FAMILY COURT OF NOVA SCOTIA

Citation: *S.P. v. T.L.W.*, 2014 NSFC 8

Date: 2014 05 12
Docket: FLBMCA No. 084216
Registry: Bridgewater

Between:

S. P.

Applicant

v.

T. L. W.

Respondent

Editorial Notice:	Identifying information has been removed from this electronic version of the judgment.
Judge:	The Honourable Judge William J. Dyer
Heard:	April 17, 2014, at Bridgewater, Nova Scotia
Counsel:	David Hirtle, for the Applicant Michael Power, Q.C., for the Respondent

By the Court:

Introduction

[1] S. P. ("P.") and T. W. ("W.") are the parents of three year old A. W. ("A.").

[2] In late December, 2012, P. started an application under the **Maintenance and Custody Act** (**MCA**) in which he requested a paternity finding, joint custody with what was described as "a shared parenting plan, access". Child maintenance was also mentioned; but there was no elaboration.

[3] By early February, 2013, W. was represented by a lawyer and arrangements were in place for paternity testing (at P.'s behest), without the necessity of a court order. By April, 2013 P. was represented by counsel. There were consensual adjournments through April, May and June. In mid-June, it was disclosed that interim access for P. had been settled, subject to variation (in Provincial Court) of a Recognizance which he had entered into regarding multiple outstanding criminal charges against him. A consent interim order was approved on June 25th.

[4] There were further consensual adjournments. The parties' discussions in aid of settlement continued through the Fall. However, by late November, there was still no settlement, and conciliation services were ruled out. I set the matter down for an interim contested "access hearing". A second interim order had ostensibly been achieved in August, 2013 but it was still in limbo and had not received court approval.

[5] By mid-February, 2014 W.'s solicitor/client relationship had broken down. The interim hearing was rescheduled, and rescheduled again, on my direction.

[6] Despite the passage of time, neither party had filed or served any affidavits during the entirety of 2013. Indeed, P.'s first affidavit was not launched until late January, 2014. Nothing substantive was received from W. until mid-April, 2014. Strictly speaking, W. had not entered a formal Reply or cross-application. However, practically speaking, it has been known from the outset that the parenting arrangements for A. have been, and continue to be, disputed.

Evidence
P.'s Affidavit Evidence

[7] I will not restate the contents of P.'s affidavits. However, I have reviewed and considered all of his assertions. I will mention a few highlights.

[8] P. had been living in a two bedroom apartment in [...] but recently relocated to a three bedroom unit in the same building. W.'s written protestations to the contrary, P. declared she knew of his changed and improved accommodations. According to him, one bedroom is now set up exclusively for A.. (In the courtroom, W. conceded the residence is now likely adequate.)

[9] P. also has an eight year old son from another relationship ("J."). There had been a shared parenting (week on/week off) regime, but by early 2014, J. was apparently spending more time living with his father than his mother. More, recently, the parties and J. have reverted to their original shared parenting schedule. J.'s mother did not submit an affidavit or testify about the arrangements or about P.'s parenting capacity and skills. There is virtually no other evidence about J. than that just mentioned.

[10] P. set out a litany of complaints about W.'s compliance with the first interim order issued in late June, 2013 (Exhibit 1, para. 12). As noted, a second interim agreement was struck in August, 2013. However, P. said there were more problems in gaining regular and consistent access.

[11] P. conceded that there were some efforts made by W. to make up for "lost" parenting times but inevitably – through no fault of his – access times were compromised again. As at the hearing he was still entitled to some "make-up" time.

[12] P. described some of the activities he enjoyed with his daughter during her visits. He made fleeting reference to his son's relationship with A. which he would like to promote. He claimed W. opposed him taking A. to a nearby park during his parenting times, but acknowledged she has not opposed contact with the paternal grandmother. He claims telephone access has been occurring without any great difficulty.

[13] There was an incident on November 9, 2013 at P.'s apartment in the wake of which W. called the police, not for the first time, to complain about personal safety and security concerns. In December, 2013 P. entered guilty pleas to charges of criminal harassment spanning October 1st, 2012 to December 2nd, 2012. In Provincial Court, it was disclosed that P. had made dozens of harassing phone and

text-message contacts, after warnings from the police not to do so. It will be recalled that he started his **MCA** application that December.

