COURT FILE NO.: D91876/16
DATE: December 20, 2017

ONTARIO COURT OF JUSTICE

RE: Kamilawatie Persaud – Applicant

Marlon Persaud – Respondent

BEFORE: Justice Roselyn Zisman

COUNSEL: Sage Harvey, for the Applicant
Marlon Persaud- self-represented
Robyn Switzer- counsel for the child

ENDORSEMENT

Introduction and background

[1] This is a motion to change the outstanding terms of custody and access in a separation agreement dated November 26, 2015 between the parties.

[2] The parties were married on April 22, 2003 and separated on November 8, 2015. There is one child of the marriage, Lyndsey Persaud born November 16, 2006.

[3] The separation agreement provided that the parties have joint custody and that they share equal time as arranged between the parties. The agreement provided that the parties equally share the child's expenses. Neither party had counsel but the agreement stated that they each waived the right to obtain independent legal advice.

[4] There was a factual dispute as to the actual residential parenting arrangements after the separation. However, as of October 2016, the child began to spend alternate weeks with each parent.

[5] The mother commenced an Application to set aside the agreement and for sole custody, primary residence, child support and other provisions incidental to custody.

[6] The motion to set aside the separation agreement was heard on May 28, 2017. For oral reasons the separation agreement was not set aside. However, in accordance with section 56 (1.1) of the Family Law Act the provisions with respect to child support

were set aside as not being in accordance with the Child Support Guidelines with respect to shared parenting. On a set off basis the father was ordered to pay child support of $208.00 per month. An order was made appointing the OCL as the child was 10 years old and I held that her voice should be heard. There was also an order for financial disclosure from the father.

[7] The parties then could not agree on which school Lyndsey should attend as of September 2017. A clinical investigator from the OCL's office interviewed Lyndsey to obtain her views and preferences. Lyndsey expressed the desire to attend a school that was closer to her mother's home. The father agreed that Lyndsey attend the school of her choice on a without prejudice basis to be reviewed after her first semester.

[8] The father sought leave to bring a motion to vary the temporary child support order. He was granted leave to do so and the endorsement indicated that if an earlier date could not be obtained that the motion could be heard on December 12th, the previous date scheduled for a case conference.

[9] On December 12, 2017 the father brought a motion to vary the temporary child support order as of September 2017 on the basis that his employment has been terminated. As this attendance was set for a case conference, Ms Switzer, counsel for Lyndsey advised that her position on behalf of Lyndsey was that the equal shared parenting arrangement should be changed and that there was urgency in doing so.

[10] A motion date was scheduled for December 20th. The father's motion to vary his child support order was adjourned to the same date.

Summary of relevant evidence on the motion

[11] It is the mother's position that she was always the primary parent and that Lyndsey is more comfortable in her care than in the care of the father. The mother alleges that the child is often left alone without any supervision, that she cannot use the computer when in her father's home, that she is limited to the time she can take a shower, that there is little food and that the father questions Lyndsey about her living arrangements with the mother. The mother also alleges that after the disclosure meeting with Ms Switzer on December 5th that Lyndsey was very scared about going home with the father as when the father does not get his own way he has a tendency to yell and bully people.

[12] On December 6th the school principal advised the mother that Lyndsey went to the office after the ~~father~~ Father went to pick her up as she felt too scared to go with him. The principal told the father that Lyndsey was not in a good state to go with him but agreed that the father speak with Lyndsey in the office. Lyndsey went home with the mother and after the mother was able to calm her down she went to stay with her father the next day. The father does not deny this incident and confirms that Lyndsey was made aware by Ms Switzer that he was not in agreement with her living primarily with her mother.

[13] The father denies the mother's allegations as to any concerns about the living arrangements in his home. He deposes that he and the mother have always been joint primary caregivers of Lyndsey and that he has always been an involved parent. The father deposes that Lyndsey told him that her mother pressured her into saying things and in particular into saying that she wanted to live primarily with the mother. According to the father, Lyndsey told him that she lied about not being able to use the computer and the allegation about using the shower. It is the father's position that he has a close, loving and healthy relationship with Lyndsey and wishes the current arrangements that have existed since separation to continue. He submitted that if his time was reduced to alternate week-ends it would be like losing a limb. He also questioned if the mother could meet the child's educational needs as he is the parent who oversees her education and he is better educated that the mother.

