

SUPREME COURT OF NOVA SCOTIA
Citation: *Norman v. Jardine*, 2017 NSSC 18

Date: 2017-01-23

Docket: *Pictou*, No. 1205-003124

Registry: Pictou

Between:

Laura Kate Norman (Jardine)

Petitioner

v.

David Garth Robert Jardine

Respondent

DECISION

Judge: The Honourable Justice N. M. (Nick) Scaravelli

Heard: December 9th, 2016, in Pictou, Nova Scotia

Decision Date: January 20th, 2017

Counsel: Shawn MacLaughlin for Kate Norman

Ellen Burke for Mr. Jardine

[1] Ms. Norman filed an application to vary and limit access provisions of a corollary relief judgement. Mr. Jardine contests the application and seeks an order for primary care of the child with regular access to Ms. Norman. Retroactive child support is also at issue.

Background

[2] The parties were divorced by divorce order issued 23 July 2012. By way of corollary relief judgement the parties were granted joint custody of the child Desarae Jane Jardine, born 5 September 2007. Mr. Jardine was granted access with the child in accordance with a fixed schedule as set out in the corollary relief judgement. At the time, Ms. Norman and child resided in Stewiacke, NS and Mr. Jardine's residence is in Trenton, NS.

[3] In February 2016 Ms. Norman unilaterally interrupted Mr. Jardine's parenting schedule, having contacted Children and Family Services with concerns over physical discipline applied to the child during access visits with Mr. Jardine. This resulted in the application currently before the court.

[4] Subsequent to the filing of the applications, Ms. Norman and the child relocated to New Annan, NS in the Tatamagouche area. Children and Family

Services investigated and took no further action other than counselling Mr. Jardine on discipline techniques. There were no child protection concerns. By way of subsequent interim consent orders, the parties agreed and undertook a custody/access assessment and enrolled the child in a therapy counselling program. Mr. Jardine's access schedule was reinstated including extended summer and Christmas access.

Law

[5] Applications to vary custody/access are made under section 17 of the *Divorce Act*. Pursuant to Section 17(5) there must be a material change in circumstances of the child since the making of a custody order or last variation order. Once a material change in circumstance occurs, the court must perform a fresh inquiry as to the best interests of the child. *Gordon v. Goertz* [1996] 2 SCR 27.

[6] In Nova Scotia, the courts often reference the seminal case of *Foley v. Foley* [1993] N.S.J. No. 347 where Justice Goodfellow set out a non-exhaustive list of factors that a court should consider when determining the best interests of a child.

[7] Section 16(10) of the *Divorce Act* directs that a child should have as much contact with each parent as is consistent with the child's best interest and a willingness of each parent to facilitate such contact.

Position of the Parties

[8] Mr. Jardine submits that Ms. Norman had intentionally minimized access to him with a view to diminishing his relationship with his daughter. He further submits that he has a more stable home environment for the child and is prepared to provide liberal access to Ms. Norman.

[9] Ms. Norman submits her initial restriction of access and involvement of Family and Children Services was a result of Mr. Jardine's physical discipline of the child that caused injury and contributed to the child being fearful of her father. Further, that her current home environment in the country is better suited to the child's needs and interests. Following the custody/access assessment and continuing child counselling, Ms. Norman has agreed to a liberal access schedule for Mr. Jardine.

Analysis

[10] Ms. Norman left a common law relationship in May of 2016 because her partner was abusive to her and not to the child nor in the child's presence. She moved Desarae and her younger biological half sister to New Annan into a home owned by Mr. Lepper whom she had known since she was 10 years of age. Originally she and the children slept upstairs and Mr. Lepper remained downstairs. Ms. Norman advises they are now in a stable relationship.

[11] Mr. Lepper's home consists of five bedrooms on approximately 50 acres of land. His three children reside in the home during weekend access visits. Desarae shares a bedroom with the oldest daughter who is near her age. Mr. Lepper's employment requires him to travel, leaving his home at approximately 3:30 am and returning in the evening.

[12] Ms. Norman is employed as a therapeutic effect massage therapist, she works 3 days per week. She advises her time is flexible and otherwise is available to parent Desarae. Desarae attends school and travels by school bus. She spends four to five hours per week in afterschool care. Ms. Norman has extended family in the Tatagamouche area including Ms. Norman's mother who is a retiring school teacher and cares for Desarae in the summer months when she is not in daycare.

School reports indicate Desarae is doing well in school and gets along well with others.

[13] Desarae is particularly fond of animals. There are several pets in the home including three dogs, two gerbils, one hamster, two cats, one budgie and a chinchilla. Desarae is responsible for caring for the pets. She has joined the 4-H Club and is taking riding lessons.

