IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA
Citation: Billington v. VanLarken, 2009 NSFC 18

Date: August 21, 2009
Docket: FNG 33203
Registry: Pictou

BETWEEN:

JEREMY PETER BILLINGTON

Applicant

- and -

KAREN SUSAN VANLARKEN

Respondent

DECISION

Judge: Before the Honourable Judge James C. Wilson,
Judge of the Family Court for the Province of Nova Scotia

Heard: Pictou, Nova Scotia, July 20th, 2009

Counsel: Kerri-Ann Robson for Mr. Billington

Roseanne Skoke for Ms. VanLarken

Decision Date:

August 21st, 2009

[1] Alicia Lindsey Dawn Billington was born October 10, 2002 and Riley Christian David Billington was born July 8th, 2004. The children have been in the sole care of their mother pursuant to a court order dated February 3rd, 2005. The order provides Mr. Billington with reasonable access. There was irregular access from the time the parties separated in May of 2004 until access was suspended after Christmas of 2006. This application by Mr. Billington is to re-start the access process. Ms. VanLarken is seeking to have access terminated.

BACKGROUND

[2] The parties were in a common-law relationship between March 2002 and May 2004. Mr. Billington's evidence is that their relationship was "on again" "off again" until February of 2007. Ms. VanLarken's evidence is that they did not co-habit since before Riley was born. She does acknowledge Mr. Billington was at the home on occasions assisting with child care between '04 and early '07. There has been no access of any kind since that time.

[3] Ms. VanLarken would describe Mr. Billington's involvement with the children as sporadic and unreliable. Mr. Billington does acknowledge that in 2006-2007 he struggled with addiction to pain medication, specifically oxytocin and diladud. All the

evidence confirms that during this period he was in a dark place and was guilty of lying to family members and being generally unreliable. He was charged and pled guilty to the offence of theft under $5,000 and breach of probation. He was sentenced to a period of house arrest. He completed his sentence successfully and there have been no further criminal charges. According to Mr. Billington he participated in a detoxification program in June 2007 and has been sober since. He is just now completing his methadone treatment program. He works part time as a cook at a diner and is also employed as a maintenance man at an apartment complex. He estimates his income at approximately $18,000 per year. He resides with his mother. He has a child from another relationship who he sees on a regular basis. Mr. Billington's mother and family support his application and have maintained some contact with the children until Christmas of '07.

[4] Mr. Billington does not question that Ms. VanLarken did the appropriate thing in suspending access, given his circumstances in 2007. He states he is now vastly improved and in a position to make a positive contribution to his children. He wishes to restart the access process so his children can get to know him and their extended family.

[5] The circumstances of Ms. VanLarken have also changed. She was employed for a number of years at a call centre. She is now completing a program at the Nova

Scotia Community College in continuing care and will be employed in a local nursing home. She and the children have relocated to a new home in rural Pictou County. Ms. VanLarken and the children have enjoyed the benefit of strong family support. Ms. VanLarken has also extended the support network for herself and the children through other supportive relationships, particularly the Cameron family. The Cameron family became involved with Ms. VanLarken and the children, as a result of Ms. VanLarken hiring Lindsay Cameron as a summer babysitter. This relationship with the Cameron family now includes Lindsay's parents, Susan and Philip Cameron, who see Ms. VanLarken and the children frequently and involve them in family activities. All the evidence suggests the children are happy, well adjusted kids whose needs are being met by a supportive network of friends and family. It is Ms. VanLarken's position that the younger child does not know his father and the older child expresses a disinterest in rekindling the relationship. It is Ms. VanLarken's position the children are in a stable and supportive environment, and should not be put at risk by forcing them into a relationship that has been historically unstable and unsupportive.

ANALYSIS

[6] Access is the *right of the child* to know the other parent. It is the *responsibility of parents* to exercise access. In determining what access is appropriate, the court is always guided by the provisions of Section 18(5) *Maintenance and Custody*

Act, R.S.N.S 1989, c. 160 as amended:

> 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.