[14] Guilty pleas were also entered for breach of Recognizance and uttering threats (to one or more police officers) arising from events on February 26, 2013, and for noncompliance with Recognizance conditions on March 16, 2013. The former involved P.'s out of control conduct at W.'s home while he was subject to a Peace Bond, and P.'s angry, drunken behaviour when several police officers interceded. The latter also involved his outlandish drunken conduct at the mother's residence while under a Recognizance. Upon a joint Crown/Defence recommendation, a Conditional Sentence Order (CSO) was imposed with statutory and other conditions which span multiple paragraphs.

[15] P. admitted that W. was one of the complainants and simply wrote that the criminal charges were the "results of poor choices" on his part.

[16] In a supplemental affidavit, P. wrote he is still behind in Family Court sanctioned access. He exemplified various excuses and reasons W. has offered up. He claimed she reneged on an understanding that A. would participate in a local play group at a church hall.

[17] P. said A. now attends preschool and that the parents (to their credit) are sharing expenses equally, despite their limited financial means. P. says he meets mother and child on Tuesday mornings and they walk to preschool together (where the child is dropped off). P. goes back later in the day at the end of the session where there is more, if brief, contact between the parents.

[18] All of this has not stopped the parents from arguing about craft activities, minor adjustments to transition times, and other minutia - down to and including disputes over candies and treats – blame for which P. drops at the mother's doorstep.

[19] Neither parent is employed or engaged in education or training programs. I was left wondering if both have too much time on their hands and, in the absence of anything more constructive, are filling the void with mutual complaints, criticisms and recriminations – rather than using their time in positive ways to improve their financial prospects and their interpersonal relations through counselling or other services.

[20] In a third volley of affidavit material, P. alleged that both parents have used inappropriate language in front of the child. He did not try to rationalize his own conduct – but apparently believes its import is lessened by the mother's misconduct. And, since the best defence is apparently a good offence, P. not only offered his rationale for what the mother perceives as unnecessary, frequent calls to her but advanced countervailing allegations about the frequency, etcetera, of her calls. And he offered his personal opinion about sleeping arrangements for A. at the mother's home and about W.'s lifestyle. He even managed to drag the maternal grandmother and the maternal aunt into the fray.

[21] In a parting submission regarding proposed Saturday access (which both parties now agree is not viable), P. effectively said that more frequent and longer access with A. will mean more step-sibling contact (i.e., with his son, J.). Precisely what benefits the children will derive went unstated. And what harm might befall A. if W. does not accede to his proposals was also unstated. How A.' best interests will be more broadly advanced, or hurt, if P. does not get his way regarding overnight visits, in particular, is anything but clear, I find.

P.'s Courtroom Testimony

[22] Fourty year old P. added fuel to the fire by alleging that as recent as the day before the hearing W. attempted to contact him by telephone 15 or 16 times. He said that he was away from his apartment when W. made these attempts.

[23] In testimony, P. admitted that he has experienced significant problems with alcohol consumption in the past and that he had engaged in some type of unspecified treatment several years ago. He also admitted to problems with "anger management". He admitted to using profanity in front of both A. and J. – although he claims his words likely slipped out in anger or in moments of weakness. Although he admitted inappropriate language is wrong, he expressed no appreciation of the possible impact on A.. As discussed elsewhere, he admitted that the police have intervened in past confrontations between the parents and that A. has been present during some of these events.

[24] P. admitted that there is ongoing mistrust and conflict between the parents but when asked to identify the source he was less than clear: he generally postulated that he and W. have different opinions on parenting A., different expectations for their daughter, and different agendas for future parenting arrangements. He expressed ambiguity regarding his feelings towards W. – despite

clear communications by her to him that their relationship is at an end and will not be restored.

[25] P. admitted that the parties had direct discussions on the eve of the hearing to see if they could resolve the outstanding issues - but they were unsuccessful. These discussions took place, apparently without the knowledge of the lawyers. I have not attached much weight to this; I was more interested in the positions they put forth in the courtroom.

