

FAMILY COURT OF NOVA SCOTIA
Citation: C.L.W. v. P.J.F., 2012 NSFC 16

Date: 20120912
Docket: FTMCA-067837
Registry: Yarmouth

Between:

C.L.W. and R.AW.

Applicants

v.

P.J.F.

Respondent

Judge: The Honourable Judge John D. Comeau, JFC

Heard: August 15 and 16, 2012 at Yarmouth, Nova Scotia

Counsel: Alex Pink, Esq., for the Applicants
Louis d'Entremont, Esq. For the Respondent

Introduction/The Application:

[1] The Court is dealing with two applications. One by the father and the other by the paternal grandmother who has been previously granted leave pursuant to section 18(2) of the *Maintenance and Custody Act*.

[2] The father's application dated August 18, 2011 is as follows:

“I therefore request - To vary the order dated the 12th day of April, 2010 with respect to custody of the children Dylan, born November 23, 2000, Emily, born the 1st day of June, 2002 and Conner, born the 3rd day of November, 2003. The Applicant is requesting joint custody with his mother R.A.W. and supervised access to the Respondent. Also requesting that child support be terminated retro-active to July 9, 2011 as the children have been residing with him and his mother.”

[3] * The order of April 13, 2012 was made by Judge C. Sparks in the absence of the Respondent father (the Judge being satisfied he had notice) and sole custody of the children was granted to the Respondent mother. The father's income was imputed to be \$22,212 and the table amount of \$437 a month was ordered, starting on the first of April, 2012, by direct deposit to the mother's account.

[4] The paternal grandmother's application also dated August 18, 2012 is as follows:

“Leave of the court to apply for joint custody of the children, Dylan, born November 23 2000, Emily, born June 1, 2002 and Connor, born November 13, 2003 with supervised access to the Respondent mother.”

[5] On August 24, 2011 this Court made an Interim Order varying Judge Sparks' order. Leave was granted to the paternal grandmother R.A.W. and custody was granted to the paternal grandmother and the father with primary care being shared by both. The Respondent mother was to have supervised access. As of July 1, 2011 the Applicant father was not obliged to pay child support as the children were with him. There was a change in circumstances because the children were residing with the father in Yarmouth and it was in their best interests to remain there until the issue of custody could be resolved by Court hearing.

[6] On October 19, 2011 the Court ordered an independent Child Wish Assessment. On March 7, 2012 the Court ordered specific interim access to the Respondent mother.

[7] Finally on May 30, 2012 the Court ordered an independent Home Study Report which was to include an updated Children's Wish Assessment.

[8] The Respondent mother contests these two custody applications indicating she should retain custody as per Judge Sparks' order. She made an application for interim access on the 6th day of March, 2012 which was granted.

The Facts:

[9] The Applicant C.L.W. and the Respondent P.J.F. are the father and mother of three children, Dylan, born November 23, 2000, Emily, born June 1, 2002 and Conner, born November 13, 2003. Their paternal grandmother is the Applicant R.A.W.

[10] According to the Home Study, the parents met in Yarmouth and dated, broke up but reconciled when the mother advised she was pregnant with Dylan.

[11] They moved to an apartment in Wellington and Dylan was born. At birth he had vision problems which was diagnosed at that time. Following the birth, the

parties moved into an apartment in the south end of Yarmouth. These times were partly stressful, due to limited finances. Two years later Emily was born and at the time the Applicant father was working three jobs and they moved into a duplex in Yarmouth. During this time things were not working well when the Applicant father would spend too much time with friends. Conner was born a year after Emily and after this their relationship is described as not being positive. There were arguments over finances and they were evicted for non-payment of rent. The Applicant father began to drink during which time he became argumentative. During this time the applicant R.A.W. who is the Applicant's mother helped out financially.

[12] At the time of the last hearing the Applicant father does not drink or use drugs. His partner is committed along with him to his sobriety.

[13] Historical evidence is that during an argument, the applicant father assaulted the Respondent mother, was arrested and spent the night in jail. This has resulted in testimony from her mother that he is an abuser. He was placed on probation for this offence but has now been discharged.

[14] At one point, the parties separated for four or five months. They eventually reconciled and rented a home in Chebogue, Yarmouth County. The Applicant father worked in a boat shop but continued to drink. This resulted in a confrontation with police at his home in the presence of the children.

[15] After this, the parties moved to Calgary where the Applicant father worked for his uncle. He had a non-drinking hiatus for 11 months but five months after moving to Calgary he returned to drinking. As a result, the Respondent mother says there was a lot of abuse in the relationship and she says she stayed because she was afraid.