[14] As indicated Ms. Norman contacted Children and Family Services following a report by Desarae that her father injured her back when he grabbed and pushed her down. She was fearful of upsetting her father when he continually pressed her to practice her reading. She resisted access visits. Ms. Norman agreed to return to normal visitation following involvement with Family and Children Services and therapy sessions with a psychologist. She acknowledges that Desarae loves her father and wishes to spend more time with him.

[15] Ms. Norman offers the following access visits to Mr. Jardine:

1. Every other weekend from Friday at 5:00 pm to Sunday at 6:30 pm, returning to Ms. Norman's home ;
2. Every other Wednesday after school until 6:30 pm to be exercised in the Tatamagouche area.
3. Mr. Jardine to be responsible for all transportation of Desarae;

4. Beginning in 2016 and all even numbered years Ms. Norman to have parenting time with Desarae from the beginning of Christmas school break until December 25th at noon. Mr. Jardine to have parenting time from December 25th at noon until January 2nd, 2017 at noon. This schedule is to alternate every year.
5. Beginning in 2017 and all odd numbered years, Mr. Jardine to have parenting time with Desarae from Thursday of Easter school break at 5:00 pm to Saturday at noon giving Ms. Norman parenting time with Desarae from noon on Saturday until school resumes. When Mr. Jardine has the last part of the break Desarae is to return to her mother's care on Easter Sunday by 5:00 pm. In 2018 and all even numbered years the schedule would reverse giving Ms. Norman Thursday to Saturday noon and Mr. Jardine having Desarae from Saturday noon until Easter Sunday at 5:00 pm. On Easter Monday the regular schedule is to resume.
6. Beginning in 2017 and all odd numbered years Ms. Norman to have parenting time with Desarae for the Thanksgiving long weekend. IN 2018 Mr. Jardine to have parenting time with Desarae beginning at 5:00 pm on Friday to 5:00 pm on Monday. This schedule would rotate each year.
7. March Break to be split each year with Ms. Norman receiving the first part of March Break until Wednesday at 5:00 pm and Mr. Jardine having parenting time the second part from 5:00 pm on Wednesday to 5:00 pm on Sunday of the March Break.

8. Summer periods Mr. Jardine to have weekends extended from Friday at 5:00 pm to Monday at 8:00 am together with one full week in July and one full week in August, which would include the weekends.
9. Desarae to be with her mother on Mother's Day from 10:00 am to 5:00 pm and with her father on Father's Day from 10:00 am to 5:00 pm.
10. Desarae should be permitted to return home during any access visit if she expresses her wish to do so.
11. Mr. Jardine shall have regular telephone and electronic access.

[16] Mr. Jardine is married to Melissa Jardine. They reside in a three bedroom home in Trenton with two children from Ms. Jardine's previous aged 11 years and 6 years. They also have a 3-year-old son together. Their residence is in the immediate vicinity of the local school. During access visits Desarae shares a bedroom with the oldest child Kaylee. Both parents are employed. The family attends church on a regular basis and include Desarae during access visits. Mr. Jardine's mother travels to Trenton in the summer to assist with child care. Mr. Jardine has three weeks summer vacation. He was diagnosed bi-polar in High School for which he takes medication to control his emotions and meets with his therapist as required.

[17] Prior to the involvement of Children and Family Services the Jardine's acknowledged they disciplined their children by slapping, spanking, squeezing hands and using fingers to flick their ears. They no longer use physical discipline following the involvement of Children and Family Services.

[18] As indicated Mr. Jardine acknowledged the incident of physical discipline that Desarae reported to her mother. He denies harming the child and believes that any fear or him expressed by the child was due to "outside influence". He acknowledges Desarae's love of animals.

[19] Mr. Jardine has provided an access plan for Ms. Norman in the event he is the primary care parent. Alternatively he seeks similar access provisions in the event he not awarded primary care.

[20] Mr. Jardine's plan is similar to Ms. Norman's regarding special/holiday parenting times with the exception of March Break and summer. Mr. Jardine proposes each parent have the child for the entire March Break in alternate years. He proposes alternate weeks parenting time during the summer. In terms of regular access Mr. Jardine proposes three weekends out of four, Friday to Monday morning. Every second Wednesday from afterschool to Thursday morning. Mr.

Jardine is not in agreement that Desarae be permitted to call and be delivered back home during any access visit.

[21] A custody/access assessment was completed by Michael Craig, M.S.W., R.S.W. in July 2016. Mr. Craig met with the parties individually and at their respective residences. Mr. Lepper was not present during the home visit. Mr. Craig concluded that both parents have the ability to provide adequate care for Desarae. He noted the resentment and negative feelings towards each other. Mr. Craig concluded that it would not be in the child's best interest to change the current custody arrangement and recommend the continuation of joint custody with Ms. Norman having primary care.

[22] Desarae continues to attend therapy sessions with a registered psychologist.

