

[3] The father initiated his motion to change in April 2019. The motion was not heard until March 16, 2020. Gracie started high school in September 2019 at the mother's preferred school in Kingston.

[4] The parents have equal parenting time with Gracie; Gracie alternates between her parents' homes on a week-on, week-off basis.

[5] In her response to the father's motion, the mother requested a change in Gracie's living arrangements so that Gracie would live with her during the school year, except on alternate weekends, which Gracie would spend with the father. The mother did not refer to this request in her factum as an issue to be argued or on her list of requested orders. In her oral submissions, the mother said that she had proposed the change in Gracie's residence schedule in an effort to relieve the conflict between the parties and that she was asking the court to consider it in the event the father's motion was dismissed and Gracie is to continue to attend school in Kingston.

The Facts

[6] The parents began to live together in May 1999. They were married in September 2001. Gracie was born in September 2005. The parents separated in December 2007.

[7] The father is a police officer. He lives in Napanee.

[8] The mother is employed by Queen's University. She lives in Kingston.

[9] A final order of Robertson J. dated November 22, 2016, to which the parents consented, provided that the parents would have joint custody of Gracie and that they would consult each other, in advance, concerning any major issue, including Gracie's educational plan.

[10] The father argues that the parents are unable to agree on an educational plan for Gracie.

[11] The father says that, after the mother failed to respond to two emails he sent to her in January 2019 in which he raised the issue of Gracie's high school, in February 2019 he enrolled Gracie in Napanee District Secondary School ("NDSS").

[12] The mother says that she did respond, by email, to the father's emails. The mother says that the father enrolled Gracie in NDSS secretly and without her knowledge.

[13] The mother says that when she found out that the father had enrolled Gracie in NDSS, she contacted the school board, which then unilaterally enrolled Gracie at Frontenac Secondary School in Kingston ("FSS").

[14] Gracie began attending FSS in September 2019.

[15] The parents agree that Gracie has expressed a preference to attend NDSS, although the mother argues that Gracie only said that to please her father.

The Position of the Mother

[16] The mother argues that there is no reason for Gracie to change schools other than to satisfy the father's long-held desire to have Gracie attend school in his hometown. The mother argues that Gracie has attended school in Kingston for almost 10 years. She says that Gracie is doing well academically and is a member of her school's hockey team. The mother says there are no academic benefits associated with changing Gracie's school. The mother is also concerned that the quality of education at NDSS may not be as high as at FSS.

[17] The mother argues that transportation is an impediment to Gracie's attendance at NDSS. The mother says that Gracie is able to take a school bus to and from FSS from each parent's home. If Gracie were to attend NDSS, she would be dependent on her parents for transportation when residing with her mother in Kingston. The mother says that even though the father has offered to provide the after-school transportation, the mother would be required to drive 90 kilometres roundtrip each morning to deliver Gracie to NDSS and to return to Kingston. The mother argues that it makes more sense for Gracie to attend school in Kingston. She says both parents work in Kingston and the father will be driving to Kingston for work every day regardless of whether he is required to drop Gracie off at school. The mother argues that there is no reason for her to drive to Napanee every day.

[18] The mother also argues that Gracie is not safe at the father's home. The mother places a great deal of emphasis on an incident at the father's home that occurred in October 2019 during

which the father gave Gracie what he described as “a smack across her butt.” The mother argues that it would not be in Gracie’s best interests for the father to have any decision-making power over Gracie, particularly in respect of the choice of school issue, because this would increase Gracie’s dependence on the father and place Gracie, on a daily basis, in an environment where she has been mistreated and may be mistreated again.

[19] The mother says that both the police and the Highland Shores Children’s Aid Society (“HSCAS”) became involved following the October 2019 incident. The mother says that the HSCAS determined that Gracie is a child in need of protection. The mother also says that the HSCAS determined that the father caused harm or maltreatment to Gracie and the father and his spouse present a risk of harm to Gracie. The mother did not, however, identify the source of this information and did not file any documentary evidence to support it.

The Voice of the Child Report

[20] The father’s motion to change included a request for a “Voice of the Child” report to assess Gracie’s views and preferences regarding her secondary school education. The mother opposed the request. The father brought a motion and on September 18, 2019, Minnema J. granted the father’s motion and ordered that a report be prepared by a clinician assigned by the Office of the Children’s Lawyer (“OCL”) to consider whether Gracie’s expressed preference about her school choice was an independent opinion, the strength of Gracie’s views and Gracie’s view about the current parenting arrangement.