[16] They returned to Nova Scotia and settled in Truro. In 2009 the Applicant father assaulted the mother in front of the children, which resulted in a black eye. He returned to Yarmouth and they both remain in Yarmouth and Truro respectively.

[17] In the summer of 2011 the children came for a visit to Yarmouth and at that time because of evidence of child protection concerns when they were with their mother, an application to the Court was successful in obtaining an Interim Joint

Custody Order to the Applicant father and his mother (leave having been granted to her).

[18] The allegations against the Respondent mother included eviction for non-payment of rent, not enough food in the house, inadequate heat, lack of supervision, inadequate children's clothing and flea bites.

[19] Evidence from a child protection agent of the Minister of Community Services from Truro is that these complaints came from the two Applicants. Some were investigated and others were not because it was felt they were initiated because of this custody dispute. Generally the agent's evidence is that the Minister was not concerned enough to intervene when the children were or were to be in the Respondent mother's care. She has a home in Truro that would be adequate to shelter and care for the children. At present, she has no job and would need social assistance to financially care for the children. She received the child tax credit over the past year while the children were not in her care. The Government is now in the process of having her return these funds. The Applicant father has applied for a reduced child tax credit because of his employment income.

[20] The Applicant father earned \$50,000 last year. He belongs to the Ironworker's Union and worked as a welder on turbines in Nova Scotia. He is presently upgrading his skills so he can go anywhere to work. There is evidence from his probation officer (on probation for the assault on the Respondent mother) he has complied with the order. He received counselling at Mental Health Services and Addiction Services. He has completed a parenting course. The Respondent mother indicates he will go back this drinking and abusive ways when probation is over. At this time probation has ended.

Living Conditions:

[21] The Applicant father resides in four bedroom house with a partner S.D. He has rented this place for a year now. There is an acre of land where the children can play. Each child has their own bedroom. S.D. is not working and provides day to day care of the children when the Applicant father has to work. When he is home he actively participates in parenting of the children.

[22] The Applicant R.A.W.'s home is described by the assessor as stylish with a pool in the back yard where the children spend a lot of time.

[23] The Respondent mother says the children want to stay with their father because they like the grandmother's pool as well as interaction with extended family, including R.A.W.'s husband who participates with the children's activities.

[24] The Respondent mother lives in the upper floor of a house in Truro that has been converted into two apartments. She lives with S.W. who is five and a half years younger than her. The apartment consists of three bedrooms which is described by the assessor as "small and cramped though clean and tidy". The boys share a bedroom and Emily has her own room. She was observed with the children and offered "attention, nurturance, guidance and direction". The children seemed happy to be with their mother though told this writer, during the visit "they did not want to live there".

[25] She wants sole custody of the children and for the Applicant father to have access. She does not want his extended family, including R.A.W., to have access.

Home Study (July 21, 2012):

[26] The Respondent has been critical of the assessor saying she did not spend enough time to observe her interaction with the children. The assessor says she was seen on two occasions in her apartment and briefly at the interview of her mother at her apartment. “The second visit with (the Respondent mother) included the children who were observed with their mother, in and out of the home, as well as being seen alone with this writer”.

[27] Her conclusions are as follows:

“The purpose of this assessment is to recommend a living situation for Dylan, Emily and Conner and to update the Wish Assessment of November 2011. The living arrangement must maximize the physical, emotional, spiritual and intellectual development of the children so that they are able to become self sufficient and productive adults. It is clear that each parent offers these children certain benefits and, conversely, certain problems. The information gathered in this assessment suggests that primary care should remain with the father. While the mother’s concerns have been noted in this assessment, regarding the father’s past behaviors, it is this writer’s opinion, and that of his former therapist and current probation officer, that he is providing, with the support of his mother and extended family, and his partner, a stable environment for the children in which they are blossoming.

The mother believes she is able to provide the children with appropriate parenting. It is this writer’s opinion that the mother has limited insight into her behaviors and attitudes and its effects on others around her.

It is significant to note that while both parents have indicated occasions of past inappropriate behavior by the other, there is no indication whatsoever of abuse or neglect since the children returned to Yarmouth last year. There has been in the past, ongoing uncertainty as to the mother's capacity to provide a stable, nurturing environment to the children. There is a long record with Childrens Aid reflecting these concerns. It appears that even now she is in danger of losing her residence due to lack of financial security. Despite this concern, the children do have an attachment to their mother and have expressed a desire to see her during school vacations.

In this writer's opinion, given the concerns expressed by R.A.W. and the father regarding the mother and her partner's drug usage, and the reports by Emily that she can smell marijuana in the apartment during visits, that the mother should undergo drug testing. It is this writer's understanding that she is agreeable to such testing. It may be beneficial for her partner to undergo drug testing as well if he continues to live with the mother. Such drug testing should be hair follicle testing.