[14] Tara Noble, a ~~clinical investigator~~ articling student* with the OCL office filed an affidavit sworn December 19th. Ms Switzer and Ms Noble met with Lyndsey at her school on December 13th. Lyndsey was clear that she values her relationship with both of her parents. She indicated that she felt good at her mother's home but not as good at her father's home. She stated that although she feels her father helps her with her homework and she enjoys spending time with her step-brother Bandon, her father spends a lot of time talking about her parents' separation and the legal issues that they are still working out and this makes her feel "heaviness and worry".

[15] Lyndsey stated that she would benefit from spending time differently with her father. She stated that less exposure to the conflict, going places with her father as well as playing and having fun might decrease her discomfort in her father's care as would being granted more privacy in the bathroom. She stated that with the current stress placed on her by her father she wishes to decrease time in his care. However, she did not want the father daughter relationship to diminish.

[16] Lyndsey expressed that she felt she could benefit from counselling that provided her a confidential and safe place to express her worries while developing healthy strategies to manage living within a separated family. She felt very supported by the staff at her school.

[17] Lyndsey reported that she remembers her parents splitting up and that she was sad. She recalled that she was aware that her parents had a dispute about where she should live and that they met with the principal of her former school. After the meeting, Lyndsey recalled that she was told she would spend one week with each parent. She said that she was not asked for her views or preferences.

[18] Ms Switzer and Ms Noble met again with Lyndsey on December 19th in response to an email that she sent to Ms Switzer on the week-end.

[19] Lyndsey repeated much of what she had said at the previous meeting. She also advised that at times her father asks her to sleep in his room and she would prefer to sleep in her own bed at his house. She stated that she would like to find more

* with a Master's Degree in Social Work.

common interests to share with her father in the hope of making their time together feel better.

[20] After exploring several options with Lyndsey she stated that she could agree to spend every second week-end from Friday to Sunday in the care of her father. She wished the schedule to commence this week-end so that she would spend December 22 to 24th with her father and then spend Christmas and New Year week-end with her mother.

[21] I have also reviewed the affidavit of Michelle Hayman who was the clinical investigator who interviewed Lyndsey with respect to the issue of which school she should attend. During that interview on August 23rd , Lyndsey unprompted started to talk about her living arrangements and stated that she would prefer to live with her mother during the week because, "I'm going to be a young lady soon." But she definitely was clear that she wished to keep seeing her father. She started to cry and stated "If I go live with one parent, the other one's going to be mad. When I see them, they're not going to be happy. I don't want my parents to be mad."

Legal test for variation of custody and access

[22] There is no statutory power that grants a court the authority to vary a custody or access term contained in a domestic contract. In *Antler v. Antler,* [1994] O.J. No. 1180, the court addressed such a request as follows:

> 4 ... [T]he separation agreement is filed under section 35 of the *Family Law Act* and accordingly, could be subject of an order of variation under section 37 of that Act by this court relating to support provisions. There is no similar provision for filing a separation agreement under the *Children's Law Reform Act*, R.S.O. 1990, c. C-12, and it could be concluded that there is no jurisdiction in the Provincial Court (Family Division) to vary a separation agreement insofar as custody or access issues therein are concerned. This view could be substantiated by considering that the legislature, in enacting the yet unproclaimed amendments to Part 4 of the *Children's Law Reform Act* relevant to access provisions of a separation agreement specifically provided that a person could file a separation agreement for the purpose of enforcing access..... I accordingly conclude that there is no provision in the *Children's Law Reform Act* similar to the jurisdiction conferred in section 37 of the *Family Law Act.*
>
> 5. However, I feel that there is jurisdiction to deal with this matter and that jurisdiction arises from a consideration of section 68 of the *Children's Law Reform Act* which states as follows:
>
> Where a domestic contract as defined in the *Family Law Act* makes provision in respect of a matter that is provided for in this Part, the contract prevails except as otherwise provided in Part IV of the *Family Law Act.*
>
> 6. Section 56 of the *Family Law Act* contained in Part IV provides:
>
> In the determination of a matter respecting the support, education, moral training or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining to the matter where, in the opinion of the court, to do so is in the best interest of the child.
>
> 7. Moreover, section 21 of the *Children's Law Reform Act* provides as follows:

> A parent of a child or any other person may apply to a court for an order respecting custody of or access to the child *or determining any aspect of the incidents of custody of the child.*
>
> **8** Section 29 of the *Children's Law Reform Act* provides that a court is not to vary an order in respect of access unless there has been a material change in circumstances that affects or is likely to affect the best interests of the child. See also *Persaud v. Garcia-Persaud* (2009), 81 R.F.L. (6th) 1, (Ont. C.A.) para. 3.