[21] The OCL clinician prepared two reports. The first report, dated November 8, 2019, was described as “discontinued” because the clinician was unable to interview Gracie on two separate occasions in accordance with the OCL’s protocol for these reports.

[22] In her first report, the clinician described reluctance on the part of the mother to facilitate the clinician’s interview with Gracie. The clinician reported that the mother suggested the clinician had a conflict of interest and when the clinician attempted to reassure the mother that she did not, the mother asked the clinician to consult with the OCL to ensure that it agreed. The mother then questioned the confidentiality of the process. After the clinician scheduled an interview, the mother contacted the clinician and informed her that a child protection

investigation was underway. The clinician contacted the HSCAS to determine whether its investigation would be an impediment to her interview with Gracie. The HSCAS said that it was unable to confirm or deny that it was conducting a child protection investigation. The clinician then rescheduled the interview for 12:30 one afternoon. The mother asked if the interview could take place after school instead. The clinician said that it could not and that she was facing a deadline.

[23] The interview the clinician attempted to arrange through the mother did not take place before the clinician prepared the first report; the November 8, 2019 report was prepared based on an interview with Gracie the clinician arranged through the father, which took place on October 8, 2019.

[24] In her first report, dated November 8, 2019, the clinician made the following observations:

- i. That Gracie was aware that her parents disagree about where she should go to school;
- ii. That Gracie had described her situation at FSS as “pretty good” but said that most of her friends go to NDSS;
- iii. That Gracie said that both of her parents had discussed the school issue with her and both wanted her to attend the school where she would be the most happy;
- iv. That Gracie said that her mother had told her that she had no way of transporting Gracie to school in Napanee during the weeks Gracie lived with her mother. Gracie said that both her stepmother and her grandmother had offered to do the driving but that this had not solved the problem;
- v. That Gracie believes that her mother wants her to remain in the French immersion program she is enrolled in and remain at FSS, which is close to her mother’s home;
- vi. That Gracie said that her mother is concerned that she would not receive the same level of education in Napanee;
- vii. That Gracie said that her father said that he will support whichever school choice Gracie makes;
- viii. That Gracie said that she would like to attend NDSS because her friends are there;

- ix. That Gracie said that her school transportation to FSS does not work well because she is required to transfer buses, is late arriving for classes, and has to leave early;
- x. That Gracie said both her parents want what is best for her; and
- xi. That Gracie said that she is generally happy with her residence schedule but that she would prefer a schedule that would enable her to spend more time at each residence.

[25] With respect to the independence of the views expressed by Gracie in her first interview, the clinician wrote that Gracie said that both parents support her wishes. Gracie also said that her mother has spoken to Gracie about why Gracie should stay at FSS. Gracie said that her mother told her that FSS would provide her with a better education and also that her mother could not transport Gracie to NDSS during the weeks Gracie was living with her.

[26] The clinician said that Gracie nonetheless expressed a desire to attend school in Napanee.

[27] On November 22, 2019, Minnema J. signed a consent order requiring the mother to make Gracie available for a second interview. The second interview took place, without incident, on December 2, 2019. The clinician's second report is dated December 31, 2019.

[28] In her second report, the clinician repeated that Gracie expressed a clear preference to attend NDSS.

[29] The clinician reported that, during the second interview, Gracie said that she had been living primarily with her mother for the previous month but was unwilling to discuss the reasons for the change in her residence schedule. Gracie told the clinician that it was not a good time to judge the school or the residence issue because of recent events. Gracie was reluctant to talk because of concerns about confidentiality.

[30] When asked by the clinician if she had a message for the judge who would decide the choice of school issue, Gracie said she wants to go to NDSS.

[31] At the hearing of the motion, when the father's lawyer noted that the mother had not filed a dispute in respect of the Voice of the Child report, the mother said that she does not dispute the report. However, in her oral submissions, the mother argued that, in her interviews with the

clinician, Gracie gave inconsistent reasons for wanting to attend NDSS: in her first interview she mentioned that her friends go to NDSS and, in the second interview, she referred to elective courses. The mother argued that if Gracie really wanted to attend NDSS she would have provided a more articulate rationale rather than one-word answers.

Analysis

[32] Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change. (*Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 17(5).)

Has there been a material change in circumstances?

[33] To establish a material change in the circumstances of the child, the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way. The question is whether the previous order might have been different had the circumstances now existing prevailed earlier. The change must also represent a distinct departure from what the court could reasonably have anticipated in making the previous order. (*Gordon v. Goertz*, [1996] 2 S.C.R. 27 at para. 12.)

