NCL v MB, 2012 ONSC 5422 (CanLII)

CITATION: NCL v MB, 2012 ONSC 5422
NEWMARKET COURT FILE NO.: FC-11-38687-01

DATE: 2012-09-26

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: N.C.L., Applicant

AND:

M.B., Respondent

BEFORE: McGee J.

COUNSEL: Shelly Kalra, Counsel for the Applicant

Roselyn T. Pecus, Counsel for the Respondent

HEARD: September 21, 2012

ENDORSEMENT ON URGENT MOTION

Background

[1] The parties were married for just over 11 years, separating on May 19, 2009. They resolved all issues arising from the separation within a comprehensive Separation Agreement dated November 20, 2009. The Agreement provides for joint custody and shared parenting of their daughters, now 13 and almost 11. It has not been varied. A Divorce Order issued December of 2011.

Ex-parte Motion September 13, 2012

[2] On September 13, 2012 the applicant mother brought an emergency motion without notice, prior to the issuing of pleadings and prior to a Case Conference, for temporary orders:

> 1. that she have sole custody of the children of the marriage: L.E.A.B. born [...], 1999, and N.E.B. born [...], 2001;
>
> 2. that the father's access be terminated until further order of the court or agreement of the parties;
>
> 3. restraining the father from attending at the mother's home, the children's school and the father's workplace;
>
> 4. that the father not remove the children from the Greater Toronto Area;
>
> 5. extending the time for the mother to serve and file her Application[1] and Financial Statement;
>
> 6. substituted service by email;
>
> 7. dispensing with the father's consent to the form and content of the draft order;
>
> 8. costs.

[3] In support of her motion, the mother deposes in an affidavit sworn September 13, 2012 that she is gravely concerned for the children's safety. She chronicles that the father has begun "demonstrating volatile and aggressive behaviour towards the children and me as the result of excessive drinking and the use of marijuana" which has worsened since she gave notice of her intention to seek sole custody. Her materials state that the father admits to his various problems, but that he refuses to seek counselling or assistance.

[4] With the benefit of responding materials from the father, it is now apparent that notice of the mother's intention to move for custody was only given to the father on September 7 when she pre-emptively picked the children up from school on his weekend and refused further contact between father and daughters absent supervision.

[5] Within the mother's September 13, 2012 affidavit, marked in bold, the mother writes,

> I want our children to have access to their father, but his recent behaviour has caused me great concern for the safety of our children. The Respondent has recently stopped supervising the children, leaving them at Pool Halls alone until 12:30 a.m. at night with older boys and men. He has screamed at them, threatened to slit his throat and

> threatened to crash the car. He has sent me several messages telling me that he cannot handle the stress and will end his life. He has also driven the children in a two seat vehicle without a proper seat belt.

[6] Also within the September 13, 2012 affidavit, the mother states that she has made a report to the CAS on September 2, 2012, and that they have told her to limit the father's access, failing which the Society would start a child protection proceeding.

[7] A letter from Cheryl Cooper, Intake and Assessment Worker for the CAS dated September 12, 2012 attached to the mother's affidavit confirms that the Society is in the process of completing a child protection assessment and is supportive of the mother's application for supervised visitation. The letter does not state that the Society will commence an action if the mother allows unsupervised visitation. This is a notable distinction.

[8] As of the writing of the letter, the Society had not contacted the father and had only met with the children once, at the behest of the mother. Indeed, the Society made no contact with the father until September 13 when he contacted them (after receiving a copy of the mother's motion materials, the Temporary Restraining Order and their letter of September 12) requesting the opportunity to be interviewed. He is now in the process of meeting with them.

[9] Justice Kaufman heard the emergency motion on September 13, 2012 and granted a Restraining Order preventing the father from contacting, or communicating with the mother and their daughters except through counsel, email, text, telephone, Skype and through supervised access. The father was also restrained from coming within 500 metres of three locations, except for agreed terms of supervised access. The order terminated on September 21, 2012 when the matter was set to return on notice to the father.

Electronic Exchanges Attached to the Mother's Affidavit

[10] As an aside, I wish to deal with two printed chats between the parties: June 1, 2012 and July 24, 2012 which were attached to the mother's September 13 affidavit. The first shows fairly routine parental exchanges over pickups, drop offs, packing and school issues; but for two passages in which the father appears to be confiding in the mother that he is struggling with stress related issues. The mother's responses do not appear to respond to the concern and the court has no way to confirm that the chat as printed is sequential or complete.

