FAMILY COURT OF NOVA SCOTIA
Citation: T.S. v. S.G , 2012 NSFC 19

Date: 20121029
Docket: 07Y054313
Registry: Yarmouth

Between:

T.S.

Applicant

v.

S. G

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: Heard at Yarmouth, Nova Scotia
June 13, 2012;
August 22 2012;
August 29, 2012;
September 12, 2012

Counsel: Timothy Landry, Esq. For the Applicant
Lynette Muise, Esq. For the Respondent

Introduction / The Application:

[1] The Applicant, T.S., is the father of A. born April [...] , 2009, B. born December [...], 2007, and C. born September [...], 2006. The Respondent, S.G., is the mother of the children. He is asking that an order of this Court dated October 5, 2007, be varied to "full custody of the children with no access to the Respondent".

[2] The Consent Order of October 3, 2007, provided for joint custody with primary care to the Applicant, T.S., and reasonable unlimited access to the Respondent. The other children were not born yet and the order was applicable to C..

[3] There have been numerous orders since 2007 applicable to all the children and it has been agreed that the last order dated April 5, 2011, is the one from which evidence would be considered respecting the issue of jurisdiction and the question of custody and access. That is to say, whether the evidence discloses a change in circumstances sufficient to give the Court the power to vary the April 5, 2011, order.

[4] That order provided for joint custody and primary care to the Applicant father with unsupervised access to the Respondent mother every Monday to Thursday from 12 p.m. to 4:30 p.m. at her residence. All three children were to be present for each access visit. Other access would be provided where the parties agreed.

[5] The Applicant was to facilitate reasonable telephone access between the Respondent mother and the children. Her boyfriend was not to be present during access visits and neither parent was permitted to move from the Town of Yarmouth without permission of the other.

[6] There is an order dated July 28, 2011, that referred to the access schedule in the April order but modified it as follows:

> "9. S.G. will have parenting time from Monday to Friday from 8:30 a.m. to 1:00 p.m. unless otherwise mutually agreed by the parties.
>
> 10. Once the hair follicle tests for both S.G. and M.C. have been completed, if the results show that both parties have been drug-free for six

> months, then the parties can mutually agree to try overnight parenting time every second Saturday night (4 p.m. Saturday until 4 p.m. Sunday).

[7] The evidence discloses that the former and latter provisions for access have been implemented and are being exercised.

[8] The Applicant's post trial brief requests the following relief:

> "The Applicant T.S. is requesting that he be granted primary care of all three children. He is also requesting that the Court grant the Respondent the same access which she currently has to the said three children".

[9] There is no formal reply, however the Respondent through her counsel indicates she is asking for primary care with access to the Applicant.

Issue:

1. Change in circumstances;

2. Primary care / access

The Facts:

[10] This is a typical case where the parties cannot agree on anything with respect to the children. The applicant father is controlling in nature and unwilling to compromise in many instances.

[11] Although relevant evidence is from April 5, 2011, the parties' relationship history is of importance. There have been three custody access assessments (Home Studies) in January and May of 2011 and April of 2012 (which will be discussed in further detail infra.)

[12] The parties began a relationship in 2005 when the Respondent mother was 16 years of age. Their three children are C. born September [...], 2006, B. born December [...], 2007 and A. born April [...], 2009. The parties separated in 2010. Prior to this, in the same year, a referral was made to the Family and Children Services over concerns of lack of supervision of the children. After

the investigation several recommendations were made and their file was closed in the same year.

[13] When they separated, the Applicant father stayed home with the children and supervised access was established for the Respondent mother. There have been lots of problems concerning access, although it is presently unsupervised.

[14] The facts presented to the Court from April, 2011, made reference to the improvement in the Respondent mother's circumstances. If this evidence were taken without the value of hindsight, it would be very difficult to determine why there is a particular status quo and whether there has been a change in circumstances.

[15] A review of the previous home studies indicates that following the separation, the Respondent mother moved from residence to residence and would not have had a stable home for the children. There was some

suggestion she was using drugs and had a number of questionable relationships.

[16] She described a mental health problem as “a chemical imbalance in my brain”. Prescription medication was given to her for depression and “to help me sleep”. Evidence, which has not been disputed, is that she is doing well now. The first assessor recommended therapy and drug intervention as beneficial for her to understand and control her chemical imbalance.