[34] The judge must be satisfied that there has been:

- (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child;
- (2) which materially affects the child; and
- (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order. (*Gordon v. Goertz*, at para. 13.)

(1) **Has there been a change in the condition, means, needs or circumstances of Gracie and/or the ability of the parents to meet Gracie's needs?**

[35] I am satisfied that, since the November 22, 2016 order was signed, the parents have been unwilling or unable to make joint decisions in respect of Gracie's education plan that are in Gracie's best interests.

[36] There was ample evidence before me of a serious lack of communication and cooperation, and a great deal of animosity between the parents.

[37] Turning first to Gracie's enrolment for the 2019/2020 academic year, initially at NDSS and then at FSS, I am unable to make any findings about the sincerity of the parents' efforts to communicate before the father registered Gracie at NDSS in February 2019. I accept that the father sent two emails to the mother which, to quote the father, "broached the issue of Gracie's high school." However, the father did not include these emails in his evidence, so it is not clear to me whether, for example, he invited a dialogue about the choice of schools or whether he made it clear that he would be enrolling Gracie in NDSS if the mother did not respond to his emails. While the father says that the mother did not reply to his emails, the mother says that she did send a responding email and that she sent it to the father's work email address. The mother did not include this email in her evidence. The father says he searched for the email the mother said she sent but could not find it. The father also says it was odd that the mother would have sent this email to his work email address because, in 2015, the mother had complained to the father's employer that the father was abusing his status as a police officer by using his police email. That complaint resulted in the father being cautioned by his supervisor not to use his work email to communicate with the mother about personal matters.

[38] Regardless, once the mother learned that the father had enrolled Gracie in NDSS, according to her own evidence, she did not discuss the choice of school issue with the father. She contacted the school board which, she says, through its legal counsel, withdrew Gracie from NDSS and "confirmed Gracie's enrolment in the natural course of her education plan in Kingston."

[39] The mother's evidence does not suggest that the mother requested any input from Gracie before the mother contacted the school board to take issue with the NDSS enrolment. The mother acknowledges that Gracie says that she would rather attend NDSS than FSS. However, as I have indicated, the mother does not accept that this is really what Gracie wants; the mother says that Gracie says that she wants to attend NDSS because Gracie knows that this will please her father and will avoid anger and "fallout" from her father's spouse. The mother was not, however, willing to allow this theory to be tested. As I have already noted, the mother opposed the father's request for a Voice of the Child report and was then uncooperative with the OCL clinician, even after the report was ordered by Minnema J.

[40] I was given no reason to believe the lack of communication and cooperation between the parents is likely to be transient. I find merit in the father's lawyer's observation about this motion that what began as an effort to resolve the narrow choice of school issue evolved into a proceeding which called into question Gracie's residency schedule combined with repeated failures on the part of the mother to respect the father's court-ordered parenting time.

[41] There was also evidence that, after the father brought this motion, the mother has made efforts to punish or discredit the father, including the following:

- i. After the October 20, 2019 incident at the father's home, the mother refused to accept an Ontario Provincial Police constable's advice that no charges would be laid against the father. The mother asked to speak to the constable's supervisor and, when the supervisor confirmed that no charges would be laid, the mother filed a complaint.
- ii. As I have already noted, in her evidence in response to the father's motion, the mother stated that the HSCAS deemed Gracie to be a child in need of protection. The mother filed no evidence in support of this statement, which is in respect of a finding which would be made by a court and not by a Children's Aid Society. The father's lawyer says that no child protection proceeding has been initiated. The father's evidence, which I accept, is that a person at the HSCAS, whom he named, told him that the HSCAS is keeping its file open because of the conflict between the two parents' homes. The father also says the HSCAS is not concerned about Gracie's physical safety or well-being while at the father's home.

- iii. The father described an incident that took place at a hockey arena in late February, 2020, three weeks before the hearing of this motion, in which the mother, who he said appeared to be very angry, shouted, in front of a group of about 30 people, that the father and his spouse had been deemed to be child abusers by the CAS.

[42] For the above reasons, I am satisfied that, since the November 22, 2016 order, there has been a change in the ability of the parents to meet Gracie's needs in that the parents are unwilling or unable to make joint decisions in respect of Gracie's education plan that are in Gracie's best interests.

(2) If there has been a change, does it materially affect Gracie?

