FAMILY COURT OF NOVA SCOTIA
Citation: Akeeagok. v. Ross, 2012 NSFC 26

Date: 201209025
Docket: FKMCA-078939
Registry: Kentville

Between:

Rhoda Akeeagok

Plaintiff

v.

Andrew Ross

Defendant

Judge:	The Honourable Judge Marci Lin Melvin
Heard:	September 25, 2012, in Kentville, Nova Scotia
Oral Decision:	September 25, 2012
Written Decision:	October 4, 2012
Counsel:	Nicole J. Mahoney, for the Applicant, Rhoda Akeeagok Michael V. Coyle, for the Respondent, Andrew Ross

By the Court

Applications Before the Court

[1] There are two applications before the Court. Ms. Akeeagok's application was made for an order for sole custody of Kaden Allen Seeglook Akeeagok, born October 23, 2011; Kayla and Kiera Akeeagok, born June 1st, 2007; and Kaleb Akeeagok, born June 24, 2008. She also sought supervised parenting time for Andrew Ross, the father of the children, and that she be able to relocate with the children to Ottawa, Ontario. The application was issued January 23, 2012. Mr. Ross filed his application on July 4th, 2012 . It was for an Order for sole custody of the child, Kaden, aforementioned.

Previous Order and Agreements

[2] There are at least two previous Orders in this matter, only one of which is before this Court as evidence. It is noted that it has not been filed as an Order, neither was there a request that it be registered with this Court.

[3] It is the written decision of Madam Justice Susan Cooper of the Nunavut Court of Justice dated April 15, 2010, marked as exhibit # 5. In Justice Cooper's decision, she notes at Paragraph 13: "There has been no final hearing in this matter. All of the previous orders were interim orders."

[4] Justice Cooper stated at Paragraph 20: "Accordingly, I vary the current Order to grant interim custody of the three children to the father, with reasonable and generous access to the mother."

Status of Applications Before the Court

[5] Given the previous interim order, albeit from another jurisdiction in Canada, the Court queried counsel as to how they intended to proceed, notwithstanding the actual form of the documents filed with the Court. Counsel for Mr. Ross argued that it should actually be an Application to Vary, and while initially, counsel for Ms. Akeeagok indicated it was an original application, she quickly conceded that the

matter could be heard as an Application to Vary for the three eldest children and an original application for the baby, Kaden. The evidence is that the parties had been reconciled for 11 months subsequent to the last Order, but when they separated again in January 2012, Mr. Ross kept the children as per the terms of the Order.

[6] Regardless of the questions of jurisdiction, whether Nova Scotia could or should view Ms. Akeeagok's application as an original application for custody ignoring a Superior Court's order, the evidence is that the three oldest children have been in Mr. Ross' care since approximately November 2009. And although the evidence of both parties is that there have been several reconciliations, the ensuing break-ups always ended with the children remaining with Mr. Ross.

[7] Therefore, the Court finds that the parties themselves treated the order of Madam Justice Cooper as an operating order, and, given the consent of the parties and the Court's own conclusions, this application will be treated as an Application to Vary. That seems to be the common sense approach considering the status quo and the best interests of the children.

Variation Applications

[8] Custody and parenting time orders are never final for the simple reason that circumstances often change. When circumstances change, the best interests of the children may also change. A variation application is a re-examination of the parenting arrangements to determine if the terms of a previous Order continue to meet the best interests of the children.

[9] A variation application is a two-step process. The applicant must prove a material change in circumstances, and further, as a result of the change prove the prior Order no longer reflects the children's best interests.

[10] It is important to note that even though there has been a material change in circumstances, the Court may not vary the order unless the variation sought is found to be in the best interests of the children.

Material Change in Circumstances

[11] The definition of a material change in circumstances is a change that may have a significant impact on a child's life as a result of the impact it may have on the parenting plan for the child.

[12] Has there been a material change in circumstances in the case before the Court?

[13] The Court has considered all of the evidence. What has obviously **not** changed is the turbulent and emotional relationship the parties seem to have with one another.