[26] As at the hearing, P. said that his outstanding parenting time was down to approximately nine hours and he agreed that the parties would likely resolve that issue between themselves. For example, P. updated his affidavit evidence by conceding that both parents realize that Saturday access by him is not going to work. And, he acknowledged that W. has reasonably proposed the following interim access: Tuesday from 9:00 a.m. to 2:00 p.m., Thursday from 1:30 p.m. to 6:30 p.m., Friday from 3:30 p.m. to 7:30 p.m., Sunday from 9:00 a.m. to 6:00 p.m.

[27] So, against that background, P. also conceded that the central issue is now overnight access.

[28] He went on to acknowledge that W. "is a good mother"; and that he does not want or intend to hurt W. in any way.

[29] Regarding his attempted contacts, P. admitted that he called W. frequently at times - but insisted that calls are prompted by questions or concerns he has about their daughter and that they are made in good faith. That said, he admitted that other issues frequently crop up and lead to argument or conflict between the parents over the phone. Indeed, he admitted that W. sometimes hangs up, if and when issues unrelated to A. surface.

[30] P. admitted that he currently has no complaints or issues regarding the exchange of appropriate information about A.' progress and general well-being. He has been actively involved with professional appointments and has ready access to reports, if need be.

[31] P. clarified that the parents live only about two and a half blocks away from each other. He is unlicensed at this time. He lost his driving privileges some time ago as a result of drinking and driving offences.

W.'s Affidavit Evidence

[32] W.'s affidavit evidence was that the parties did not live in a common-law relationship before the relationship ended. She has another child, seven year old "X", by another relationship.

[33] She wrote that she and P. have a "history of volatility toward each other" and that P. has a "history of domestic violence" toward her.

[34] W. is a "stay-at-home" mother. She said her children live with her in a three bedroom apartment. Each child has her own bedroom. Like P., W. is unemployed and currently receiving social assistance benefits. She said she is actively looking for part-time employment.

[35] Following an all-party meeting and agreement in early August, 2013 W. admits that there was some noncompliance with P.'s access - but she blames this on (among other things) his episodic misconduct during some transitions when A. has been exposed to inappropriate behaviour by him. However, she professed general compliance as time went on. As noted elsewhere, this is in stark contrast to P.'s assertions.

[36] W. countered P.'s evidence regarding thwarted access visits with brief denials or explanations but, with respect, little elaboration. (See Exhibit 4, paras 28 - 31). Since February, 2014, W. claims access has been occurring as per the last consent order. She reiterated that P.'s behaviour and language in front of her children are "highly inappropriate and stressing for the children" but did not exemplify in her affidavit.

[37] W. claims P. has repeatedly phoned her and "often leaves extremely aggressive messages" on her voicemail, but did not exemplify. W. also claims P. persists in telephoning her – even when A. is visiting him.

[38] W. broadly asserted that P. has "anger issues" which he is sometimes unable, or unwilling, to control even when the children are present. She gave her version of events of which occurred in the past and which has led to police intervention.

[39] W. expressed concern about P.'s accommodations which, as noted elsewhere, he has countered in his final affidavit and in his testimony.

[40] W. opposes overnight access "until A. starts school". She sees no need for A. to stay at her father's residence at this time. She perceives her current access offerings as being more than generous in the circumstances.

W.'s Courtroom Evidence

[41] W. confirmed that the parties are now meeting halfway between their respective residences in order to facilitate A.' transition. W. believes that the current arrangements are working well - despite the long lists of competing and conflicting complaints by one against the other.

[42] W. believes that P. should engage in professional services to address a host of issues which she firmly believes has prompted parental discord and conflict. She offered that both parents in their own ways try very hard at times to make things work in A.' best interests – but, inevitably, there are arguments and conflict, some of which spills out onto the public streets of the town in which they live and some of which plays out in front of one or more children.

[43] W. firmly believes that P. "wants her back" - despite her protestations. She declared "It's not going to happen," and that she told him, "We will never be together again," - but she believes that he is not willing to accept these declarations and that his various demands regarding access reflect a hidden personal agenda (i.e., reconciliation) as opposed to advancing the child's best interests.