[11] The second chat is again unremarkable, if not benign. The mother wishes the father a happy birthday and there are cheerful exchanges on the weather, the girls' sandals, the exchange of a picture, etc. Within the stream of the text, undifferentiated, is a handwritten line and arrow dating an exchange as July 20, 2012 approximately 11:00 p.m. In that portion, the father texts that they (the parents) have a problem because L.E.A.B. just took off. There are a number of text lines concerning security holding L.E.A.B., the police attending, and then the chat resumes its usual course of banal, friendly, child related exchanges.

[12] The texts, or bbms are odd, in that many of the lines are not responsive. The father states at paragraph 23 of his affidavit sworn September 20 that portions of the chat are either missing or have been slightly altered. He did not keep the original. He deposes that one cannot print bbms directly, but that they can be cut and pasted into a word document. The court finds that no weight can be placed on the chat exhibit filed by the mother.

Return of Motion on September 21, 2012

[13] The father replies by affidavit dated September 20, 2012. He serves a cross motion asking that:

> 1. the parties return to the shared parenting schedule set out in the Separation Agreement;
>
> 2. that the father be able to take the children to a family baptism the weekend of September 28;
>
> 3. that the parents use a parenting coordinator;[2]
>
> 4. that the OCL be asked to provide assistance for L.E.A.B. and N.E.B.;
>
> 5. that the mother produce a Financial Statement and be required to pay child support to the father.

[14] His affidavit sworn September 20 states that the mother has twisted the truth and exaggerated incidents. He denies any marijuana use for the past 20 years, prior to which both he and the mother were occasional users. He denies any suicidal thoughts, depression, violence or threatening statements.

[15] The father does acknowledge that he has been struggling financially and that he has been venting stress in a manner that could be better managed. He has been attempting to broach the topic of child support from the mother. The terms of their Separation Agreement provide that neither parent pay child support to the other, nor is there any payment of spousal support. At the time of signing, their incomes were relatively the same. That is no longer the case as a result of changes in his employment.

[16] The father also acknowledges stress resulting from the usual challenges of parenting a teenage and preteen daughter. He has seen a therapist through his Employee Assistance Program and intends to take parenting courses through Jewish Child and Family Services.

[17] In summary, the father's lengthy affidavit of September 20 sets out equally credible (and unconcerning) versions of the same events deposed by the mother as the basis for her allegations.

[18] For example, he identifies the "Pool Hall" within the mother's affidavit (set out in paragraph 5 above) as an Arcade located at Sherkson Beach Resort and Campground. He states that the location has been a family favourite for many years and that the incident involved the removal of L.E.A.B. from a compromising situation, not the placing of her into one.

[19] The father attaches six unsworn letters of support to his September 20 affidavit, including a letter from his employer, his physician and a school employee. He also attaches a driver's abstract showing no infractions. Although none can be admitted into evidence, it is appropriate to note that the father was able to secure a considerable amount of written support for his position in under a week.

[20] The father's statement that the girls' statements to the CAS may have been misconstrued is possible and bears further inquiry. The father's statement that the girls are not afraid of him is confirmed by the September 19, 2012 i-messages from the girls to their 22 year old cousin, D.C., copies of which are attached to her affidavit of September 20, 2012. The messages powerfully convey how much N.E.B. is missing her father.

[21] Ms. D.C. further deposes that she has a close relationship with both girls, and that they have confided in her over the years with respect to the various tensions that arise in their lives, including those created by their mother's current new partner and a previous partner of their father's. She supports her uncles' view that the mother's allegations are misconstrued and terribly unfair. She describes the significant distress and dismay being experienced by her young cousins by being suddenly and forcibly separated from their father.

[22] Also attached is a supporting affidavit from the father's older sister dated September 20, 2012. She describes an admirable parenting *status quo*. She deposes that to date, both parents and their extended families have enjoyed a "functional, friendly and amicable" relationship. The girls have had both sides of the family together for vacation and outings as recently as last month. There have been no indications - none - of any concerns but for a passing comment earlier this summer by the maternal grandmother that the mother ought to have custody.

[23] Everything changed the afternoon of September 7. The aunt deposes that the father called her in distress, confused as to why the mother had taken the girls on his parenting weekend without any explanation or notice. The aunt immediately spoke to the mother who surprised her with concerns of "drug, drinking and anger problems" and her intention to go to court. She had never heard these concerns before.

[24] The aunt acknowledged that her brother tends to exaggerate his frustration when things did not go smoothly, but assured her that there was no cause for concern. She offered to speak to the father over the weekend.

