindsay could be at the top of her class when she started public school in the fall.

[39] Ms. Hunter has told her employer that she plans to relocate, and she will be replaced. She says that for the short term she'll be required to travel to Halifax a few days each month. In cross-examination she explained that, "For a very short time I would be working basically the two days in the office where I was bringing her so that Jeff could have her those alternating weekends. And then my mother would have her those Thursdays and Fridays, and she would do the home schooling." Ms. Hunter would bring Lindsay to Halifax, and Lindsay would stay with her grandmother for Thursday and Friday and with her father for Saturday and Sunday.

[40] As a result of Ms. Hunter's testimony it became apparent that Ms. Hunter may be spending more than a day or two in Nova Scotia each month (she referred to being here before each of Mr. Hunter's alternate weekends with Lindsay) and

that she would not be solely responsible for Lindsay's home schooling, but that this responsibility would be shared with Ms. Wile. At the time she swore her affidavit, Ms. Hunter said she had "spent a lot of time reviewing the curriculum [for home schooling] and working on an application for home schooling, but I have not yet filed it." There's no evidence that Ms. Wile has any skills, background, preparation or ability to contribute to Lindsay's home schooling.

[41] In her affidavit, Ms. Hunter says that Ms. Wile is unable to provide significant support to Lindsay because she must meet the needs of her elderly husband. This is inconsistent with the requirement that Lindsay live with Ms. Wile, and that Ms. Wile will assume responsibility for Lindsay's home schooling during this time.

[42] Ms. Hunter is not immediately opening her own business and this may not develop for some time. So, in the short term, the move will not provide flexibility: Ms. Hunter will need to travel to Nova Scotia for work at various times. If she was home schooling Lindsay, she would bring Lindsay with her and Lindsay would stay with Ms. Wile who would provide the home schooling.

[43] On receiving Mr. Hunter's reply affidavit Ms. Hunter learned her husband objected to home schooling. She said she'd be willing to enroll Lindsay in public school in January. This will mean that while Ms. Hunter works in Halifax, Lindsay will be in New Brunswick, separated from both her parents, unless she is taken out of school.

[44] Currently, Ms. Hunter works three days each week and she earns \$60,000.00 each year. She offered no evidence of the work she'll need to do to open her new business in the longer term, as is her plan, or what she anticipates earning.

[45] Ms. Hunter's evidence doesn't persuade me that her new employment circumstances will be any more flexible than her current employment. In fact, given her ongoing commitment to her current employer and the need to travel to Halifax, her availability will be somewhat circumscribed.

[46] Ms. Hunter's move to New Brunswick is motivated by her desire to cohabit with her fiancé. Living with Mr. Myers does not enhance Ms. Hunter's ability to meet Lindsay's needs. Ms. Hunter is financially able to meet Lindsay's needs in Halifax, where she can do this working only three days each week. She has support from Ms. Wile, which is limited, and from Mr. Hunter, which has not been

fully utilized. The move does not enhance Ms. Hunter's ability to meet Lindsay's needs.

The disruption to Lindsay

[47] Ms. Hunter submits that relocation "will not result in a significant disruption to Lindsay". She says Lindsay is not involved in "a lot of activities" and doesn't have "strong ties to the community". In her neighbourhood, two families which had children with whom Lindsay played have moved away in the last six months. Ms. Hunter says that Ms. Wile, though in Halifax, is married to a man who is quite elderly, so she doesn't always have an ability to help out when needed. Ms. Hunter claims that Ms. Wile "can easily visit Moncton". Ms. Hunter's affidavit mentions Lindsay's theatre school and swimming lessons. She failed to mention Lindsay's piano and tae kwon do lessons.

[48] Lindsay's in her fourth year at the Sacred Heart School. This isn't a neighbourhood school, so Lindsay's classmates don't necessarily live in her neighbourhood. As a result, it is less important that Mr. Hunter doesn't live in the vicinity of the school. Mr. Hunter tries to ensure Lindsay has playdates with her classmates.

[49] The statement that Ms. Wile "can easily visit Moncton" contrasts with the evidence that Ms. Wile's husband is quite elderly and this limits Ms. Wile's ability to "help out" when Ms. Hunter needs assistance. I'm told that Lindsay has a "great relationship" with her grandmother. This will likely be disrupted by relocation.

[50] There will be further disruption because Lindsay will be forced to leave her school. Whether Lindsay is home schooled or attends a public school in New Brunswick, Lindsay will be in an entirely new educational environment. Notably, this will be happening while Ms. Hunter is continuing to travel to Nova Scotia to complete her commitments to her current employer.

[51] Considering these matters, there is a genuine issue for trial. It is not "inevitable", to borrow Justice Zisman's language from paragraph 48 in *MacKenzie v. Newby*, 2013 ONCJ 541, that relocation will be allowed. There are no compelling circumstances which might dictate allowing an interim move. Changing schools mid-year and putting access at the mercy of winter weather are not in Lindsay's best interest, nor is it best for Lindsay that she live in New

Brunswick while her mother returns to Nova Scotia to work. There is no financial imperative requiring a move at this point.

