

IN THE FAMILY COURT OF NOVA SCOTIA
Citation: C.H.T. v. C.L.M., 2008 NSFC 13

Date: 20080423
Docket: 06D048998
Registry: Yarmouth

Between:

C.H.T.

- APPLICANT

v.

C.L.M. and J.M.M.

- RESPONDENTS

Before the Honourable Judge John D. Comeau, Chief Judge of the Family court for the Province of Nova Scotia

Heard at: Digby, Nova Scotia
February 26, 2008
March 4, 2008
April 1, 2008

Decision date: April 23, 2008

Counsel: Anita Hudak Esq. for the Applicant
Sharon L. Cochrane Esq. for the Respondent C.L.M.
Peter Van Feggelen Esq. for the Respondent J.M.M.

DECISION

THE APPLICATION:

[1] The Applicant is C.H.T., the father of the child, T., born July *, 2000. (*
editorial note- removed to protect identity) He is applying to vary the order dated November 7, 2006, and is asking for “sole custody of T.”.

[2] In the order of November 7, 2006, by consent, C.L.M., the maternal grandmother, was granted custody of T. with weekend supervised access to T.’s mother J.M.M.

[3] The father C.H.T. was given reasonable access at reasonable times, upon reasonable notice.

[4] There is also an order on record dated August 7, 2007, that deals with child support for T.. It varies an order dated January 2, 2003, by consent, making child support payable to the maternal grandmother, C.L.M., starting August 31, 2007. The order of 2003 was based on an annual income of \$8,300.00, and the table amount is \$50.00 a month. It was payable to the mother at that time through the Maintenance Enforcement Program.

THE ISSUE:

Custody and access

THE FACTS:

The maternal grandmother:

[5] The facts concerning the parties have been outlined in part, in a decision of this Court dated March 4, 2008, which dealt with two boys who are the children of the mother J.M.M., in this case. The decision made in a contest between the maternal grandmother C.L.M. and the father J.D., granted custody to the grandmother. T. lives with her.

[6] The history of the parties outlined in that case, is relevant and helpful to the Court in formulating this decision:

“The Respondent maternal grandmother has had problems with drugs and alcohol but this has not been a concern in her life for the past four and a half years. She is now 44 years old and upgraded her education receiving her human services diploma. She has worked in various group homes and the W. R. C. Further

courses in counselling and suicide intervention have been taken at the *. (*editorial note- removed to protect identity*) Continuing Education is planned at A. which is near her home.

On October 4, 2007 she moved to C., Nova Scotia, from S. C., Nova Scotia, in a subsidized apartment. She and her partner P. have been together since 1995, although the evidence is unclear as to whether they now reside together.”

- [7] In 2005, the mother J.M.M. moved to a women’s shelter and then to N. with her three children and a new boyfriend.

“In N. the three children continued to live with their mother until she asked the maternal grandmother to take T., so she might better care for the two boys. When the Respondent grandmother arrived in N. she took all three children with her because of the bad condition of the mother’s home. Following this the Respondent grandmother says she contacted and advised the fathers and the child protection authorities that she had care and custody of all three children.”

- [8] Initially, the father C.H.T. was content with this situation, but later came to see her advising he would be looking for custody of T.. She refused to let her go, and the matter was resolved by the court order dated November 7, 2006, whereby the father agreed the grandmother would have custody.

“At the times referred to, the Respondent grandmother lived in S.’s C. but moved to the V. (C. area) after a stay in C. H. (women’s shelter) for a period of time. The reason she moved into the women’s shelter was not because of problems with her partner P. (they are still together) but because of threatening behaviour from D.A. (D.) and the Applicant father (which is denied by the applicant C.H.T.).

The person referred to as D. began dating the Respondent J.M.M., mother of the boys, in early April of 2007. This relationship deteriorated to the extent that this person called the Respondent grandmother's house leaving a disturbing message threatening her and her daughter. Both her and her daughter got the assistance of the R.C.M.P. following this and other incidents."

[9] There is no real connection between the father and D., except that he knows him as a friend of his brother-in-law, the father of the children referred to in the previous case.

[10] The relations, which were quite good between the parties, deteriorated when the grandmother moved with the children to the V. (C. area). It was after this move that the father decided to apply for custody.

[11] The maternal grandmother C.L.M., believes she is providing a clean, safe and nurturing home environment for T. at her home in C.. She has her own bedroom and she is healthy and provided with proper food. T. has been in her care for one and a half years, and she now has sole custody of her brothers. She is doing well in school which is confirmed by her teacher, whose evidence will be discussed later. She is a very good reader, and she often reads to her brothers. She also has many friends with whom she spends time. She is very industrious and helps out around the house, including helping with her younger brothers.

[12] There is a good support system in the area for the maternal grandmother and she hopes to further her education at A.

