

IN THE FAMILY COURT OF NOVA SCOTIA

Citation: B.A. v. A.A., 2009 NSFC 11

Date: 20090430

Docket: 06D047977

Registry: Yarmouth

Between:

B.A.

- Applicant

v.

A.A.

- Respondent

Editorial Notice

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

Judge: Before the Honourable Chief Judge John D. Comeau,
Chief Judge of the Family Court of Nova Scotia

Heard: Digby, N.S., March 10, 2009
Annapolis Royal, N.S., March 19, 2009

Counsel: Donald A. Urquhart, Esq. on behalf of the Applicant
Bill Watts, Esq. on behalf of the Respondent

Decision Date: April 30, 2009

DECISION

THE APPLICATION:

[1] This is an application brought by B.A., who is the mother of S., born June 1, 2003 and T., born July 11, 2005, for sole custody with reasonable access to the Respondent. The Respondent A.A. is the father of the children and is asking for joint custody with an access schedule that would achieve a 50/50 split in parenting time.

[2] The Application was originally made on August 2, 2006 and there have been a number of consent orders from that time up to November 13, 2008 (this order was only issued on the 22nd of January, 2009). They are as follows:

- December 5, 2006 - issued January 18, 2007. This order, by consent of the parties, provided for joint custody and split parenting times, based on 3 1/2 days each per week. No child support payable by either party.

- January 17, 2008 - issued the same day, orders a homestudy to be prepared on the parties and their children. Costs of the report and financial disclosure were also set out in the order.

- June 26, 2008 issued July 22, 2008. The order required an updated custody and access report, with a different assessor from that ordered in January, 2008.

The fee for the report was waived by the Court.

- November 13, 2008 - issued January 22, 2009. The order set out parenting time (by consent - without prejudice) as follows:

“ Week 1

B.A. shall parent the children from Saturday at 9:00 a.m. until Thursday at 9:00 a.m. A.A. shall parent the children from Thursday at 9:00 a.m. until Saturday at 9:00 a.m.

Week 2

A.A. shall parent the children from Saturday at 9:00 a.m. until Monday at 9:00 a.m. B.A. shall parent the children from Monday at 9:00 a.m. until Thursday at 9:00 a.m. A.A. shall parent the children from Thursday at 9:00 a.. until Saturday at 9:00 a.m. when week 1 commences again.”

ISSUE:

Custody/Access

THE FACTS:

[3] At hearing the parties affidavit evidence was supported by their *viva voce* evidence. The Applicant testified she became concerned about the Respondent's parenting, following the order of January 18, 2007. She says that over the summer and into the fall, the Respondent A.A. was frequently unable to take the children because he could not provide basic necessities, such as food and toilet paper. The phone had been disconnected several times as had been the electricity. Concern was expressed over the Respondent allowing the children to ride on his four-wheeler without helmets and play with an axe.

[4] The Applicant indicates that when the Respondent had the children, he got in a domestic dispute with his girlfriend as a consequence of which he was stabbed. She has expressed concern about his inconsistent access and use of young babysitters and often leaves the children with his sister and they smell of cigarette smoke.

[5] The Respondent does not have a valid drivers license, no insurance and an unregistered vehicle, and she says he still drives with the children in the car (has no car seats for the children).

[6] There have been problems with pick up and delivery of the children, according to the Applicant. There was a concern about Santa delivering a pellet gun at the Respondent's at Christmas for S..

[7] The Respondent father indicates the parties had an on again/off again relationship, with a final separation in March of 2007. Since then they have shared custody of the boys on an equal basis. At one point in time, the applicant mother worked , while the Respondent father looked after the children. "I attended all the doctor and dentist appointments and school appointments".

[8] They have had domestic disputes over the course of their relationship and since they have separated, the Applicant mother has had a relationship with a woman and the Respondent had problems with this at first, but now cooperates with the Applicant's partner to arrange access to the boys. Recently the Applicant's mother bought a home for her not far from her own. The Respondent

says he got by on little money and was able to provide for his boys at his home. At the time of the hearing, he commuted to work in Alberta as a contractor earning \$18.75 an hour, \$1,200.00 a month. The company pays for his flights and because he does a lot of work at home on the internet (blue prints etc.) he can devote half of his time to his children. Both parties admit the Respondent is a good father, giving quality time to the boys, reading books, doing numbers and letters, crafts, baking, camping, fishing and going on nature walks.

[9] The Respondent father disputes certain allegations made by the Applicant. He explained missing his scheduled access as a result of a mix up on the job at the West Edmonton Mall, while he had to wait to install stairs because of a shipping error. Any missed or late exercise of access has been explained by the Respondent and any allegations that he did not have enough food in the home for the boys has been denied by him.

[10] In the past the Respondent admits he used to deal drugs but that has not been done for a very long time. Also in the fall of 2006, the Applicant asked Family and Children Services to inspect the Respondent's home, claiming lack of cleanliness, no food and an unsafe wood stove. No action resulted from this visit.