[25] The aunt relates that she did speak with her brother. She learned that he was seeking financial support from the mother as his work was slow, and that he was

experiencing stress resulting from the parenting of teenage daughters, who could be a handful.

[26] The aunt goes on in her detailed affidavit to set out what she believes are misrepresentations as to the mother's concerns. Her statements are compelling, reasonable and sensible. She describes both parents in a kind manner that accepts neither as perfect, and both as committed to their daughters.

Analysis

[27] It is no light matter to vary custody terms within a Separation Agreement. There must first be a material change in the circumstances of the parties, or of the children since the execution of the Separation Agreement. Absent such, there is no jurisdiction to vary.

[28] In the face of competing affidavits, the finding of a material change will often require *vive voce* evidence to determine issues dependent on findings of credibility. Motions to Change proceed carefully, with due regard for procedural fairness, and when appropriate, the views and preferences of the children who will be affected.

[29] No parent should be caught off guard when the interests of children are at stake. An early motion is not an opportunity for a pre-emptive strike.

[30] It is generally the practice that a judge will not change the *status quo* prior to a full hearing unless harm to the children is apprehended or there are unusual circumstances.

[31] A letter from a protection Society is an unusual circumstance that will engage the court to make an early protective order. Such was the basis of Justice Kaufman's Temporary (eight days) Order, pending a return date on notice to the father.

[32] Upon review of the father's responding materials a fuller view emerges. The Society had not yet spoken to the father at the time of providing the letter. The father acknowledges that the events conveyed to the Society by the children occurred, but submits that they have been misconstrued. The Society has only met once with the children, and within the context of the mother's allegations.

[33] The time line for the mother's allegations raises questions. No concerns were known to the father or his extended family before her formal notice of September 7, when she withheld the children from the father. That notice was in the form of a solicitor's letter which states that she is seeking a change in custody as a result of "escalating incidents that occurred while L.E.A.B. and N.E.B. were in your care, combined with your continued use of alcohol and drug use."

[34] The aunt requested and received the mother's assurances that she would not go to court until the aunt was able to speak to the father. Neither the aunt nor the father was told that the mother had already made a report to the CAS, or that the

preparation of court materials was underway. The father was not given notice of the September 13, 2012 motion until after an order had been secured.

[35] The mother's timeline pre-empts the father from responding to the allegations. For example, he is prepared to obtain a drug test but has not had enough time to do so.

[36] The court views the father's evidence on these issues to be on an equal footing with that of the mother. Neither can be preferred at this time. As a result the court cannot be satisfied that the *status quo* is causing harm to the children or that these are unusual circumstances.

[37] There is uncontradicted evidence that the girls are missing their father. The mother deposes in her affidavit that she does not want to terminate the father's access. Nonetheless that has been the effect of the September 13th motion. The court finds there is no basis to terminate access. The court also finds that it is premature to vary custody and there is no finding of urgency, as required under Rule 14(4.2) for a motion to be heard prior to a Case Conference.

[38] The Society is now investigating with the benefit of both parents' involvement. Pending their assessment, and the opportunity, if necessary to elicit the girls' views and preferences, the court finds that there should be no change as to the *status quo*.

[39] Order to go as follows:

1. The mother shall have until September 28 to serve and file her Motion to Change and Financial Statement.

2. The father shall have until November 9 to respond and make any Claim.

3. Reply, if any, 10 days later.

4. The parties will attend a Case Conference before a DRO, which may be scheduled immediately upon close of pleadings, or earlier should the parties agree. Counsel may waive the First Appearance.

5. Upon the close of the CAS investigation, or a letter indicating that protection concerns have been found, either party may bring a further motion for the appointment of the OCL, or other relief by 14B motion to my attention.

6. Per paragraph 3, the Form 25G Order of Justice Kaufman dated September 13, 2012 is terminated. The terms of the November 20, 2009 Separation Agreement govern.

7. L.E.A.B. and N.E.B. shall be in the father's care from Friday, September 28, 2012 at 4:00 p.m. to Sunday, September 30, 2012 at 7:00 p.m. Thereafter the regular schedule shall resume.

8. Should the father seek his costs, he may do so by submissions no more than three pages in length, exclusive of a Bill of Costs or Offer to Settle within 14 days. Mother shall have 14 days thereafter to respond.

Date Released: September 26, 2012 Justice H. McGee

[1] Which she now acknowledges is a Motion to Change.
[2] It was acknowledged at the beginning of submissions that the court cannot order parties to attend a parenting coordinator, only that the husband is willing to do so.