“RECOMMENDATION

1. Emily Conner and Dylan be placed in the sole custody of their father, and that their mother be allowed reasonable access during school vacations.
2. All medical and educational material, as appropriate, be shared between the parties.
3. The mother to complete a parenting course similar to that completed by the father and his partner. She could contact a local Parent's Place Center or contact Mental Health Services for assistance.
4. The mother to undergo random drug testing.

5. It is recommended that the mother not use FaceBook posts as a mechanism to vent her frustration. A better option would be for her to seek counseling to deal with the issue of losing custody of the children and her apparent unresolved feelings toward the Applicant father.

6. The mother to contact her children, by phone, at least once a week. She does not have a phone at this time that allows incoming calls. This situation should be changed. As of the date of this report, she has not contacted the children in the week since they left her care.

7. Neither parent to make comments about the court case or custody issues in front of the children. The transition times should be smooth and free of drama.

8. No smoking in the house or vehicle when children are present.”

Children’s Wish Assessment (November 2, 2011):

[28] A Children’s Wish Assessment was prepared by Ilonka (Thomas as she then was) Alexander on November 2, 2011. This document was prepared by consent of the parties. At no time during interviews were the parties present.

“SUMMARY

All children expressed a desire to remain living where they are now. All children expressed fear if they were to go to their mother’s house to live; they are ambivalent about a relationship with their mother at this time and want her to change her behaviour: Stop drinking, stop smoking, and stop fighting with others.

The children expressed concern that their wishes may hurt their mother, which they do not want to do”.

[29] The assessor updated the childrens’ wishes in the Home Study of July 21, 2012.

“All three children describe an environment, when with their mother, that brings them anxiety. The children said to this writer, last year, “Dad is a good dad he cheers us up it is a safe house he provides for what we need.” Their beliefs and wishes remain the same to this day. They are happy where they are and want to remain with their father. All three children want the custody to stay the same as it is now. They want to live with their father and see their mother, from time to time, when they wish, and not be formally scheduled to visit their mother. They said they feel safe and protected. There is no reason to interrupt or change what is working for the children.”

Issues:

Change in Circumstances Custody, access, child support

The Law:

[30] Statutory authority to award custody and access is set out in section 18 of the *Nova Scotia Maintenance and Custody Act*.

“Powers of court

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.

[31] Counsel has referred the Court to a number of cases; In *LeBlanc v. LeBlanc* [2009] N.S.J. no. 346 Judge L.J. Dellapinna of the Nova Scotia Supreme Court (Family Division) quoted the 1994 Nova Scotia case of *Foley v. Foley* [1994], 124 N.S.R. (2d) 198 at paragraph 51:

“51 So, what is in the best interests of the parties’ two children? I know of no exhaustive list of factors that the court is to consider when trying to determine what is in a child’s best interest. Arguably the best attempt to summarize a list of considerations is found in *Foley vs. Foley* (1994, 124 N.S.R. (2d) 198 where Justice Goodfellow wrote, beginning at paragraph 15:

• ...

- In determining the best interests and welfare of a child the court must consider all the relevant factors. The diversity that flows from human nature is such that any attempt to compile an exhaustive list of factors that could be relevant is virtually impossible.

- 16.

Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:

- 1.

Statutory direction *Divorce Act*, ss. 16(8) and 16(9), 15(5) and 17(6); (In the case before this Court 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 question with whom would the best interests and welfare of the child be most likely achieved. That question requires 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 a 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 parents and each parent's obligation to promote and encourage access to the other parent. The *Divorce Act* s. 16(10) and s. 17(9) and case law;

- 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 any other relevant factors;

- 17.

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?

- 18.

The weight to be attached to any particular factor would vary from case to case as each factor must be considered in relation to all the other factors that are relevant in a particular case.

- 19.

Nevertheless, some of the factors generally do not carry too much, if any, weight. For example, number 12, the financial contribution to the child. In many cases one parent is the vital bread winner, without which the welfare of the child would be severely limited. However, in making this important financial contribution that parent may be required to work long hours or be absent for long periods, such as a member of the Merchant Navy, so that as important as the financial contribution is to the welfare of that child, there would not likely be any real appreciation of such until long after the maturity of the child makes the question of custody mute.

- 20.

On the other hand, underlying many of the other relevant factors is the parent making herself or, himself available to the child. The act of being there is often crucial to the development and welfare of the child.”

[32] Custody cases are fact specific, although some precedents may seem similar each turns on its own set of facts. Considering the factors in *Foley* supra are important.