[17] The evidence presented during the course of this application by both parties was designed to show the positive parenting abilities of both parents. During the course of that exercise, as is common, they took opportunities to bring forth negative issues concerning each other’s abilities to parent the children. The end result is that both are good parents and have an ability that might be described as positive to bring up the children in a responsible and caring manner.

Home Environment:

[18] The Applicant lives in his family home (pictures have been entered in evidence) with the three children and current partner K. They have an infant daughter and two other children of K which visit part time. K. has been an excellent access transporter and facilitator for the parties. The Respondent mother lives in a three bedroom apartment in Yarmouth which she has had for a year. She has a relationship with M.C. who at the present time does not live with her.

Present Custody Access Arrangement:

[19] An order of July 28, 2011 (issued November 4, 2011) modified and set out the custody and access arrangements which are in place. The Applicant and Respondent continue to have joint custody with the Applicant father having primary care. The Respondent mother has parenting time Monday to Friday 8:30 a.m. to 1:00 p.m. and every second Saturday night (4 p.m. Saturday until 4 p.m. Sunday). All of this is unsupervised. There were conditions for the later access that she be drug free for six months. This has

happened as the assessor refers to unsupervised weekend access taking place. Other evidence also confirms this.

The Home Study:

[20] The assessor who prepared a Home Study dated April 14, 2012, saw the following issues:

> "The issues seen by this writer are the following:
>
> 1. T.S. and his family distrust S.G. and are critical of her and vice versa. T.S. spends a lot of time talking abut the past wrong doings of S.G. and little time acknowledging some of her positive steps and recent personal gains. T.S. and S.G. do not have effective communicating patterns and rarely, if ever, see each other. Most of the transporting of the children back and forth, though a small distance, has fallen on T.S.'s partner, K.
>
> 2. S.G. and her family believe that T.S. is too dependent on others for financial assistance and should find a job, obtain some retraining, and be self supporting as she is. T.S. is currently on Social Assistance and has no job prospects in sight. His partner is collecting maternity benefits and has decided she is unable to return to work.
>
> 3. The couple appears to have been through a destructive relationship. It is S.G.'s belief that T.S. is overstepping his bounds by asking for sole custody and child support since she has met al the court's requirements to reassume the role of parent. There is nothing negative to suggest the current arrangement vis a vis access by S.G. is not working.

4. S.G. believes that T.S. is not good with limit setting, structure, needed schedules and his method of discipline is too harsh. She proudly showed off her certificate to indicate she had completed a Parenting Course at Parent's Place. T.S. has not done this although it was requested by the court. S.G. is worried about the children in that they are "always exhausted when they come to visit with me." To her this suggests that the children are not properly cared for in terms of a sleep schedule and have too many activities for their young age. Both T.S. and K, however, state that there is a scheduled bedtime routine for all children and it is adhered to regularly.

5. T.S. and his family believe that S.G. is unstable and may have a mental illness, namely depression, and would benefit from ongoing mental health treatment. They say S.G. is a rigid, controlling, often rude, arrogant and unable to be flexible. S.G. says she tries to be reasonable with T.S. and their discussions always deteriorate into screaming. T.S. would use almost the same words to describe S.G.

Recommendations

1. Custody of C., B. and A. be "joint" with the full understanding that both parents share in the decision making regarding the education, emotional, medical, and spiritual needs of the chid. The time spent with S.G. to be gradually increased so that in three or four months' time she can assume the role of primary care provided, as intended when the Home Study of January 2011 was completed. At that time it is recommended that the children visit with their father every other weekend as well as a day or two during the week. Shared parenting of the children is the goal. Other access to be determined, i.e., summer vacations, holidays, as the parties agree with reasonable times and dates.

2. Parenting course for T.S. and K. S.G. has already completed this course.

3. Possible mental health assessment for C. to rule out possible ADHD.

4. T.S. and K. to consider a referral to Family & Children's Services to access a family support worker and additional resources.

5. Neither parent discuss the court case in front of the children nor their dislike for the other parent. Negative comments regarding the other parent not to be made in front of the children.

6. The driving and transportation of the children from one parent to the other to be shared 50-50%. The weight of this responsibility is now resting on K and this is inappropriate and unfair.