[13] The maternal grandmother, C.L.M., is prepared to facilitate access to the father. She refers to three arranged visits that were cancelled by him. An exchange has been agreed upon but, if the grandmother gets a vehicle, she would be prepared to meet the father half-way.

The father C.H.T.:

[14] The Applicant father's testimony and affidavit describes an abusive relationship with J.M.M., the mother of the child. This abuse was directed at him and consisted of physical and emotional abuse. They separated when T. was two years old and she stayed with her mother. He says he visited the child often. He had concerns over her use of alcohol and drugs and the effect it would have on her parenting. To attempt to protect T., he contacted Social Services, his local M.L.A., and the local police department.

[15] When the grandmother stepped in and took the child (September'06) from her mother, he was relieved and felt she could provide good care for her. It was his opinion that if he applied for custody, the child's mother may get custody, and he felt she was unfit to parent because of problems with drugs and alcohol. He exercised access more than every other weekend and provided the grandmother with clothing, food and money for the child. The evidence is, however, that he has never paid any child support, contrary to the court order of January 2, 2003.

[16] The applicant has not done any continuous parenting of the child. She has been in the care and custody of her mother or grandmother since birth.

[17] K.T. is the spouse of the applicant C.H.T., and she has been involved in T.'s life for the past five years. When dealing with affidavits and other written materials on the witness stand, C.H.T. admitted he had a very difficult time reading because of leaving school at an earlier age. His spouse, K.T., is very articulate and is his support in that area.

[18] K.T. describes certain activities that she and T. and her father do when they visit, from building bon-fires, and play on the beach, to four-wheeling, and cycling

and tractor rides. They also have a number of pets she enjoys. She also has special girl day, so called, with her such as putting in the cosmetics department. She is assigned chores to do such as tidying up her toys, washing, drying dishes, and setting the dinner table, all under the supervision of K.T.

[19] The father's home would provide T. with her own bedroom and it has bunk beds for sleep overs with friends, lots of toys and clothes there.

[20] She has several friends in the neighbourhood, and an extended family with frequent get togethers. They have also agreed that she would get to spend a lot of time with her brothers who are in the care and custody of the maternal grandmother C.L.M.

[21] Both C.H.T. and K.T. say they are prepared to facilitate access to the maternal grandmother, but access in his home to the mother J.M.M. seems less certain, although his spouse K.T. seems to be a conciliator, with the other parties. There appears to be animosity of the father C.H.T. towards the mother J.M.M..

[22] He blames her for causing him to suffer from an anxiety disorder for which he takes medication.

The child:

[23] T. is described by her teacher (26 years teaching) from G. S. in the V., as a "sweetheart, kind and well liked by others." She is a good all-round student, and she is a very active student with anything going on. She is involved in the after school programs, and has many friends.

[24] Academically, T. reads beyond other students her age and has confidence, and her writing has improved since she has come to the school. She has not missed much school and she is always clean, with good clothes and a happy child.

[25] The teacher has a very open communication with the grandmother, and a comment log goes back and forth from school to home with the child, and she always attends school's open house.

[26] There was some evidence before the Court that if the father were given custody, his spouse K.T. was considering home schooling.

[27] T.'s teacher offered an opinion, that to pursue this type of schooling one must be qualified, and that it can be a bar to having friends, and collaborating with fellow students so one participates in life's lessons.

[28] There have been no inquiries to her, from the Applicant father or his spouse concerning T.'s schooling.

The mother J.M.M.:

[29] The Respondent mother has access through her mother. Her value to the children's well being should not be underestimated. She was the primary caregiver since the child's birth. She has had problems with relationships, and describes that with the Applicant as abusive, that he was controlling and jealous, and when the child was born he wanted little to do with her.

[30] The relationship with the person with whom she moved to N. was not a positive one for herself or the children. When her mother came to help out in N. she agreed to her taking the child and her brothers into her care. Since this was formalized in court order of 2006 she has exercised regular access to the children, and telephoned them on a daily basis. In her affidavit she makes the following statement concerning access to the father:

“That T. visits her father, on an average once every two weeks. She has adjusted well to this arrangement and this has been the arrangement that T. has been familiar with for the past two years. C.H.T. has never been a primary caregiver for T., and frequently, it is K.T. (his spouse) not C.H.T., who spends most of the time with T. when she visits.”

[31] She refers to the relationship between T. and her brothers (her mother has sole custody of them by recent court order).

“That T. is very attached to her brothers in my mother’s home. She has an excellent relationship with my mother and enjoys a stable and secure home. My mother and her partner P., continue to see each other on a frequent basis and T. enjoys the contact. I speak with T. on the phone frequently and continue regular visitation. I would like to be able to visit T. at my mother’s house every second weekend.”