[11] Concerns were expressed by the Applicant about the boys on the Respondent's four-wheeler without helmets. This is denied by the Respondent, saying they always wore helmets and at this point in time he does not have such a vehicle. He is a hunter and has let the boys use a bee bee gun under his supervision only (one bee bee at a time).

[12] The Respondent wishes to maintain the status quo (joint custody) and does not want her to have all the say (control). The Applicant mother wants the father to have access weekends and holidays.

CUSTODY/ACCESS ASSESSMENT:

[13] An assessment was prepared by consent of the parties and conducted by Kevin Graham, M-Div., M.Sc., CCC. In preparing his report the Assessor interviewed the parties, the children and a number of teachers (Elementary school principal). Other collaterals included a medical doctor, correctional services, the R.C.M.P and various sectors of the Department of Community Services.

“Reason for Report:

The couple appears to have had an unsettled relationship from the beginning. There were many moves and separations. In late 2006 they were before the Court in pursuit of a custody/access arrangement to assist them in working out a suitable custody and access schedule. The children were placed in joint custody between the parents with equal access. The couple reconciled in January 2007 and split again in March of 2007.

The mother brought the current application before the Court. She claims that the father is very inconsistent in his contact with the children; often not picking them up at designated times or not be at home when she dropped the boys off. She mentioned that often the father would not have sufficient food in the home. Basically she contends the father is not able to provide consistent care for the children. Therefore she is asking the Court to place the children with her on a full time basis.

The father’s position is that the couple was managing quite well with the custody/access arrangement until the mother began a relationship with C.A. Apparently C.A. and A.A. had been friends and involved in the drug trade. However C.A. and her partner at the time were investigated and believed that A.A. had informed on them. This led to bad feelings between C.A. and A.A. He believes that it is C.A.’s influence on B.A. that is creating custody and access difficulties between the parents.”

THE LAW:

[14] Section 18 of the **Maintenance and Custody Act** deals with applications for custody and access. That section also provides for the court to always take into account the paramount consideration:

“18(5) In any proceeding under the **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.”

[15] In the case before the Court, the Applicant is asking for the custody 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 and 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 decisions.”

[16] The decision of *Foley v. Foley* (1993), 124 N.S.R. (2d) 198 is commonly referred in arriving at a decision in custody matters because it sets out a number of relevant factors that assists the Court to conclude what is in the best interests of the children .

[17] Particularly relevant here is numbers 2, 8 and 11. These deal with physical environment, time availability of a parent for a child and emotional support to assist in a child developing self-esteem and confidence.

CONCLUSIONS/DECISION:

[18] The parties cannot agree on an appropriate conclusion to their dispute with respect to the children. They have a problem with what essentially appears to be an issue of control. Sole custody anticipates that one parent has more of a say in the children's lives than the other. Parents have separate idea of what joint custody means. In this particular case, the Respondent father does not want to agree to the Applicant mother having sole custody because "she will have all the say".

Parenting of children should be a cooperative effort. On the one hand the Applicant mother finds a list of complaints against the father dealing with the children and then indicates he is a good father to his children and should play a significant role in their lives.

[19] It is the responsibility of the Court to make decision that is in childrens' best interests. A decision that would continue the conflict between both parents is not in their best interests. The Applicant mother is in a common law relationship, which initially caused bad relations with the father. This appears to have been

resolved. The questions therefore, is what benefit is there to ordering sole custody to one parent? Would this be in the childrens' best interest?

[20] The Respondent father has a lot to contribute to the boys; they need a father figure in order to develop into well rounded adults. He is providing that and although there may be some activities the Applicant mother does not agree to, overall their relationship with their father is a positive one.

[21] At the present time, the father's work requires him to commute to Alberta and consequently there may be times he is unavailable to participate in joint decisions concerning the boys.

[22] The definition of custody in *Kruger supra*, is an extreme view of what this type of parenting means. Although statute authority (**MCAct**) does not exist to impose conditions on custody, judicial discretion to provide for children's best interest includes the right to impose such conditions. In *Blois v. Blois* (1998), 83 N.S.R. (2d) 328 (N.S.S.C. App. Div., Jones J.A.) it was determined that section 18(5) of the **MCAct** obliging the Court to give paramountcy to the welfare (best

interests) of the child, the Family Court has the right to place conditions on custody orders.

[23] In this case, because of the mobility of the father in his work and on the evidence as a whole, the Court grants custody of S. and T. to the Applicant mother, subject to the following conditions which mitigates the definition of custody in *Kruger supra*:

1. The parties shall keep the other informed about anything that affects the welfare of the children, more particularly but not limiting to medical and education.
2. Neither party shall permanently remove the children from the jurisdiction of the Court (Nova Scotia). This does not limit vacations/visits outside the Province.
3. Wherever an issue arises concerning the welfare of the children, the parties shall consult on a possible solution. Where they are unable to agree, the custodial parent will deal with in unilaterally.

[24] Access shall remain as set out in the order of November 13, 2008 and issued January 22, 2009.

JOHN D. COMEAU
Chief Judge of the Family Court of Nova Scotia