[23] Therefore it appears that the court is not bound by the provisions in a separation agreement as it is the interests of the children rather than those of the parents which are at issue for the court. A court should therefore consider the prior agreement as well as evidence of the proposed or changed circumstances. The test to be followed would then be simply if it is in the best interests of the child to vary the terms of the separation agreement.

[24] If the test in section 29 Children's Law Reform Act is applied then the court is required to find a material change of circumstances However, in either case the onus is on the party seeking to change the separation agreement. In view of the long standing status quo it would be appropriate in this case to apply a more stringent test to the change that is being requested.

[25] The Supreme Court of Canada in *Gordon v. Goertz*[1] found that the change in circumstances must not have been foreseen or reasonably contemplated by the judge who made the original order. The change must be to the condition, means, needs or the ability of the parent to meet those needs. The last order is presumed to be correct. The party seeking the variation bears the onus of demonstrating a material change of circumstances that will materially affect the child. However, once this threshold is met, the court "must embark on a fresh inquiry into what is in the best interests of the child."

[26] It is also a long standing legal principle that absent a material change of circumstances and that an immediate change is required, the status quo will be maintained until trial.[2]

Analysis

[27] In this case, the custody arrangements were set out in the separation agreement executed by the parties. At that time the child was not involved nor were her views or preferences sought.

[28] The court has found the expressed views of a child may amount to a material change of circumstances especially in circumstances where those views were not previously known. [3]

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[1] [1996] 2 SCR 27 at para. 29

[2] *Grant v. Turgeon* [2000] OJ No. 970 (SCJ)

[3] See *Wood v. Wood* [2005] OJ No. 369 at para. 55 (SCJ); *Stirling v. Blake* 2013 ONSC at para. 118; *Vojan v. Lauzon* 2015 ONSC 987 at para. 39; *Rideout v. Rideout* [2004] OJ No. 1277 (SCJ) at para. 24.

[29] Lyndsey is now 11 years old and in my view she is of an age where her views should be heard and given serious consideration. Those views have remained consistent as she initially voiced her views in August and now again in December to both her counsel and in the presence of two different clinical investigators. I find that those views amount to a material change in circumstances which meets the first inquiry of the test set out in *Gordon v. Goertz.*

[30] The second inquiry, under *Gordon v. Goertz,* requires the court to consider what is now in the best interests of Lyndsey.

[31] Although Lyndsey has a close and loving relationship with both of her parents, it is the mother who she believes is now in the best position to meet her needs. The father denies the concerns raised by Lyndsey about the living conditions in his home and believes that the mother has influenced her to make these allegations.

[32] However, based on the credible evidence of Ms Noble as to her interviews with Lyndsey, I find that there is no basis to draw this inference. Lyndsey has raised some serious issues with respect to the living arrangements at her father's home, even if she may have exaggerated those concerns to ensure that her wish to reside primarily with her mother, it would reinforce her strong wish to change the current arrangements.

[33] There is also credible evidence that Lyndsey is currently very stressed and worried about her father's reaction and needs the change in the residential arrangements to happen immediately.

[34] Lyndsey has spoken about how changing the time she spends with her father would improve her relationship with him. Despite the father's disappointment in the decision I will make today I am hopeful that he will accept Lyndsey's wishes and that as a result they will actually spend more quality time together.

[35] With respect to the issue of a variation in the child support obligation, as the child will now be residing in the full-time care of the mother the father is required to pay child support in accordance with the Child Support Guidelines. Despite his evidence that he was laid off, the letter he produced states that he was fired for cause. Therefore, the case law is clear that income can and should be imputed to him in the amount that he previously earned.[4]

[36] The father has also not provided any evidence with respect to his attempts to find new employment. This is a proper case where income should be imputed to him in the amount he earned in 2016.