[14] This is of great concern to the Court, because if these two parties do not start acting like emotionally mature adults who treat each other with respect and kindness, their children will be the ones who suffer for it. But I digress.

[15] Ms. Mahoney argues that the change in circumstances is that the children now live in Nova Scotia with Mr. Ross as opposed to Iqaluit. The Court has considered this argument. While there is perhaps some merit in it, the fact that both parents now live in Nova Scotia and within spitting distance of one another puts somewhat of a dent in that argument. If both parents live in the same area, how can it be called a change that is "significant" or "material"? It is simply a change in location, but not a material change insofar as parenting the children.

[16] There is no evidence before the Court with respect to the manner in which circumstances may have changed in a material way that could affect the children, but for one: Ms. Akeeagok finally has a home. The evidence is that - except for the times she and Mr. Ross lived together - Ms. Akeeagok finally has a three-bedroom house of her own where she could care for the children if she were to have primary care of them.

[17] The Court finds that much of the other evidence before the Court is more the "bump and grind" of what has unfortunately become the normal day-to-day vitriolicisms the parties have indulged in and are not material to this application.

Variation Sought versus Best Interests Test

[18] In any application under the ***Maintenance and Custody Act,*** RSNS, ch. 160, for custody or parenting time, the Court has to take into consideration all relevant circumstances of the children, or the plan the non-caring parent has for the children. These circumstances are enumerated in **Foley v. Foley**, (1993 Can LII 3400 (NSCC) by Justice Goodfellow. Although the Court mentioned this to counsel at the beginning of the hearing, little evidence was led by either party to allow the Court to take these factors into consideration. They are however included in the following:

> "(a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development." Neither parent has given the Court significant, if any, evidence with respect to these criteria.
>
> (b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian." There is evidence of Mr. Ross that welcomes Ms. Akeeagok to take the children as often as possible.
>
> (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs." The Court has considered this scant evidence led on these criteria also.
>
> (d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs." Ms. Akeeagok's evidence is only that she intends to live in Nova Scotia now, but there is nothing that has been fleshed out for the Court. Mr Ross' evidence was scant also.
>
> (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage." There is some evidence of this. Ms. Akeeagok is clearly concerned that the children will lose their heritage.

(f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained."

(g) the nature, strength and stability of the relationship between the child and each parent or guardian." The Court finds there is some stability in the children's lives in that they have had permanent residence with Mr. Ross. The relationship stability, because of the constant bickering of the parents, must be difficult for these children to endure.

(h) the nature, strength and stability of the relationship between the child and each sibling, grandparent or other significant person in the child's life."

(i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and

(j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on

(i) the ability of the person causing the family violence, abuse intimidation to care for and meet the needs of the child, and

(ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person."

[19] It must be noted that the above is the codification of **Foley v. Foley** ***supra*** with some additions and has been taken from proposed amendments for the ***Maintenance and Custody Act***. Although these amendments are not yet proclaimed, the Court finds it is in the best interests of the children to give consideration to all of the above.

[20] The three eldest children have been with Mr. Ross since the Fall of 2009, with various interludes of having Ms. Akeeagok reside with them, including 11 months during which the parties were reconciled until January 2012. The issue of whether Ms. Akeeagok gave her consent to Mr. Ross to move to Nova Scotia with the children is somewhat murky, but as both parents have lived in Nova Scotia for some time now (Ms. Akeeagok for 19 months, Mr. Ross longer), the issue is somewhat moot.

[21] Having considered the **Foley** enumerations above, in conjunction with the limited evidence available, the Court finds that the order should be varied. The Court finds that Ms. Akeeagok is a soft-spoken, gentle young woman who is needy for a relationship and perhaps easily swayed. She clearly loves her children. There is evidence of the Respondent, on direct, unconfirmed by herself, that she is pregnant again. This would make five children for her. The Court was curious as to why this evidence was neither confirmed or denied by herself, and not elicited on cross-examination by counsel for Mr. Ross. Why would counsel do this? And then adduce the evidence through his client on direct? Was it designed to make her look bad to the Court with no ability to refute it?