[7] In a recent decision Justice Forgeron of the Family Division in *Clark vs. Gale* 2009 NSSC, 170 noted at paragraph 45:

> [45] Our courts have consistently held that there is no absolute right to access, although the best interests of the child is generally promoted when a child has meaningful contact with both parents. Restricted access is not the usual remedy. A child is ordinarily entitled to share in the daily life of his/her parents unless such is not in the child's best interests to do so. Access is the right of the child and not the right of a parent. There is no presumption that contact with both parents is in the best interest of the child: **Young v. Young** (1993), 160 NR 1 (S.C.C.) and **Abdo v. Abdo** (1993), 126 NSR (2d) 1 (C.A.)
>
> [46] In **Abdo v. Abdo**, *supra*, the Nova Scotia Court of Appeal reviewed three legal principles relevant to the determination which I must make:
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> 1. a) The right of a child to know and be exposed to the influences of each parent is subordinate in principle to the best interests of the child.
> 2. b) The burden of proof lies with the parent who alleges that access should be denied, although proof of harm need not be shown in keeping with the decision of **Young v. Young**, *supra.*
> 3. c) The court must be slow to extinguish access unless the evidence dictates that it is in the best interest of the child to do so.

[8] Access is premised on the parent meeting their responsibilities. Parents who support their children, who are there on a consistent or predictable basis for their children, and who mentor their children with a positive lifestyle will enjoy access that is a nurturing experience for the child and promotes the best interests of the child.

[9] Too frequently parents fail their children in any or all of the above-noted responsibilities. The reasons are as varied as the circumstances of life, but circumstances do change over time. The immature mature, the addicted recover, the selfish learn to put others first, the unemployed find jobs. But improved circumstances alone do not necessarily equate with access being in the best interest of the child. Although a change in circumstance is relevant to any custody and access decision, the best interest test is more complex. In *Poole v. Bailey,* (1988) 80 N.S.R. (2d) 238, Williams, J.F.C. (as he then was), identified a number of factors to consider in deciding whether or not access was in the child's best interests. At paragraph 20 Williams J. summarized these factors including: (a) the actual relationship between the parent and child (b) whether the parent has supported the child materially and emotionally (c) whether the child has any specific needs that are not being met at present (d) the nature of other family supports (e) the nature of the relationship between the parents and whether or not that relationship may reasonably cause stress to the custodial parent and (f) the current status of the access relationship.

[10] It is easy to sympathize with a parent who wants back into the life of his child. Particularly so when that parent has overcome severe problems and is today in a

better place then when access terminated. And particularly so when that parent appears to be filling a nurturing role with a child from another relationship or where there is extended family who want to be supportive.

[11] The views of both custodial and non-custodial parents are entitled to serious consideration. A custodial parent may support access or he or she may sabotage access in both suttle or direct ways. A non-custodial parent may feel entitled where he has demonstrated progress and change or victimized by a former spouse who refuses to acknowledge the positive change. However, parental views must always be subordinate in the best interests of the child. In *King v. Low* (1985) 44 R.F.L. (2d) 113, McIntyre J. of the Supreme Court noted at paragraph 27:

> · · · Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside.

CONCLUSIONS

[12] Circumstances have changed since the last order. Not only are the children older, but both parents have moved on. Mrs. VanLarken has completed Community College and has a career that should provide stable employment. Mr. Billington is no longer addicted to drugs and is re-employed. Both appear to be in better places than they were five years ago at separation.

[13] I accept the evidence of Ms. VanLarken that the parties separated in 2004 before the birth of Riley. I also accept that Mr. Billington was around over the next two and a half years but on an irregular basis, and he did provide child care at times. I do not believe he was involved in what would be referred to as a parenting role. Riley doesn't know him and Alicia says she is not interested in a relationship. Whether Alicia's comments are a reflection of her mother's views or her own sense of frustration at being let down by her father, I need not decide. Her position is not unreasonable based on her experience. She knows who her father is and she apparently knows he wants to have a relationship with her.

[14] Mr. Billington may have something to offer. He is agreeing to provide his required financial support. He would also like to have time for he and his children to get to know each other and their extended family.

[15] Access would provide an opportunity to do these things. But access would also cause stress to Ms. VanLarken because she still does not trust or believe that Mr. Billington has changed. He is just finishing his methadone program and has not had time to establish stability outside that program. She fears his recovery may not be permanent and the children will be hurt should access again fall by the way side. She argues Riley

doesn't know him and has adjusted to his absence. She feels that introducing or re-introducing a father who may yet again be unable to meet his parenting responsibilities is too great a risk for the children. While Mr. Billington has been absent dealing with his issues, others, including Ms. VanLarken's mother, her aunt and the Cameron family have stepped forward to meet the needs of the children.

