IN THE FAMILY COURT OF NOVA SCOTIA
Citation: D.M.T. v. C.R.L., 2011 NSFC 22

Date: 20110912
Docket: 08C057494
Registry: Yarmouth

Between:

D.M.T.

Applicant

v.

C.R.L.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge:	The Honourable Judge John D. Comeau, J.F.C.
Heard:	Digby, Nova Scotia, April 12, 2011 and June 14, 2011 - and - Comeauville, Nova Scotia December 9, 2010 and July 21, 2011
Counsel:	Matthew Dill Esq., for the Applicant Kay L. Rhodenizer Esq., for the Respondent

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DECISION

The Application:

[1] The contest between the parties has a long history. This is an application brought by the Respondent on October 4, 2010 to vary (initially ex parte) the provisions of a custody and parenting consent order issued on November 28, 2008 (due to a written error it may appear to be November 18, 2008). The parties' child S., born December *, 2006 is the subject of the proceeding.

[2] Initial court date was October 14, 2010 and at that time both parties appeared and a consent inter partes order was made. A review date was set for December 9, 2010. On this date pre-trial discussions indicated the Respondent who is the father of the child, was asking for sole custody and supervised parenting to the Applicant who is the mother of the child. The Applicant mother requests a return to the November 28, 2008 order which provided for a parenting schedule referred to as "a reciprocal four day on, four day off access with full disclosure to both parties of anything that affects the welfare of the child".

[3] There was an interlocutory interim consent order reached concerning custody and access on October 14, 2010. This order and the November 28, 2008

order (referred to as November 18, 2010 order) was replaced by another interlocutory interim consent order dated January 6, 2011. The order authorized a home study assessment and provided for joint custody with the father being the primary caregiver. An information clause was inserted that required the father to inform the mother about “significant things” that affect the welfare of the child. Decisions of this nature were to be made in mutual consultation. If disagreement resulted, the father was to make the final decision.

[4] The mother was to have supervised parenting time every second weekend from 6 p.m. Friday to 6 p.m. Sunday and each week overnight at 3 p.m. Wednesday to 3 p.m. Thursday. Access during holidays was also set out and such other access as the parties could agree upon. Provision was made in case of storms and prohibitions that provided for moderate use of alcohol within a supervisor’s discretion were set out. Non-exposure of the child to second-hand smoke was the responsibility of the mother. Respectful and courteous interchanges were provided for.

The parties now agree that supervised access to the mother is not required.

Issues:

1. Change in circumstances;

2. Custody/access/joint custody;

3. Condition to custody regarding which school the child would attend - oral decision made July 21, 2011 - reasons outlined herein.

Schooling:

[5] The parties were in opposition to the school which the child should attend. It was necessary for the Court to make a decision in relation to this because school would have started before a final decision on all issues was rendered.

[6] Evidence was provided to the Court that the child was registered in the school recommended by the father. That both parties attended this school. The mother took the child there herself for orientation and there is evidence that many of the child's friends would be going there.

[7] The school the mother recommended is five minutes away from her residence but she had not taken any steps to contact school authorities or have the child registered there.

[8] As is the case in most of these disputes, the Court has not received any evidence that one school is better than the other and as education is a provincial matter, it is assumed there is consistency in delivery of education services.

[9] When one makes an argument put forward by one of the parties and that party has an opportunity to affect the decision of the Court, it is assumed a pro-active course would have been followed. That is not the case here.

[10] The child will attend the school recommended by the father. The child is registered there and has attended orientation.

[11] For the purpose of privacy (publicity ban as provided in the **Family Court Act**) the name of the school will not be set out in this written decision but counsel preparing the final order will be more specific in referring to the name. Conditions to custody are authorized not by statute but in the best interests of the child (see **Blois** v. **Blois** (1988), 83 N.S.R. (2d), 328 (N.S.C.A).

The Facts:

[12] There has been an ongoing dispute between the parties with respect to custody and access of their child S., born December *, 2006. The initial order issued the 28th day of November, 2008 (erroneously referred to as November 18, 2008 in the application to vary) was by consent as a parenting plan on a four day on, four day off rotation, holidays and special occasion parenting was provided for. The parties agreed to keep the other informed as to "all aspects of the child's welfare". Financial provisions were outlined and a respectful relationship clause was inserted.

[13] This parenting plan ran into problems which led to the present application. The barrier to the successful implementation of the parenting plan included the relationship the mother developed with a same sex partner. There was evidence of domestic violence between the two.

[14] The Respondent father became concerned about the child in May, 2009 when the Applicant mother and the child began living with one J.C. He noticed aggressive hitting behaviour in the child and indicates the child once told him mommy and J.C. play "bare bums".