[44] W. reiterated her proposals for daytime access which would occur on Tuesdays, Thursdays, Fridays and Sundays, but which would not include overnight access (for example Saturday night) at this time.

[45] W. believes telephone access should be constrained to perhaps one morning and one evening (before bedtime) call between father and daughter. She perceives anything more than this as unnecessary, if not outright harassing.

[46] W. proposes that overnight access may begin when A. reaches school age. At that stage she believes that her daughter will be much more capable of expressing her own views and preferences and, of course, disclosing any inappropriate conduct by P..

[47] During questioning, W. admitted to using inappropriate language in front of A. and that some of her own family members may have similarly acted inappropriately. However, by comparison to P., she suggested this is infrequent and of brief duration, when it happens. She acknowledged that cursing, swearing, and the like are inappropriate.

[48] W. acknowledged that P. seems to be parenting his son J. without any known problems or complaints from his mother or anyone else. She also stated she is unaware of any serious problems when A. is with her father during daytime access. However, she did complain that the father, on at least one occasion, was given a list of medications and usage directions, etcetera, but that he either lost or ignored that list. That said, she admitted P. has contacted her from time to time for clarification or assistance with minor medical and related issues.

[49] During questioning, W. insisted that P. will often contact her ostensibly to discuss A. - but more often than not the discussion turns to other adult issues which frequently turn to arguments and conflict.

Discussion

[50] This is an interim – not a final hearing. With respect, as is so often the case, much of the evidence was self-serving, unreliable and unsupported by independent or objective evidence. In the same vein, the evidence was incomplete. And, contradictions in the evidence make it virtually impossible to determine with any confidence the ability of these parents to meet the child's needs in her best interests – especially when it comes to overnight access. As mentioned, as the hearing evolved, potential overnight access by P. became the central theme.

[51] Interim orders are intended to give short-term relief to address the immediate problems of where a child will live and the roles of the respective parents. Although interim orders may be seen as creating a *status quo,* the parents are usually cautioned that the outcome at the interim stage should not be taken as a sign or signal as to the likely result after a full and final hearing. Courts generally discourage multiple interim hearings or contests. Otherwise, revolving door situations are created in which parents who are dissatisfied seek incremental changes and multiple reviews - instead of advancing the matter to final hearing. It is one thing to present a consent variation order for approval pending the final hearing. It is quite another to expect interim relief by multiple contested interim hearings.

[52] In the present case, the record discloses no request by either parent to set a final hearing even though the file has been open since late 2012.

[53] Under the **MCA**, the father and mother of a child are joint guardians and are equally entitled to the care and custody of a child, unless otherwise provided by

statute or ordered by a court. When deciding a child's care and custody, or access and visiting privileges, the court must give paramount consideration to the child's best interests. In determining the best interests, the court must consider all relevant circumstances, including those set out in section 18 (6). I have touched on some of the most relevant circumstances throughout the decision.

[54] Under section 18(8), the court must give effect to the principle that a child should have as much contact with each parent is as consistent with the best interests of the child. But, the court is directed to keep in mind the impact of any family violence, abuse or intimidation. **MCA** section 2(d)(a) defines "family violence, abuse or intimidation" as follows:

> (da) "family violence, abuse or intimidation" means deliberate and purposeful violence, abuse or intimidation perpetrated by a person against another member of that person's family in a single act or a series of acts forming a pattern of abuse, and includes
>
> (i) causing or attempting to cause physical or sexual abuse, including forced confinement or deprivation of the necessities of life, or
>
> *(ii)* causing or attempting to cause psychological or emotional abuse that constitutes a pattern of coercive or controlling behaviour including, but not limited to,
>
> (A) engaging in intimidation, harassment or threats, including threats to harm a family member, other persons, pets or property,

[55] I conclude that P.'s past conduct continues to have negative ramifications for the kind of trust, respect, cooperation and communication usually needed for joint decision-making which is at the heart of successful parenting arrangements [See, for example, **K.(C.N.) v. A.(A.E.)**, 2011 NSFC 9.] Although it is not determinative, this case is against the background of domestic violence and criminal court processes. Indeed, P. is still under a CSO and will be until the end of this year.

