

**SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** *S.H. v. C.Y.*, 2018 NSSC 129

**Date:** 2018-05-29  
**Docket:** SFSND 1206-7186  
**Registry:** Sydney

**Between:**

S.H.

Petitioner

v.

C.Y.

Respondent

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**LIBRARY HEADING**

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**Judge:** The Honourable Justice Lee Anne MacLeod-Archer

**Heard:** April 16 - 18, 2018 in Sydney, Nova Scotia

**Summary:** This is a decision about custody and mobility. The Petitioner sought the right to move with the parties' daughter to Lebanon where both the Petitioner and Respondent were born and from where they immigrated to Canada. The Respondent opposed the move.

**Key words:** Family  
Parenting, Custody, Access, Relocation, Mobility

**Legislation:** *Divorce Act*, R.S.C. 1985 (2<sup>nd</sup> Supp.), c. 3  
*Hague International Convention on the Civil Aspects of Child Abduction*

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**Written Release:** May 29, 2018

**Counsel:** Elaine Gibney for the Petitioner  
Damien Barry for the Respondent

**By the Court:**

[1] This is a decision about custody and mobility. Ms. H seeks the right to move with the parties' daughter AY to Lebanon, where both she and Mr. Y were born, and from where they immigrated to Canada. Mr. Y is opposed to the move.

**Facts**

[2] Mr. Y immigrated to Canada at age 21 and set up a restaurant business. The parties were married in Lebanon, after which Mr. Y returned to Canada to operate his business. Ms. H followed approximately 10 months afterward, and two years later their daughter AY was born in 2013.

[3] Mr. Y was charged with several criminal offences in 2014. He was convicted in 2016 and sentenced to two years and eight months in prison. He served that time, and then spent several months at a halfway house after his release.

[4] After moving to Canada, Ms. H helped Mr. Y build his business and cared for the child AY. At times when she was working and Mr. Y was not, the child was sent to stay with the paternal grandparents, who live two hours away.

[5] The parties separated in November, 2016 when Ms. H took their daughter and left for Australia to visit her sister, on a one-way ticket. Mr. Y filed an ex parte application to have her return with the child, although by the time that hearing was held, she had returned voluntarily to Canada.

[6] After Ms. H's return to the local area, an order was issued granting interim primary care to her, and access to Mr. Y. Terms and conditions included a requirement that the child's passport be held in trust by Mr. Y's counsel pending further order of the court.

[7] The parties briefly reconciled, but separated again in March or April, 2017. At that time, Mr. Y moved in with his parents and Ms. H stayed in the matrimonial home. She now seeks permission to move back to Lebanon with AY.

## **The Law**

[8] Both counsel have acknowledged that the test to be met was laid out by the Supreme Court of Canada in **Gordon v. Goertz** [1996] 2 S.C.R. 27. That case dealt with variation of an original order, which is not applicable here. There is an interim order in place which does not establish a status quo. As noted by Bateman, JA in **Burgoyne v. Kenny**, 2009 NSCA 34 “obviously, in the case of an original custody order, as is sought here, it is not necessary to demonstrate a material change in circumstances because there is no prior order.”

## **Custody**

[9] Ms. H’s mother travelled to Nova Scotia to assist with childcare for several months after AY’s birth, but otherwise, Ms. H has been the primary caregiver. In fact, she was the sole caregiver during Mr. Y’s incarceration.

[10] There is little evidence of the role played by Mr. Y during AY’s young life. Her relationship with her father has been interrupted for lengthy periods, including his incarceration, and extended travel outside the country with her mother and grandmother.

[11] Since the 2017 interim order was issued, Mr. Y has exercised regular access with his daughter. However, I accept that the child spends a significant amount of time with his mother and family during access. Mr. Y works late nights and weekends.

[12] Considering all of the evidence, I find that it is in the child’s best interests to remain in the primary care and custody of Ms. H. She has consistently met AY’s needs since birth, and is the parent in whose care the child has become accustomed. Mr. Y will have access.

## **Mobility**

[13] In this context, I will address the mobility issue. As with the custody issue, I must do so having regard to AY’s best interests. I must consider all the relevant circumstances relating to her needs and her parents’ ability to satisfy them, and I must prioritize the child’s best interests in the particular circumstances of this case; the interests or rights of the parents play a secondary role.