[52] I dismiss Ms. Hunter's request for permission to relocate Lindsay to New Brunswick. I find that the disruption to Lindsay's relationship with her father, her community (her grandmother and step-grandfather, her school and her activities) is not in Lindsay's best interests. I find that the reason and consequences of Ms. Hunter's proposed relocation do not enhance her ability to parent Lindsay. Further, the relocation does not permit maximizing Lindsay's time with her father in a way that is consistent with her best interests.

What parenting arrangement should there be?

[53] Mr. Hunter wants a shared parenting arrangement. Ms. Hunter opposes this, saying she doesn't know how Lindsay would get to school in Halifax since Mr. Hunter lives in Dartmouth and works in Bedford. She says she doesn't know where Mr. Hunter lives. Ms. Hunter says she and Mr. Hunter have difficulty communicating but, while she had fully four months to respond to his motion for shared parenting, she did not itemize a single instance of this in her affidavit. It was only when she was questioned about denying Lindsay time with her father in June that she said she and her husband must have had their wires crossed. Ms. Hunter says she doesn't think a shared parenting arrangement is in Lindsay's best interests but offers no other reasons for this opinion.

[54] Mr. Hunter has referred me to the decision in *Gibney v. Conohan*, 2011 NSSC 268, an interim parenting motion. Over eight days, Associate Chief Justice O'Neil heard from more than a dozen witnesses. Ms. Gibney argued that preserving the *status quo* was "an overriding consideration for the court when considering the best interests of the children" particularly where this was an interim proceeding. At paragraph 67, Associate Chief Justice O'Neil said that the evidence, the duration of the proceeding, the likely delay before final hearing and the time that had passed since the parties separated meant that the "description of the hearing as "interim" is less a consideration for the court."

[55] While the Hunters have been separated for considerable period of time, the hearing before me was less than two and one-half hours long and involved only the parties. Many questions remain. Associate Chief Justice O'Neil identified a number of considerations for assessing whether a shared parenting arrangement is

in a child's best interests in paragraph 92 in *Gibney v. Conohan*, 2011 NSSC 268. I don't have the evidence necessary to conduct this analysis.

[56] A move to a shared parenting regime would be a departure from the *status quo*. I have insufficient evidence to support this departure.

[57] Lindsay's time with her father has been expanding over the course of the separation and particularly this past year. I have no evidence why this expansion shouldn't continue. Pursuant to subsection 16(10) of the *Divorce Act*, Lindsay is to have as much contact with each of her parents as is in her best interest.

[58] Ms. Hunter has not complained about the quality of Mr. Hunter's care for Lindsay.

[59] I am concerned that Ms. Hunter has twice refused to communicate directly with Mr. Hunter at all. In the spring of 2013, she compelled him to deal with Ms. Wile and in the fall, he had to deal with Mr. Myers.

[60] The parties were able, following their 2007 separation, to live in the same house for ten months in 2009 without incident. They agree they shall have joint custody. They have come to terms about significant matters such as Lindsay's private schooleducation: Mr. Hunter worried that living in Stillwater Lake and attending private school in Halifax would deprive Lindsay of the chance to play with classmates after school, but he accepted Ms. Hunter's desire that Lindsay receive a private schooleducation and he's attempted to address his concerns by arranging play dates with her classmates. The parties also resolved their disagreement about how Lindsay would spend this Christmas.

[61] Lindsay will continue her involvement in activities in the local area (Halifax, Dartmouth and Bedford). Pending trial she will not be enrolled in activities other than during the week. Mr. Hunter will be responsible for all Lindsay's transportation to school and her activities while she is with him. Ms. Hunter will be responsible for Lindsay's transportation while Lindsay is with her. Each parent may have others assist with this responsibility.

[62] In terms of regular time with her father, I order that Lindsay will be with her father from Thursday after school until the following Monday morning when she will be returned to school and she will be with her mother from Monday after

school until Thursday morning of the next week. In case a diagram makes this easier to understand, I chart the weeks as follows:

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Mom	Mom	Mom	Mom	Mom/Dad	Dad	Dad
Dad	Dad/Mom	Mom	Mom	Mom	Mom	Mom

[63] This schedule will start on Sunday, December 28, 2013 and Lindsay will be with her father starting on Thursday, January 2, 2014. Of course, Mr. Hunter may continue to attend Lindsay's weekday extra-curricular and school-based activities.

[64] If Ms. Hunter goes to New Brunswick for the weekend when Lindsay is with her father and Ms. Hunter isn't returning until after Monday, Lindsay shall remain with her father until her mother returns to Halifax. When Ms. Hunter is not in Halifax, Lindsay shall stay with her father.

[65] This is an interim motion. A divorce hearing hasn't been scheduled. It isn't clear that Lindsay's parenting will be resolved prior to the summer of 2014, so I will address the summer. Starting on the Saturday following the last day of school, Lindsay will alternate between her mother's home and her father's, at weekly intervals. The transfer time will be noon on Saturday and the parent who is beginning a visit with Lindsay will collect her from the other parent's home. Neither parent will relocate Lindsay's home from the Halifax Regional Municipality. The first week will be with her father.

[66] Mr. Hunter's counsel will prepare the order. He shall also prepare a discrete order providing that each parent is entitled to speak directly with those who are involved with Lindsay (teachers, doctors, dentists, coaches and others) and to obtain information about Lindsay from them, without the need for the consent of the other parent.

Elizabeth Jollimore, S.C.J.(F.D.)

Halifax, Nova Scotia