[32] As to the professional report, she has concerns:

"That I do not believe it is in T.'s interest to disrupt her family life again. She is doing so well. I am concerned, because the report of Michael Donaldson did not address concerns related to C.H.T. and T.'s attachment to her grandmother, her siblings and her progress in school. Michael Donaldson did not even speak to T.'s school teachers, past or present. He spoke to me once for approximately 45 minutes. He never even saw me with T.. I feel his report is biased and inadequate. It does not address T.'s needs and interests."

[33] Because there is animosity between her and the father, she is certain that he would hinder access, rather than facilitate it.

Professional Custody and Access Evaluation:

[34] Michael Donaldson, Family Therapist, prepared a homestudy, dated November 30, 2007. His conclusions are as follows:

- “1. That T. be placed in the primary care of her father;
2. That there be specified access between T. and her maternal grandmother, that would allow as part of its structure, access between T. and her mother.”

[35] Mr. Donaldson's reasons for his conclusions are gained, after interviewing the parties, the father's mother and the father's brother-in-law J.D., who is the father of the two boys, who are now in the custody of the Respondent grandmother

by order of the court referred to earlier. The Respondent J.M.M. is their mother.

[36] He concludes:

“My observations would lead me to conclude that C.H.T. has demonstrated stability in his residence, his employment, marriage and family relationships, and most importantly, in his relationship with T., to become her primary caregiver.”

[37] He did not assess the Respondent mother J.M.M., because she supported her mother’s position.

[38] Reference is made to the Respondent grandmother’s concerns about the father’s environment, while commenting on the good care at her home.

“Further in my opinion, the concerns that C.L.M. has stated regarding the father C.H.T.’s ability and desire to parent his daughter are questionable and not convincing enough to exclude him from having a significant parenting role in her life. This in no way, conflicts with what is assessed to be an appropriate caring environment, that she creates for all three children, currently in her care.”

[39] Mr. Donald refers to the goal of the assessment, namely:

“... to recommend a living situation for T., that maximizes her physical, emotional and intellectual development.”

[40] He did not interview her teachers, and describes her in different lights, given which parties he is quoting; from outgoing, very compassionate and a people pleaser, to unsettled and not confident.

[41] Her teacher in C., describes her as a “sweetheart, kind and well liked by others.” She is a good, all-round student, very active, with many friends, which indicates she is “settled and confident.”

THE LAW:

“The **Maintenance and Custody Act** deals with custody of children.’

Powers of the Court

“37(1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstance since the making of the order or the last variation.

Custody

18(1) In this Section and Section 19, “parent” includes the father of a child of unmarried parents unless the child has been adopted.

(2) The court may, on the application of a parent or guardian or other person with leave of the court, make an order.

(a) that a child shall be in or under the care and custody of the parent or guardian or authorized person: or

(b) respecting access and visiting privileges of a parent or guardian or authorized person.

18(5) In any proceeding under this **Act** concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration. R.S., c. 160, s. 18; 1990, c.5, s. 107.”

[42] This court has referred on a number of occasions to the decision of Justice Goodfellow in **Foley v. Foley** (1993), 124 N.S.R. (2d) 198. It is very helpful concerning specific factors the court should look at:

“1. Statutory direction Divorce Act, ss 16(8) and 16(9), 17(5) and 17(6); **and** s. 18 of the Maintenance and Custody Act;

2. Physical environment;

3. Discipline;

4. Role model;
5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the questions with whom would the best interests and welfare of the child be most likely achieved. That questions required the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference;
6. Religious and spiritual guidance;
7. Assistance of experts, such as social workers, psychologists, psychiatrists, etcetera;
8. Time availability of a parent for a child;
9. The cultural development of a child;
10. The physical and character development of the child by such things as participation in sports;
11. The emotional support to assist in a child developing self esteem and confidence;
12. The financial contribution to the welfare of a child;
13. The support of an extended family, uncles, aunts, grandparents, etcetera;

14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. The **Divorce Act**, 16(10) and s. 17(9);

15. The interim and long range plan for the welfare of the children;

16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and

17. Any other relevant factors.

The duty of the court in any custody application is to consider all of the relevant factors so as to answer the question.

With Whom Would The Best Interest and Welfare Of The Child Be Most Likely Achieved?"

[43] It would take a significant, material change in circumstances to change parenting arrangements that meet the child's needs, because another parent, can also care for the children (see **Lovergan v. Lovergan** (1998) W.D.F.L. 332 (B.C.S.C.).

CONCLUSIONS/DECISION:

[44] Reference is made in Foley supra., to other relevant factors concerning the welfare of the child. The consequences of the Respondent grandmother having obtained custody of T.'s brothers is relevant to her welfare.