[43] Gracie has found herself in the middle of the battlefield in a war between her parents. She has not been attending the school she says she would prefer to attend and while her wishes would not necessarily determine the issue, she cannot feel that they have been taken into account. Gracie also knows that her parents disagree about where she should go to school. She also knows that, to the extent that she expresses an opinion, one parent will be at least disappointed and possibly angry or upset with her. I am satisfied that, in these respects, the change in the parents' ability or willingness to make joint decisions that are in Gracie's best interests materially affects Gracie.

(3) If there has been a change that materially affects Gracie, was the change either not foreseen or could it not have been reasonably contemplated by the judge who made the initial order?

[44] I am satisfied that, had the lack of communication and cooperation and the degree of animosity apparent in the evidence before me on this motion been known at the time of the November 22, 2016 order, that order would have been different; it would have given ultimate decision-making power in respect of Gracie's education to one parent or it would have provided a mechanism for resolving the disputes that would inevitably arise.

How should the November 22, 2016 order be varied?

[45] Section 17(5) of the *Divorce Act* provides that, once a material change in circumstances has been established, the court, in making the variation order, shall take into consideration only the best interests of the child as determined by reference to that change.

[46] As noted at the outset of this endorsement, on his motion, the father seeks final decision-making power in respect of Gracie's educational program and an order permitting him to enrol Gracie in NDSS. He also seeks an order requiring the mother to be responsible for Gracie's transportation to NDSS the mornings Gracie is in her care.

[47] The mother did not request similar relief in her response to the father's motion; the mother did not ask for decision-making power or an order that Gracie continue to attend FSS. I take from the mother's written materials and submissions that, in respect of Gracie's education, the mother is content with the *status quo*. As I noted above, the mother requested a change in Gracie's residency that would see Gracie living with the mother during the school year, visiting the father only on alternate weekends. The mother did not press this request in her factum or her oral submissions. If she had, I would have found that the evidence did not provide a basis for such a request; Gracie told the OCL clinician that she is fairly content with the current residency arrangements. I deny the mother's request for the residential/access arrangements set out in paragraph 12 of her response to the father's motion to change.

[48] I am persuaded that it would be appropriate for one parent to have final decision-making power in respect of Gracie's educational program and that it should be the father.

[49] Should any issue arise concerning Gracie's educational program, following consultation with the mother, the father shall be entitled to make the final decision.

[50] I am mindful that the mother was not represented by a lawyer on the motion. For that reason, I will add that I would have reached the same conclusion even if the mother had requested an order that she be accorded this decision-making power.

[51] The mother may be correct when she says that the father would like Gracie to attend high school in Napanee because it is where he lives and is his hometown. I am nonetheless satisfied that the father has been acting with Gracie's best interests in mind. The father says that Gracie

wants to attend NDSS and that that was why he initiated this motion to change. The father sought to have Gracie's views and preferences put before the court through a Voice of the Child report. The mother opposed this request. Gracie told the OCL clinician that she wanted to attend NDSS and provided some reasons. Although the mother argued that Gracie was influenced by the father's desire to have her attend school in Napanee, Gracie told the OCL clinician that her father said that he would support whichever school choice she made. Gracie told the clinician during both of her interviews that she wanted to attend NDSS. At the time of the second interview, Gracie had been living exclusively with her mother for several weeks. Even if Gracie had been under the influence of her father at the time of her first interview, and I make no finding that she was, I find it unlikely that Gracie would have been under the influence of her father at the time of the second interview, when she was not living with him or even seeing him on a regular basis.

[52] The father has asked that he be permitted to register Gracie for enrolment at NDSS beginning in September 2020.

[53] The mother has raised some reasonable arguments in opposition to this request. The mother questions why Gracie should change schools when she is doing well at FSS. The mother says that school buses do not travel from Kingston to Napanee and that if Gracie is to attend NDSS, the mother would be required to drive 90 kilometres each morning to deliver Gracie to school. The mother is also concerned that the level of education Gracie would receive at NDSS may be inferior to that available at FSS.

[54] I have carefully considered the mother's arguments:

- i. With respect to the argument that there is no reason for Gracie to change schools because she is doing well at FSS, both parents believe that Gracie will do well regardless of which school she attends, which I find neutralizes the mother's argument.
- ii. With respect to the transportation issue, I accept that driving Gracie from Kingston to Napanee each morning, every second week, would be an inconvenience for the mother. However, it would also provide the mother and Gracie with "windshield time" to talk privately each morning. It would also ensure that Gracie was at school on time each day, in contrast to her current

busing arrangement, which Gracie told the OCL clinician causes her to be 25 minutes late for class and requires her to leave school early. The mother and her spouse live with the mother's stepchild who is almost 14; the mother does not have young children to care for in the mornings. I find that being driven to school in the morning by the mother on the weeks Gracie is living with the mother would be in Gracie's best interests and would be better for Gracie than her current school transportation arrangement.