[33] It is clear that children's voices should be heard. The issue is what weight should be given to the children's wishes as contained in an assessment of that name. Age and maturity are considerations in determining how to accommodate a child's wishes, see *Zamanchuk v. Baldwin* [2000] W.D.F.L. 345 (Ont. S.C.J.) A further determination, is the extent to which the child has been influenced, whether directly or indirectly, to express a preference, see *Endicott v. Endicott* 2001 Carswell BC 2001 BCSC 607 (CanLII)

[34] The parties have not expressed any concern over the method used or the results of obtaining the children's wishes. The Respondent mother believes the children are happy with the father's home and environment and they enjoy their grandmother's home and pool and the interaction with extended family. She however, believes they would be better off residing with her.

Conclusions/Decision:

[35] The Court's consideration is whether there has been a change in circumstances since Judge Sparks made her order on April 15, 2010. The children are residing with their father in Yarmouth. They arrived here on an access visit and an application to the court was made by the father and his mother, citing the fact that there were concerns about the mother's home and agents for the Minister of Community Services were investigating. She had also been evicted from her home for non-payment of rent. A concern was expressed that there was not enough food in her home for the children. There were issues with respect to lack of heat in the winter. At this time the Court found a change in circumstances, given the evidence of the mother's home and situation and the children were allowed to stay with their father.

[36] The father's life has changed in the past year in that he does not drink alcohol or use drugs. He works and has a potential long term career.

[37] The mother's evidence is that she is awaiting the outcome of this case and has not sought work. If she gets the children back, it appears social assistance would be in order, although she says she wants to set up a painting company in the future. Her home is described by the assessor as having "three bedrooms, is small and cramped, though clean and tidy. She says if she obtains custody of the children, she will find a bigger apartment."

[38] The father's home is described as "....immaculate, cozy in its feel, and full of activity when the children are present The children's rooms are upstairs and each child has their own room." The father and his partner provide the day to day care of the children.

[39] There is a change in circumstances, given the father's change in lifestyle and the children's wishes that have been expressed to the assessor.

[40] The relevant factors referred to in *Foley*, supra., include the wishes of the children and the weight the Court may attach to them. Their statements have been ascertained through an independent professional assessor and has been updated

within a reasonable time of the rendering of this decision. They want to remain living with their father where they are happy and content.

[41] Another factor to be considered is the financial contribution to the welfare of the children. With respect to this aspect, the father is employed and has a future career, while the mother would rely on social assistance until she could enter into a career as a painting contractor.

[42] The mother admits the children enjoy interacting with extended family in Yarmouth, which is described in *Foley*, supra. As “the support of an extended family, uncles, aunts, grandparents ...”

[43] Evidence is that the paternal grandmother R.A.W. has been supportive of the children and her son both emotionally and financially. She is the stability in this whole situation and is applying for joint custody with her son. She provides for and participates in the children’s activities, including those the father has set up. The children are involved in Karate, bowling, curling, piano and summer camp.

[44] Although there appeared to be some reluctance with respect to access to the mother, the father argues that there have been many invitations for the mother to visit with the children in Yarmouth. They (father and his mother) says they encourage the children to speak to their mother on the telephone. If there is a problem with this, it is the children's hesitation.

[45] On the evidence as a whole, the Home Study, the children's wishes and consideration of the *Foley* factors, it is clear the children's best interests are served by remaining with their father. In the face of all these things that weigh in favor of custody to the father, the mother feels the children would be better off with her. The difficulties that would arise by taking the children out of their environment in which they are happy and want to stay would weigh heavily on the mother's future parenting. If one is thinking about the children's best interest, it is clear it would be obvious they should remain where they are.

[46] The consideration is the children's best interest and this is achieved by custody to the Applicant father and to allow for any future problems that may arrive in his life, joint custody with his mother R.A.W.

[47] The mother will have liberal phone and e-mail access. She will have access one weekend a month at her home. A weekend is defined as Friday after school to Sunday at 6 p.m. In order to allow the children to settle in school routines, the first weekend access shall start on October 28, 2012 and thereafter the last weekend of every month, unless the parties agree to modify this due to bad weather or illness. She will have access at her home half of all school holidays, including Christmas, Easter and March Break. She will have access for half the school summer holidays, the first two weeks in July and the first two weeks in August. Transportation for all access visits except those in Yarmouth shall be provided by the father and his mother.

[48] She will have access whenever she is in Yarmouth after giving the father 24 hours notice. She will have such other access as the parties may agree upon.

[49] Both parties shall keep the other informed of anything that affects the welfare of the children when the children are in their care.

[50] Child support is terminated as of July 9, 2011.

[51] Counsel for the Applicants shall prepare the order.

JOHN D. COMEAU
JUDGE OF THE FAMILY COURT FOR THE
PROVINCE OF NOVA SCOTIA