[16] While access demands commitment from the parents, it also places demands on the children. Suddenly there is a schedule and expectations. There is less freedom and more compromise to accommodate everyone. The payoff for the children is supposed to be the benefit they derive from access.

[17] The benefit is clearly in getting to know a parent or continuing a relationship with one. The cost to the children is that they are in the care of a parent who will be stressed by access and the children are at risk of experiencing another parental failure. Are the potential benefits of access worth the risk of upsetting a well functioning status quo?

[18] The tragedy of these circumstances is that if Mr. Billington presented in 2004 or 2006 as he does today, we would not be in this dilemma. If Mr. Billington had

been able to support his children, had he not been unreliable because of drugs or immaturity, there would be no valid objection to access. However, we are five years later and the court is asked to decide if Mr. Billington should be re-introduced into the lives of children who appear to be doing fine and have adapted to life without their father. His request to again be a father is understandable, but is it in the best interest of the children?

[19] A court should be cautious about implementing changes to a successful parenting regime. Changes should only be endorsed when it is demonstrably in the children's best interest. The burden is on the applicant Mr. Billington to satisfy the court as to what form access should take. The burden is on Ms. VanLarken to satisfy the court that circumstances have changed so that the access provision should be terminated. If the court is not satisfied that the benefits outweigh the risk, the children should not be subjected to change. It is the court's opinion that the risks to the children at this time are greater than the benefits. Therefore, access will remained suspended subject to the following.

[20] Baring an adoption, of which there is absolutely no evidence to suggest that is likely, Mr. Billington is and will remain the children's father. I believe he is sincere in wanting access because he believes the children would benefit. He also has an obvious

personal interest in having a relationship with his children who by all accounts would be a delight to any parent. He has made progress and will be supporting the children. I do not believe the door to access should be closed entirely.

[21] As the children get older, they will have questions and may well search out answers for themselves. They should have that opportunity so long as Mr. Billington can sustain a positive role model. If the children were older I would order that access be as initiated by the children. However, given their age and the tenuous, if any, relationship that currently exists, the court must respect the wishes and judgement of the custodial parent so long as they are consistent with the children's best interests. Based on the evidence before me, I believe Ms. VanLarken has so far acted in the children's best interests. She is not yet convinced the benefits of access would out weight the inherent risks. For that reason, at this time, access should occur at the discretion of Ms. VanLarken. As Mr. Billington demonstrates stability over time, the concerns of Ms. VanLarken should be addressed. The stress and concern of old patterns reemerging can only be resolved over a longer period of demonstrated stability. The stress on the children of initiating an access schedule is not a concern if Mr. Billington is demonstrating stability and the children are seeking access.

[22] The order will contain a provision that Mr. Billington will have physical access at the discretion of Ms. VanLarken. In addition, he will have access by way of letters, cards and gifts for special occasions. Consistency in this area will demonstrate stability and positive role modeling.

[23] In addition, Ms. VanLarken will be required to keep Mr. Billington advised of the children's residence, the school the children are attending and provide copies of all school reports as they become available. As noted earlier in this decision, access is the right of the child and the responsibility of the parent to exercise it in a positive way. Through this application Mr. Billington has started to address his responsibility. This decision attempts to support the rights of the child to get to know his parent on terms that minimize any risk to the child. The children should benefit from knowing they have a father who supports them and wants to have a relationship with them on terms consistent with their best interests.

[24] The court is prepared to review the issue of access upon the application of either party.

SUPPORT

[25] The financial records of Mr. Billington for the periods since the February ‘05 order are incomplete. Based on the information that is on file, I am prepared to suspend the enforcement of any arrears accumulated on that order pending the filing with the court of income tax returns for the years ‘05, ‘06, ‘07 and ‘08.

[26] Mr. Billington is currently employed at two different part-time jobs. Based on the evidence submitted, he has an approximate annual income of $18,200.00. Based on that income, he will pay support as of August 1st, 2009 in the amount of $274.00 for the support of the two children.