[14] I must consider maximizing contact between the child and both of her parents to the extent this serves AY's best interests. If the move is allowed, it would significantly limit her contact with Mr. Y. At the present time, he has weekend access with AY.

[15] Mr. Y suggests that if Ms. H wishes to move to Lebanon, she may do so, but should leave AY in his care. I reject that suggestion. He is not in a position to provide primary care to AY. To date, he hasn't played such a role in the child's life, and there is scant evidence to suggest he is able to assume that role in future. He lives with his mother, who could provide care to AY, but the choice is not between Ms. H and his mother.

[16] The disruption of a move would be significant. AY was born in Canada and has lived here her whole young life. Lebanon is half a world away. However, she has travelled extensively for her age, including several extended visits to Lebanon with her paternal grandmother. And both parents have family in that country.

[17] If AY moves, it will not involve a significant change in her day to day routine. She attends daycare now, but would attend school in September, 2018 in Cape Breton. She will be old enough to attend school in Lebanon in the fall too, so her routine would be similar. Because AY is only 4 years of age, she has little other connection with the community. Her real connection is with her family.

[18] A move would mean a significant change to her contact with Mr. Y and her paternal family. Instead of weekly access, she would likely only see her father a couple of times per year. However, electronic access is available, and the parties have successfully used it to keep in touch when travelling in the past. As well, the paternal grandmother visits Lebanon regularly, and AY's uncle travelled there last year. Clearly the family has strong ties to the country and would continue their visits in future. Should Mr. Y and his family travel to Lebanon while AY resides there, they could have visits with her.

[19] Ms. H has stated her reasons for moving, insofar as they are relevant to her ability to meet AY's needs. She successfully pursued a university degree in Cape Breton, but has been unsuccessful in her search for a job in her field. She provided evidence of what lengths she has gone to secure employment. I accept that her part-time job in a retail position is the best she can obtain at this time. That job doesn't provide her with enough hours, or money, to make ends meet here in Cape Breton.

[20] The evidence of a job offer for her in Lebanon was not challenged. In Lebanon, she would have the emotional and financial support of her family in establishing a career. She wants to better her life for the benefit of the child. At present, she receives child support from Mr. Y in the amount of \$300.00 per month to supplement her part-time income, but she is still struggling financially.

[21] There was no evidence advanced about religious and spiritual guidance. However, one of the reasons Ms. H wants to relocate to Lebanon is to connect the child with her culture and language. AY speaks a smattering of Lebanese (Arabic) already, so her transition to life in Lebanon would not be difficult.

[22] The reality is that both AY's parents have to work to make ends meet. Mr. Y lost his business and source of employment because of his crimes. He now works for his brother in a town two hours away. Ms. H is stressed, both financially and emotionally. Her presentation in court spoke volumes about the challenges she has faced since Mr. Y's incarceration.

[23] Ms. H has no family support in Canada. She has friends who help on occasion, such as checking on her home when she is absent. Her boyfriend helps by picking up AY at daycare when she works past 5 pm. His involvement has inflamed tensions between the parties, but on a practical level, his assistance is a support to Ms. H.

[24] Mr. Y has the support of his extended family where he lives. His mother, in particular, has a close relationship with AY. But she does not have a good relationship with Ms. H anymore, and her behaviour at access exchanges is concerning.

[25] Ms. H has shown herself willing to facilitate contact with Mr. Y. She travelled lengthy distances to bring AY to visit when he was in prison, and when she travelled to Australia in 2016, she ensured that Mr. Y had contact with AY. Mr. Y has not been as willing. For example, when Ms. H travelled to Lebanon to be with her sick father earlier this year, he ignored her texts asking to speak with the child.

[26] Ms. H will ensure the child has a relationship with her father. I find no evidence of an intention to interfere with that relationship. In contrast, I find Mr. Y is likely to interfere with Ms. H's contact with AY. To him, AY is a pawn to be used to negotiate financial terms between the parties.