[45] Separation of siblings, particularly where they have continuously resided together, is an important consideration. In some cases, it is possible to structure access, to be able to maintain the sibling bond. In the case before the Court this would be much too difficult. For example, in Dohms v. Dohms, (2005) 19 R.E.L. (6th) 369 (Q.B.) custody of three youngest children was granted to the father, even though one of the children wanted to be with the mother, as it was in the children's best interest not to be separated from each other.

[46] In the case before the Court, Michael Donaldson's report makes reference to T. wanting to be with her father, although there is no further proof of that. Consequently, the Dohms decision supra; is authority for the children staying together.

[47] T. is happy and doing well in her grandmother's home, and she has regular access to her mother, and the grandmother is the person who would be more

inclined to facilitate access to the father and the mother, (see **MacDonald v. Hasking** (2004), Carswell Ont. 5457 (S.C.J.).

[48] T.'s bond with her mother should not be underestimated, as she has been the primary caregiver, until her mother, the grandmother, took over care of her for reasons referred to earlier in this decision.

[49] The Applicant father has never been a continuous caretaker for T.. He has had access, sometimes sporadic, and not because the grandmother prevented him from exercising it, when she was able to contact him. He was ordered to pay child support for T. in 2003, and has paid nothing.

[50] The Court is aware that there is no relationship between the paying of maintenance and access. For example, a custodial parent cannot withhold access from a payor parent because he or she has not paid ordered child support. This is a reasonable concept in that it recognizes a child needs shelter, food and clothing, and there are ways to enforce such orders. However, access is a child's right and goes to the child's best interest, even in the face of default of payment of child support.

[51] The nonpayment of ordered child support in a custody dispute is relevant where the non-custodial parent payor says he can provide a better home for the child, who is now almost eight years old. That he is concerned for her welfare now is suspect, given his lack of support since the maintenance order was made in 2003.

[52] Presently, T. is in a situation, that meets her needs and the Applicant father does not provide a better plan (see **Wood v. Legge** (2004) 227 N.S.R. (2d) 74 (Fam. Ct.)

[53] The decision in **Foley** supra., sets out many factors to be considered, and the professional custody assessment is but one. The purpose of the report was to recommend a living situation that maximizes her (T.'s) physical, emotional and intellectual development.

[54] This conclusion in the homestudies assessments must be in accordance with the objective facts. (See **Blumer v. Blumer, 2004 Carswell, BS, 473, R.F.L. (6th 16)**) and the Court should not delegate it's duty to determine what parenting arrangement is in a child's best interests to an assessor.

[55] It is clear from the evidence that her father, who is unable to read, cannot help her with schooling and it would fall to his wife to provide this type of help. T. already is a prolific reader beyond her years, and changing custody would not improve this.

[56] The Applicant's wife K.T.'s evidence, left the impression that she was contemplating substituting herself as T.'s mother. She talked about home schooling and other activities that would lead one to believe that was the case.

[57] The Court, again expresses the view that the importance of T.'s mother J.M.M. in her life cannot be underestimated. Her mother is valuable and important, although she has, at the present time, given up the parenting role.

[58] The onus is on the Applicant father to show there has been a change in circumstances to vary the November, 2006, order. It is a two step process, first, the applicant must prove a material change, and second, he must prove that as a result of the change the prior order no longer reflects the child's best interest (see

Roberge v. Roberge 2005 Carswell B.C. 31.

[59] In the case before the Court there has been a material change, in that the child moved with her grandmother to a different area of the province, which makes access for the father more difficult. However, considering those factors set out in Foley supra., which culminate in determining the paramount consideration, is the Applicant father has not proved that the order of November 7, 2006, does not continue to reflect the child's best interest with respect to custody, and that aspect of his application is dismissed, which means custody remains with the grandmother.

[60] There is a change in circumstances referred to earlier, and considering access to the non-custodial parties, there is a material change on the part of the mother J.M.M. The court is of the opinion she has improved to such an extent that her access should be reasonable access, at reasonable times, agreed upon with her mother (the custodial parent so-called). Supervision is no longer necessary, given her improvement and the child's age. There is presently a schedule of access the Court is aware of and it appears to be working fine.

[61] Access to the Applicant father shall remain as set out in the November 7, 2006 order, as reasonable access, at reasonable times, upon reasonable notice. This is done with the knowledge that there has been a schedule, and the Respondent grandmother is very capable of facilitating access . The Court reminds the Applicant father there is an outstanding child support order made in 2003, payable to the grandmother (August 7, 2007) through Maintenance Enforcement.

[62] At the present time, the Court is not dealing with an application to vary the 2003 order. However, it is the duty of a payor to pay child support in accordance to his annual income (see D.B.S. v. S.R.G. 2006 S.C.C. 37).

[63] Counsel for the Respondent C.L.M. shall prepare the order.

JOHN D. COMEAU
CHIEF JUDGE OF THE FAMILY COURT
OF NOVA SCOTIA