[22] The Court finds there is no evidence to support Mr. Ross' application for sole custody of Kaden. Kaden has been in Ms. Akeeagok's care since birth and he is now 11 months old. There is no evidence of abuse or neglect by Ms. Akeeagok before the Court.

[23] The Court therefore finds it to be in Kaden's best interests to remain in the primary care of Ms. Akeeagok.

[24] The Court finds that Mr. Ross has the best intentions in raising their children, but his frustration is clearly manifested by the rude and insulting manner in which he speaks to Ms. Akeeagok. This is in evidence by his use of the "F" word in his texts to her. The Court finds that Mr. Ross has made it very difficult for Ms. Akeeagok to try to effectively be a mother to these children, by his attitude towards her, and his moving to Nova Scotia instead of Ottawa. But back to the texts. There is no need for either parent to address each other in this manner. This type of communication is destructive and detrimental to their children who do not need to hear their parents react towards one another with such disrespect. Ms. Akeeagok was concerned

about the children's cleanliness. The Court accepts Mr. Ross' evidence that the children are dropped off from daycare and are dirty from playing outside.

[25] The Court orders as follows:

(1) Both parents will attend the Parent Information Program and will file their certificate of attendance with the Court on or before December 1, 2012;

(2) Both parents will meet with Debra Reimer, KAP, to determine what parenting courses they can take to ensure better communication and co-operation between them in the best interests of their children;

(3) Neither parent shall abuse alcohol, use non-prescription drugs, or misuse prescription drugs 24 hours prior to or while the children are in their care;

(4) Ms. Akeeagok will provide Mr. Ross with the name and address of the family doctor in this area that she may have found for the children;

(5) Mr. Ross will provide a copy of the children's health care cards and any medical insurance cards he may have, to Ms. Akeeagok;

(6) The parties through counsel will mutually agree upon an assessor to do the following and if they cannot agree, one will be appointed:
An assessment will be conducted with costs to the parties waived with an emphasis on how the "on again - off again" relationship of their parents is affecting the children, and how to temper their emotions and, built into the home study, the assessor will spend two sessions with each parent individually to ensure the parent is aware of how to communicate with one another without allowing their emotions to dictate their actions around their children;

(7) Pending the receipt of the assessment, the parties will share parenting of their children as follows:

   (a) Ms. Akeeagok will have primary care of Kaden;

   (b) Mr. Ross will have parenting time with Kaden every Thursday from 4 p.m. until 7 p.m. (weather and road conditions permitting);

   (c) As Mr. Ross said he would welcome Ms. Akeeagok having much more time with their children, Ms. Akeeagok will have parenting time with Kayla and Kiera every Friday after school (or whatever time Mr. Ross can deliver them when he finishes

work) until Sunday at 4 p.m. Ms. Akeeagok will have parenting time with Kaleb every Thursday at 4 p.m. until Sunday at 7 p.m.;

(d) Mr. Ross will have parenting time with Kaleb every Sunday at 4 p.m. until Thursday until Thursday at 7 p.m.;

(e) Mr. Ross will have primary care of Kayla and Kiera;

(8) Neither Ms. Akeeagok nor Mr. Ross will introduce or expose any of their children to a new boyfriend or girlfriend until that new boyfriend or girlfriend has been in that party's life for six months minimum;

(9) Both parties will inform the other of all extra-curricular activities concerning the children, doctor's appointments, dentist appointments, hospital visits, events at school, etc. in advance (if possible) to allow her to go there also;

(10) Neither party shall use inappropriate language with the other or with the children at any time;

(11) Ms. Akeeagok may meet with the children's educators and health care practitioners without further notice to Mr. Ross;

(12) Neither parent shall remove any of the children from the jurisdiction of this Court without further order of the Court;

(13) This matter will return to Court for review on Monday, December 3, 2012 at 10:30 a.m.

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M. Melvin
A Judge of the Family Court
for the Province of Nova Scotia