[56] While the evidence is that P. has been generally compliant with the CSO, he is disinclined to take any initiatives to address his long-standing challenges with anger management, substance abuse, mental health and domestic violence - unless directed by his probation officer. P.'s probation officer did not testify – so there is no explanation for why he has not been referred to more than one service from a palette of many contemplated by the CSO. He has been referred to the Alternatives Program (presumably to deal with spousal/partner violence intervention and

prevention) but he had attended no appointments as at the hearing. Outside of formal criminal court processes, and despite the mother's well documented concerns, P. coasts along as if there is nothing he can or should do; and he shows no insight into why he needs to change his ways – if not for his child's benefit, for his own.

[57] From W.'s perspective, transition to overnight access requires a considerable "leap of faith", given the child's age and stage of development, the past history of conflict between the parents, and the striking lack of insight and initiative by P.. I accept her evidence that if P. had self-referred to mental health and addiction services before now, many of her present concerns would have been allayed (assuming the professional feedback was positive). In submissions on behalf of W., it was said that P.'s simple admission that he has "shortcomings", and his assurances he will engage in domestic violence services when his appointments are confirmed, are insufficient to support movement toward overnight access – at least for now. Mr. Power submitted on behalf of the mother that a "go slow approach" is fair and reasonable, and that a practical approach would be to keep the parenting issues in Family Court in tandem with the life expectancy of the CSO. I agree.

[58] Ultimately, on behalf of P., there seemed to be a concession that daytime access had been sorted out. The court was invited to take no adverse inference from the father's failure to self-refer to services when he is under no obligation to do so under the CSO. Respectfully, I am not bound by what happened in Provincial Court when weighing the relevant consideration under section 18 of the **MCA**. It was also broadly asserted that the father has "disassociated himself from bad influences" and was successfully addressing his substance abuse issues in his own way through self-direction – but there really was nothing to support those contentions, other than the father's own assurances. In sum, the submissions on behalf of P. are to the effect that overnight access at this time is reasonable and it is unreasonable to delay overnight visits until the child reaches school age.

[59] Regrettably, thus far the case has boiled down to "I want" versus "You can't have", insofar as overnight access is concerned. However, in my opinion, the mother has elicited enough evidence of unaddressed or outstanding issues and concerns on the father's part to sustain a guarded approach to overnight access. Allowing there is an element of rough justice involved, but looking at the evidence as a whole, I am persuaded that there is merit in tethering any final determination of overnight access to the progress under the CSO. Accordingly, the father's

request for interim overnight access is denied at this time, but it may be subject to further review and consideration at his request upon the expiration of the CSO (without the necessity of demonstrating a change in circumstances pursuant to section 37 of the **MCA**).

[60] Pending a final hearing, I order that P. shall have unsupervised parenting time with his daughter as follows: Tuesday from 9:00 a.m. to 2:00 p.m., Thursday from 1:30 p.m. to 6:30 p.m., Friday from 3:30 p.m. to 7:30 p.m., Sunday from 9:00 a.m. to 6:00 p.m. P. may also have reasonable telephone access, not to exceed twice daily, provided that such access shall be limited to not more than once in the morning and once in the evening (before the child's bedtime). By agreement, the parents may expand or contract P.'s parenting times and telephone access. Telephone access is for the child's benefit and the parents shall not use those times to discuss adult matters.

[61] The parents are also cautioned not to discuss adult matters in the child's presence during access transitions. Every effort shall be made to ensure those times are polite, civil and positive. The parents may wish to consider using a journal to exchange relevant care information.

[62] P.'s underlying application is adjourned for final hearing on all issues, except overnight access. The parties are encouraged to reconsider conciliation services.

[63] Mr. Power shall submit an appropriate order.

[64] Counsel may seek a docket appearance to set a final hearing date if the parties do not resolve the (remaining) outstanding issues by discussion.

Dyer, J.F.C.