[15] The Applicant mother describes the relationship with J.C. as non violent physically, although admits they have had verbal disagreements but never in front of the child. She says there is no smoking or excessive drinking with the child present. She indicates “I do not know what bare bum means and J.C. and I have never acted inappropriately in front of the child”.

[16] She has indicated that J.C. has never struck the child to discipline her and in fact the child likes her and she has been nothing but a loving caregiver to the child.

[17] The Respondent father made reports to the R.C.M.P. and Minister of Community Service which resulted in his dissatisfaction because no action was taken. There is evidence that the Applicant mother and J.C. were interviewed by an agent of the Minister of Community Services and found everything to be in order.

[18] With respect to this relationship presently, the Applicant mother lives alone near her mother and father. She has a two bedroom home. She remains in a relationship with J.C. who works in * but plans to visit in the fall. J.C. has been supportive of all her endeavours and they remain in telephone and internet contact.

There is a denial that she has been a victim of domestic abuse in this relationship. Denial also that she or J.C. would do anything to cause harm to the child.

[19] Through her counsel, the mother proposes a parenting order that she says would be workable. It is a partial reflection of what the parties had agreed to in 2008. It appears deterioration of consensus occurred as a result of her relationship with J.C. This order would reference parenting time in a respectful and informative atmosphere between the parties in a week on/week off scheduling, special occasion access was provided for. Schooling and transportation were recommended (the Court did not agree with the mother's proposal, see supra).

[20] The father does not believe the parties can make joint decisions, although he has now agreed to unsupervised access. He does not believe that the week on/ week off parenting time is in the best interests of the child. His counsel has also proposed an order that provides for unsupervised alternate weekend, a weekly visit each Wednesday, from 3 p.m. to 6 p.m. and other time on special occasions. This would be in the form of an order for joint custody and provide for consultation on significant decisions that affect the child. Final decisions would be made by him where there is disagreement. Both parties could make direct inquiries to

institutions, officials and persons who were involved in the child's life. He says "D... (the mother) and I do not have a good history of communication on joint decision making".

[21] Mediation is not available to this court to assist the parties in understanding how to communicate for the purpose of joint decision making.

Home Study:

[22] There was a home study done by Ilonka F. Thomas, MSW, RSW on March 5, 2011. It was further amended on April 6, 2011. The assessor was aware of "one of their main difficulties at this time is ineffective communication about their daughter". She refers to the mother's parents telling the father about their concern that she was taking the child to places where there was excessive drinking and smoking of marijuana. There was also evidence of domestic violence between the mother and her same sex partner. There was some evidence that the mother was afraid of her partner and controlled by her.

[23] The assessor describes the child (through her teacher) "as a busy child, sociable, loving and kind". She speaks English and French as does her father. Her

mother is uni-lingual, English. The teacher also indicated she may not respond to direction and is, instead persistent.

[24] The conclusions reached by the assessor in the March report was that the child remain with the father during the school week and access take place every other weekend (supervision recommended at the time). She did not have an opportunity to interview the mother's partner J.C. as she was out of the province. It was her belief that the father's "parenting are sound and he appears to have the best interests of the child in mind at the time. He is insightful and appears to have good judgement where decision making is concerned about his daughter".

[25] The purpose of the amended home study in April 6, 2011 was because the mother's partner J.C. had returned home from and was available for an interview. She was interviewed twice, once with the child present at the mother's home. Both parties have resigned themselves to J.C. working outside the province and returning from time to time. They denied any physical abuse between them. All other allegations of excessive drinking, use of drugs or smoking in front of the child were denied.

[26] The assessor observed an excited positive reaction from the child towards J.C. The child did not know beforehand she was going to see J.C .and she observed a happy and content child, keen on seeing and relating to J.C. Following her observations with respect to this interaction, parenting and the positive state of the home, the assessor has amended her March recommendation to support shared custody of “one week at a time, with transition at 4 p.m. on Sunday afternoon”.

The Law:

[27] The authority of the Court to deal with custody and access is set out in section 18 of the **Maintenance and Custody Act**.

> “**Powers of the court**
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> **18(1)** In this Section and Section 19, ‘parent’ includes the father of a child of unmarried parents unless the child has been adopted.
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> **(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.

(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."

[28] Variation of a court order requires a change in circumstances.

"**Powers of 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 circumstances since the making of the order or the last variation order.

(2) When making a variation order with respect to child maintenance, the court shall apply Section 10."

[29] The decision of Justice Goodfellow in **Foley** v. **Foley** [1993], 124 N.S.R. (2d) 198 is often cited as helpful for factors the Court might consider.