[27] I also have no information about Mr. Y's plan of care for the child. Presumably it involves his mother, but she did not testify. Ms. H's plan is clear. She plans to enrol AY in a private school, spend time with family, connect with her language and culture, and work to better herself in Lebanon.

[28] I have considered the agreement between the parties, wherein Mr. Y agreed to allow Ms. H to move to Lebanon, if she repaid him the money she withdrew from a joint account with his mother. Ms. H paid him the monies and he reneged, cancelling the one-way tickets he'd purchased for her and AY to Lebanon. This tells me not only that Mr. Y is prepared to use AY as a pawn, but that he does not really view Lebanon as an unsafe place to live.

[29] I have also considered the evidence about the safety of Ms. H's hometown in Lebanon. Mr. Y asks me to take judicial notice of the fact that there were recent airstrikes in neighbouring Syria, and that one of the main targets was a town only about 100 km. away. The latter fact is not so notoriously known and irrefutable that I can take judicial notice, but even if so, these points are not persuasive. Mr. Y's brother and his fiancé travelled to Lebanon last summer, and Ms. H travelled to her hometown earlier this year. There is no evidence that either encountered any danger.

[30] There is therefore insufficient evidence to establish an immediate risk to the child should Ms. H be permitted to move with AY to Lebanon. There is no evidence of war, terrorism or conflict in the area where Ms. H plans to reside.

[31] I have considered the fact that Lebanon is not a signatory to the *Hague International Convention on the Civil Aspects of Child Abduction*. I am satisfied that this does not present an obstacle. There is no evidence that Ms. H will refuse access between AY and Mr. Y if she relocates, or that Ms. H would refuse to send AY for access in Canada. I have already found that she is unlikely to interfere with Mr. Y's access.

[32] Lastly, I accept that Ms. H's true destination is Lebanon, rather than Saudi Arabia where her boyfriend is resident. She knows she must focus on building a future for her and AY, and that she needs the support of her family to do so. Most of her family is in Lebanon, in particular her parents.

[33] I have considered a number of cases dealing with mobility, including those cited by counsel. I have considered the factors and principles enumerated in them,

though the old adage that each case must be decided on its own facts is applicable here.

[34] I have read the cases dealing with cross-country and international relocation with particular care, because of the six hour time difference between Lebanon and Nova Scotia. That time difference is not an impediment to a move, but must be factored into access arrangements.

[35] One case which merits mention is **Brill v. Brill**, 2010 ABCA 229, in which the Alberta Court of Appeal dismissed the father's appeal of a decision allowing the mother to relocate with their two children to Israel. The children had dual Israeli and Canadian citizenship, they had extended family on both sides living in Israel, and they had visited there on a number of occasions. The mother sought to return to Israel in order to find a job in her area of expertise and to be near family.

[36] Like the trial judge in **Brill** (*supra*), I recognize that a long-distance move means that AY will lose the opportunity for regular access with Mr. Y. However, he will not lose all access with AY and maximizing his contact with AY is not presently in her best interests. A move with her mother will enhance her long-term interests and welfare. I do not make such a determination lightly, but in the best interests of AY.

[37] Another case of note is **Y.N. v. D.M.**, 2011 NSSC 81 in which Justice Legere-Sers permitted a mother to relocate with the parties' son to Japan. The father was incarcerated, and although she received some assistance from the father's family, the mother relied heavily on her parents in Japan for support. The father also posed a risk to the child should the move not be allowed.

[38] In that vein, I have considered Ms. H's evidence that Mr. Y has threatened her in the past. That behaviour is consistent with the evidence that he was aggressive with staff at AY's daycare, and with the receptionist at her doctor's office. His behaviour poses a risk to Ms. H and the child should they remain here.

[39] I accept that Ms. H travelled to Australia in 2016 to get "a break" after Mr. Y threatened her and the relationship soured. This is not akin to **I.P. v. A.M.** [1998] Q.J. No. 1538, where the court refused a request by the mother to move to Greece. She had previously taken the child to Greece without the father's approval, and he filed a *Hague Convention* application to force her to return.