7. No smoking to be done in either household with the children present."

[21] The Homestudy of January, 2011, was prepared by a different assessor, Michael Donaldson. This report was referred to by the present assessor with the mistaken belief that the intent of the former report was that the Respondent mother "assume the role of primary care provider". Although Mr. Donaldson referred to the children being placed in the primary care of the father until such time as a number of conditions on the Respondent mother (negative drug test, residence, a therapeutic relationship). He meant she would have unsupervised access. There is no reference to a primary care recommendation.

[22] The subsequent assessment of May, 2011, prepared by Mr. Donaldson concludes that the mother had complied with the conditions set out in his January, 2011, assessment and that it would be "appropriate to increase S.G.'s current parenting time" as well as structure a schedule that will maximize her time with all three children as well as accommodate her current work schedule. This has resulted in the access schedule referred to earlier.

[23] Assessments are very helpful to the Court, but it must not delegate authority to award custody to an assessor (see ***Snodden*** v. ***Snodden***, 2004 Carswell Ont. 1901).

[24] Further, where the Court determines the assessor's conclusions (with respect to primary care in the case before the Court) were inconsistent with objective facts, the Court may reject the recommendations [see ***Blumer*** v. ***Blumer*** 2004 Carswell BC 473, 1 R.F.L. (6^{th}) 16]. The Court in cases before it will decide what weight to give to an assessment (homestudy) depending on the facts of each case.

The Law:

> "**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."

[25] Both counsel in their post trial (summation) briefs refer to Justice Goodfellow's decision in ***Foley*** *v.* ***Foley****, 124 N.S.R. (2d) 198.*

> "Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:
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> 1. Statutory direction (***Maintenance and Custody Act***)
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> 2, Physical environment;
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> 3. Discipline;
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> 4. Role model;
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> 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 for 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 who 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 as social workers, psychologists, psychiatrists, et cetera;

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, et cetera;

14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent;

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

17. Any other relevant factors.

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?

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."

[26] ***Gordon*** v. ***Goertz***, [1996] 2 S.C.R. 27, McLachlin J. (as she then was) which is used to consider mobility issues dealt with a change in circumstances as a preliminary matter.

"12. What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: ***Watson*** v. ***Watson*** (1991), 35 R.F.L. (3d) 169

> (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: ***MacCallum*** v. ***MacCallum*** (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. 'What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place': J.G. McLeod, Child Custody Law and Practice (1992), at p. 11-5.
>
> 13. It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order."

[27] Primary care is perceived to have the same context as sole custody. This is what many parties believe as set forth in ***Kruger*** v. ***Kruger*** & ***Baun*** (1980), 11 R.F.L. (2d) 52 (Ont. C.A.) at 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 decisions."

[28] When joint custody is ordered primary care is a condition of that type of custody. This form of custody requires communication and a spirit of trust and cooperation. Both parties must work for the best interests of the children.

[29] The Applicant already has primary care, so the onus is on the Respondent to show there has been a change in circumstances. It is a two step process. First, the Respondent must prove a material change; and second, she must prove that as a result of the change the prior order no longer reflects the children's best interests (see ***Roberge*** v. ***Roberge*** 2005 Carswell B.C. 31).

Conclusions / Decision:

[30] The Court has commented on the applicant father's propensity to be rigid and sometimes uncooperative when it comes to access schedules. There is a status quo which appears to be working in the children's best interests. They are happy and content. In order to continue and further the best interests of the child, the Applicant father must realize that joint custody requires a spirit of trust and cooperation. Cooperation with the Respondent mother is necessary to contribute to the welfare of the children and if he fails to do this, he is not fostering the best interests of his children.

[31] Counsel for the Applicant argues there is no change in circumstances sufficient to provide the Court with jurisdiction to vary the order of April 5, 2011, or any of the previous orders. It is clear the Respondent mother has followed through with the recommendations made in the first Homestudy of Mr. Donaldson. This was not any unforeseen change in circumstances and these changes were necessary for her to obtain unsupervised access, which is now the case.

[32] There is no change in circumstances to warrant varying the order of April 5, 2011. The Applicant continues to be the primary caregiver and the parties are joint custodians. It is in the children's best interests that the present situation continue. The children are happy and content.

[33] This matter is dismissed with the understanding the order of April 5, 2011 and its subsequent modifications to access, July 28 2011, are confirmed to in force.

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