Definition of (sole) custody:

[30] In the case before the Court, the Applicant is asking for the custody (primary care) of the children which was defined in *Kruger v. Kruger & Baun* (1980), 11 R.F.L. (2d) 52 (Ont. C.A., Thorson, J.A.) P. 78.

> "In my view, to award one parent the exclusive custody of a child is to clothe that parent, for whatever period he or she is awarded custody, with full parental control over the ultimate responsibility for, the care, upbringing and education of the child, generally to the exclusion of the right of the other parent to interfere in the decisons."

[31] Another form of custody, is joint custody, which has a different definition, depending on how that form of parenting is conceived by individual parents. Although there have been decisions that go either way, a lot of cases have denied an order for joint custody, where for example, there is no spirit of trust or cooperation. See **Stefanyk v. Stefanyk** 1994 CanL II 6390 (NS S.C.), (1994) 128 N.S.R. (2d) 335 (Saunders, S.C.J.). There is, however a presumption of joint custody under section 18 of the **Maintenance and Custody Act**. See **Dayle v. MacNutt** (1995), 144 N.S.R. (2d) 301 (Scanlon, S.C.J.)

[32] Levy, J.F.C. in **R.E.W. v. K.L.S.** (1997) F.K. 97-0116 (not reported) decided that because sole custody may be a cause of much irritation and conflict, joint custody was ordered as a way to lessen conflict. See also: **Godfrey-Smith v.**

Godfrey-Smith (1997), 165 N.S.R (2d) 245 (MacArnold, S.C.J.) Joint custody has also been ordered where there is a 'realistic hope' that the parties can work together."

[33] The onus is on the Respondent father to show there has been a change in circumstances to vary the November 28, 2008 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.

Conclusion/Decision:

[34] A review of the history of this matter indicates that the parties have in the past been able to agree on the role of each in parenting their child. It is conceded there were minor problems along the way but major problems occurred, mostly in the mind of the Respondent father, when the mother entered into a relationship with a same sex partner. There was concern about that person's character and lifestyle. Concerns over domestic violence, drinking, smoking and exposing the child to this. He was concerned about the improper disciplining of the child by the

third party and possibly inappropriate actions between the mother and her partner in the presence of the child.

[35] This resulted in the mother agreeing to supervised access, something the father requested but now agrees is not necessary.

[36] These concerns have not been proven and the mother's partner now lives in Alberta where she works. She visits the mother maybe twice a year and during one of these visits the home study assessor had an opportunity to observe and interview her with the mother and the child. She observed a positive state of the home and an excited child, happy to see the mother's partner.

[37] This is a case that should have been settled long ago. Neither party has a complaint about the parenting of the other. They do not live more than a half hour car drive from each other or the school the child will attend. These type of litigation serves no purpose towards the best interests of the child in that it precipitates bad relations and creates the impression that, one parent is attempting to control all aspects of the child's life to the detriment of the other.

[38] There is some evidence in the past that the parties were capable of making joint decisions with respect to the child's education in a French school. That pre-school and sports activities were beneficial to the child. As mentioned, the father's concern about the mother's partner disrupted their communication and consensus. This is no longer an issue as confirmed by the assessor.

[39] The order sought to be varied was at that time in the child's best interests but there has been some "water under the bridge" so to speak since then. Those issues raised are a change in circumstance but the material change since 2008 is the child will be attending school this month.

[40] The Court has considered the evidence before it came to the conclusion that joint custody is a serious option in this case. There is a history of some consensus. It will require the parties to communicate for the benefit of their child. They are both good parents and the environment at their particular homes are appropriate for the child. Both parents have extended family that will assist in items they may need such as transportation.

[41] It is in the child's best interests that the Court make the following order:

1. The parties shall share joint custody;

2. The child will reside with each parent one week at a time with transition at 4 p.m. on Sunday afternoon. Transportation to be by parent who is returning the child;
3. There will be unlimited telephone access by either parent. When the child is able to communicate electronically this type of access shall be unlimited;
4. Both parents shall keep the other informed about anything that affects the welfare of the child and this shall be done in a respectful way;
5. The mother shall be in receipt of the Child Tax Credit Benefit and the Universal Child Tax Benefit from Canada Revenue Agency;
6. The parties shall share holidays on a 50/50 basis. Christmas Eve 2011 shall be with the mother because of the schedule set out in the 2008 order;
7. Nothing herein prevents a party from applying for child support.

Counsel for the mother shall prepare the order.

JOHN D. COMEAU
JUDGE OF THE FAMILY COURT