- iii. With respect to the mother's concern about the relative levels of education offered at FSS and NDSS, there was no evidence in support of this concern. I note that Gracie is in a French immersion program at FSS and that NDSS offers a French program; Gracie had, in fact, been registered in the French program at NDSS for this school year, before her enrolment was changed to FSS.

[55] I accept the evidence that Gracie's preference is to attend NDSS. As I have already observed, Gracie's preference, on its own, is not determinative. However, as Gracie is doing well in school and her parents believe that she will do well regardless of which school she attends, and as there appear to be no impediments to Gracie's attendance at NDSS, I feel comfortable placing significant weight on Gracie's preference. Gracie told the OCL clinician that her friends attend NDSS and that the school's broad range of elective courses appeals to her. I consider these to be good reasons for a 14-year-old to choose a school and also factors that will contribute to a positive school experience.

[56] Gracie told the OCL clinician that she wanted the judge hearing this motion to know that she wants to attend NDSS. I have received Gracie's message and, as I am not persuaded that there are any valid reasons that Gracie should not attend NDSS, I order that the father be permitted to register Gracie in NDSS beginning in September 2020.

Conclusion

[57] In conclusion, the father's motion is granted.

[58] Paragraph 2 of the November 22, 2016 order shall be amended so that:

- i. Should any issue arise concerning Gracie’s educational program, following advance consultation with the mother, the father shall be entitled to make the final decision;
- ii. The father shall be permitted to register Gracie for enrolment at NDSS for the semester commencing September 2020; and
- iii. The mother shall be responsible for the transportation of Gracie to NDSS during the mornings Gracie is scheduled to be in the mother’s care.

[59] For greater clarity, paragraph 2 of the final order of November 22, 2016 shall be amended in accordance with the first three paragraphs in paragraph 10 of the father’s motion to change dated April 4, 2019, except that paragraph 10(2) shall refer to “September, 2020” instead of “September, 2019.”

[60] Further, in his oral submissions, the father’s lawyer requested a change to the November 22, 2016 order to confirm that Gracie transfers from one parent’s home to the other’s on Wednesdays, a practice the parents adopted informally since the date of the order but which was not consistently honoured by the mother after the father brought his motion. Although the father did not request this change in his written materials, the mother did not oppose the request in her oral submissions, and, in the circumstances, I consider the request to be in Gracie’s best interests. I note that, at present, paragraph 26 of the order, which deals with Gracie’s residency schedule, consists of an incomplete sentence which should be corrected to have any meaning in any event.

[61] Paragraph 26 of the final order of November 22, 2016 shall, therefore, be amended to read as follows: “The residency schedule concerning Gracie Kathryn Hughes shall be on alternating weeks as between the Applicant, Jill Germaine Hughes and the Respondent, Jason Robert Hughes. Wednesday shall be the changeover day.”

[62] As I have already determined, the relief sought by the mother in her response to the motion to change is denied.

Costs

[63] If the parties cannot agree on the costs of this motion, the father may deliver written submissions of no more than three pages in length within 14 days of the date of this decision. The three-page limit does not include the bill of costs. The mother may deliver written submissions in response of no more than three pages in length within 14 days of the date of receipt of the father's submissions. The father may deliver any reply submissions of no more than three pages in length within seven days of the date of receipt of the mother's submissions.

[64] The costs submissions may be filed by sending them to me by email at scj.assistants@ontario.ca.

A handwritten signature in black ink, appearing to read 'H. J. Williams', is written above a horizontal line.

Madam Justice H. J. Williams

Date: May 6, 2020

CITATION: *Hughes v. Hughes*, 2020 ONSC 2821
COURT FILE NO.: 82/11
DATE: 20200506

ONTARIO
SUPERIOR COURT OF JUSTICE

RE: JILL GERMAINE HUGHES
Applicant

AND

JASON ROBERT HUGHES
Respondent

BEFORE: Madam Justice H.J. Williams

COUNSEL: Self-Represented Applicant
Mark S. LaFrance, for the Respondent

ENDORSEMENT: MOTION TO CHANGE

Madam Justice H. J. Williams

Released: May 6, 2020