Order as follows:

[37] Paragraph 2 of the separation agreement dated November 26, 2015 shall be varied to provide as follows;

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[4] Luckey v. Luckey 1996 CanLII 11217 (Gen.Div. Fam.Crt.)

1. Lyndsey Persaud born November 16, 2006 shall reside in the primary care of the Applicant, Kamilawatie Persaud;

2. The Respondent Marlon Persaud shall have access to Lyndsey on alternate week-ends from Friday at 3:30 p.m. to Sunday at 6:00p.m. extended to Monday at 6:00 p.m. if it is a statutory week-end to commence on Friday December 22nd, 2017;

3. On December 25th 2017, Christmas Day the Applicant will pick up the child at 2:00 p.m.

4. The Applicant shall arrange for individual and confidential counselling for the child. Neither parent shall be permitted to request notes or information from the counsellor to be used for court purposes;

5. As of January 1, 2018, the Respondent shall pay child support per the Child Support Guidelines to the Applicant in the amount of $478.00 per month based on an imputed income of $51,954.

6. Support Deduction Order to issue.

Dated December 20, 2017

Justice Roselyn Zisman

ENDORSEMENTS – GENERAL **D91876/16** DATE: Dec 20, 2017

PERSAUD, K VS PERSAUD, M

Applicant ☑ Counsel: S. Harvey Respondent ☑ Counsel: _____

Other: _____ Ch. Lawyer: R. Switzer

CTSS ☐ Agent: _____ FRO ☐ Counsel: _____

Service complete ☐ Service outstanding on: _____

ORDER TO GO: On Motion ☐ On Application ☐ On Form 14B ☐ 23C ☐

DISMISSED AS ABANDONED ☐ ON CONSENT ☐ UNOPPOSED ☐ OPPOSED ☐ WITHOUT NOTICE ☐

IN TERMS OF CONSENT OR MINUTES OF SETTLEMENT FILED ☐ CHILDREN'S LAWYER REFERRAL MADE ☐

TEMPORARY ☐ FINAL ☐ **CUSTODY TO :** _____

TRAVEL AND PASSPORTS

TEMPORARY ☐ FINAL ☐ The _____ may apply for passports, renewals of same, and other government documentation for the child(ren), without the consent of the _____.

TEMPORARY ☐ FINAL ☐ The _____ or his/her designate may travel with the child(ren) outside of Canada, for vacation purposes, _____ without the consent of the _____.

TEMPORARY ☐ FINAL ☐ **ACCESS BY:** _____ **AS FOLLOWS:**

_____

ACCESS ENDORSEMENT CONTINUED ON REVERSE ☐

TEMPORARY ☐ FINAL ☐ **CHILD SUPPORT:**

On consent of the parties pursuant to S. 33 of the FLA ☐ or:

On finding that the annual income of the payor is $_____

And the annual income of the recipient is $_____,

And referring to the CSGL table amount for _____ children:

THE RESPONDENT/APPLICANT IS TO PAY TO THE APPLICANT/RESPONDENT child support in the amount of $_____ monthly/weekly commencing _____ 20____, and

FOR SPECIAL EXPENSES, the amount of $_____ payable as above, or _____

COSTS

☐ _____ shall pay to _____ $_____ in costs payable _____

EXTENSION

☐ _____ shall have until _____ to serve and file _____

ENDORSEMENT CONTINUED ON REVERSE ☐

ADJOURNED TO : March 26 2018 @ 10 am TIME ALLOWED: _____

FOR: Case Conf. ☐ Sett. Conf. ☐ Motion ☒ Trial Mgt. Conf. ☐ Trial ☐

Briefs required: Yes ☒ No ☐ Offer to settle required: Yes ☐ No ☐ Up-to-date Financial Statement required ☑

Signed: JUSTICE _____ ☑ by father to prepare formal Order promptly

Mr Harvey to approval by father and dispensed with.

Motion by mother re custody & ~~finances~~ child support

Submissions made

See attached endorsement for terms & temporary Order.

Costs requested:

Bill of Costs provided

Counsel seeks costs of $2,000.00

: Father to pay costs of $2000 to the mother to be paid within 90 days.

Signed: Justice _____