A September 2016 report to Mr. Jardine's legal counsel provides in part:

It is the undersigned's impression that Desarae has a healthy relationship with her mother, feeling safe and trusting to share her emotions and concerns. While she seeks a similar relationship with her father, Desarae expressed some fears of upsetting her father (make him mad) if she were to share her feeling with him. She also expressed a strong desire to spend more time with her father during his access time. Desarae reported her dad often has to work.

[23] Ms. Norman's move from Stewiacke to New Annan, the introduction of a new family and school, following the issuance of the corollary relief judgement, constitutes a material change in circumstances.

[24] It is apparent that both parents are capable of parenting Desarae. However, I am not satisfied that it is in the child's best interest to vary primary care to that of her father. I am satisfied Ms. Norman's decision limiting access to Mr. Jardine, involving Children and Family Services and subsequent move to New Annan was made in the best interest of Desarae and not for the sole purpose of depriving Mr. Jardine of access to his daughter. Desarae's concerns about upsetting her father and his reactions are being addressed through counselling. Liberal access has been resumed.

[25] Ms. Norman is a capable and protective parent. She has had primary care since the child was three years of age. Due to her work schedule and flexibility she has more time to be physically present for the child. Desarae appears to be in a stable environment. She is fully engaged in her present environment including school and activities that are of interest to her while residing in a rural area. Desarae has the support of extended family in the Tatamagouche area. Moreover, Ms. Norman is willing to facilitate liberal access to Mr. Jardine.

[26] I find that Ms. Norman's access plan best suits the needs and interests of the child with the following exceptions:

1. Weekend access to be extended one day if it falls on a holiday or school or in-service day.

2. In the event weekend access is cancelled due to unforeseen circumstances or by agreement, it is to be made up the following weekend.
3. Summertime vacation access for Mr. Jardine to be three non-consecutive weeks unless otherwise agreed upon.
4. The court is not prepared to order that the child have the option to call home at anytime and terminate an access visit. There is no evidence that this condition is in the child's best interests. Such a provision would only serve to cause further conflict between the mother and father. I am satisfied that Mr. Jardine is responsible enough to decide if the child should return home while in his care.
5. Ms. Norman shall not move from the New Annan/Tatamagouche area without providing notice to Mr. Jardine 90 days in advance. Ms. Norman shall also provide the civic address of the intended new residence as well as the reasons for the move. Failing consent, the parties may make application to the court to have the custody/access agreement varied accordingly.

Child Support

[27] According to the latest financial information before the court, Mr. Jardine has an annual income of \$45,100 which results in table amount child support of \$377.80 per month effective January 1, 2017.

Retroactive Child Support

[28] Ms. Norman claims entitlement to retroactive child support effective January 1st, 2014. The last varied corollary relief order was granted July 2013. At that time Mr. Jardine's income was \$34,554 and he was ordered to pay table amount of \$293 per month.

[29] Mr. Jardine's reported income was \$44,667 in 2014 and \$45,100 in the years 2015 and 2016. Adjusting for child support tables, Ms. Norman submits the total is \$3,012.84. At the hearing Ms. Norman indicated she was seeking the amount of \$2,000 for retroactive payment which would round out her retroactive claim to commence January 2015.

[30] Mr. Jardine submits an award for retroactive child support is not appropriate in this case.

[31] The seminal case dealing with retroactive child support is *D.B.S. v. S.R.G.* [2006] 2 SCR 231 (*D.B.S.*). The court is to take a holistic approach to retroactive claims based upon facts of each case. In determining whether a retroactive award is appropriate, the court must consider the applicant's reason for not claiming support earlier, the respondent's conduct, the children's past and present circumstances and whether a retroactive award would result in hardship.

[32] Ms. Norman's application to vary and affidavit in support, dated March 2016 did not contain a claim for retroactive child support. The application sought restricted access and a go forward child support based on current table amount. As a result, Mr. Jardine's notice of contest and affidavit did not address this issue. Both parties filed supplementary affidavits. It was not until Ms. Norman's affidavit of 2016 that the issue of retroactive child support was raised. Ms. Norman's pre-trial brief did not deal with retroactive child support.

[33] Uncontradicted evidence adduced at the hearing established that Mr. Jardine attempted to arrange for increased child support in the past. Mr. Jardine provided his financial information to Ms. Norman electronically in the years 2014 and 2015. However, she did not make an application to vary. In addition Mr. Jardine attempted to increase his payments through MEP but the payment was returned as there was no court order.

[34] There is no blameworthy conduct that can be attributed to Mr. Jardine.

[35] There is no evidence before the court relating to the child's circumstances including her needs at the time the additional support should have been paid, nor is there evidence of hardship.

[36] Based on all of the considerations set out in *D.B.S.*, I decline to award retroactive child support.

[37] The corollary relief judgement varied in July 2013, is varied accordingly. In all other aspects, all the terms and conditions remain in full force and effect.

[38] Counsel for Ms. Norman is to prepare the order, for approval as to form.

Scaravelli, J.