[40] In this case, Ms. H returned from Australia voluntarily in 2016. While she was gone, she permitted Mr. Y to contact AY. She provided a copy of her return ticket to Mr. Y's lawyer on request. She had the child's passport. She also had access to funds. Had she wanted to abduct the child and relocate without the court's approval, she could have done so then or while Mr. Y was incarcerated. Instead, she filed the appropriate documents with the court and sought permission to relocate, which satisfies me that she is unlikely to flaunt a court order for access in future.

[41] Mr. Y says that Ms. H's plan is not concrete, and that a lot of details remain to be confirmed. It's not unexpected that some details cannot be confirmed. It's a classic catch-22 situation: she cannot enrol the child in school and accept employment until she has permission to move, yet Mr. Y says she should be refused permission to move because these details aren't nailed down.

[42] Mr. Y also says that this proposed move is about Ms. H, not the child. He points to the fact that much of the evidence focussed on her circumstances, not those of the child. He says AY's needs are being met in Cape Breton and there's nothing in Lebanon that she can't access here. That may be partly true, but AY's welfare is inextricably linked to her mother's situation. To improve one's circumstances is to improve the other's.

[43] Mr. Y also points to the fact that Ms. H introduced a "plan B" at the end of the hearing, which involves a move to Australia to stay with her sister and children (if Lebanon is not approved). He believes this was her original plan in 2016, and he argues that if she is still considering it, her plans are still uncertain.

[44] The fact that Ms. H is considering a back up plan is not fatal to her application. She cannot make concrete plans until she receives approval from the court to move. She knows that Mr. Y is opposed to her moving to Lebanon. She has thought about her options should the move be rejected. Either way, she is clear that she cannot live in Cape Breton, and wishes to move closer to family to expand her employment options and improve her life. Her "plan B" shows the extent of her thought process, and should not be viewed as a negative.

### **Conclusion:**

[45] Ms. H is permitted to move to Lebanon with AY. Mr. Y's counsel will deliver the child's passport to Ms. H through her counsel immediately. Mr. Y will also deliver any of Ms. H's and AY's personal items (including the child's toys

and clothes) still in his possession within seven days. Before she leaves Canada, Ms. H will execute a Quit Claim deed to the home, to be held in trust by Mr. Y's counsel pending sale of the home and distribution of any proceeds.

[46] Mr. Y will have access with AY as follows:

- Pending a move, the current schedule of weekend access will continue; Mr. Y will retrieve AY at 3:00 pm on Friday (every second weekend and at 3:00 pm on Saturday on alternate weekends) at the matrimonial home and return her at 6:00 pm on Sunday to the home.
- Ms. H will provide a copy of her plane tickets and itinerary for travel to Lebanon for her and the child within 24 hours of purchase.
- Mr. Y shall have phone/Skype/FaceTime/other electronic access once weekly at 10 am Atlantic Standard Time every Monday morning, starting on the first Monday after the move.
- Mr. Y shall have access during the child's summer break for 2 consecutive weeks each year, at his expense. He shall arrange and pay for a person to accompany AY to and from Canada, if he opts to exercise access in Canada.
- Mr. Y may exercise Christmas access annually in Lebanon, from December 25<sup>th</sup> at 4 pm (local time) to January 2 at noon in even numbered years and December 20 at 4 pm (local time) to December 25<sup>th</sup> at noon in odd numbered years.
- In the event he travels to Lebanon at other times, Mr. Y shall have access with AY at times arranged between the parties (no less than 4 hours per day during each day of his visit).

[47] Ms. H will provide monthly updates in writing to Mr. Y about AY's health, education, activities, and major developments in her life. Should Mr. Y wish to receive videos of important events in AY's life such as religious celebrations, birthdays, etc. he may obtain a private YouTube channel (or other similar sharing platform) and provide Ms. H with access to upload videos.

[48] Mr. Y will be entitled to access information in the control of third parties involved in AY's life, including teachers, physicians, coaches, etc. without Ms. H's authorization.

[49] Ms. H shall be entitled to phone/Skype/Facetime/other electronic access with AY on Wednesday and Friday during Mr. Y's summer access and at any other time AY is in his care for more than 3 days.

[50] Ms. H's counsel will prepare the order. If costs are sought, submissions are due within thirty (calendar) days.

MacLeod-Archer, J.