

FAMILY COURT OF NOVA SCOTIA

Citation: *G.N. v M.S.*, 2009 NSFC 32

Date: 2009-01-30

Docket: FKMCA-016795

Registry: Kentville, N.S.

Between:

G.N.

Applicant

v.

M.S.

Respondent

Editorial Notice:

Edited by Judge for grammar, punctuation and readability

Judge: The Honourable Judge Marci Lin Melvin

Heard: January 27, 2009, in Kentville, Nova Scotia

Written Decision: January 30, 2009

Present: G.N., Applicant, self-represented
M.S., Respondent, self-represented

By the Court:

[1] This is an application by G.N., for an order for shared custody of two children. Neither party had legal representation and both expressed that they wished to represent themselves.

[2] The Applicant requested the Court to order parenting time to the above children similar to the parenting time as set out in an order issued in 2003, referring to another child of the parties who is not the subject of these proceedings.

[3] That order determines joint custody, day to day care and control, with very specific alternating weekly access during the school year.

[4] The Applicant testified that he was not living with the Respondent when their baby was born. Sometime subsequent to this child's birth, he moved in for "five or six months." He said it was during this time that he purposely "planted the seed" so the second child could be born and the first child could have a "friend" to grow up with. However, the parties separated prior to the second child's birth.

[5] At this time the first child is three years old and the second child is three months old. The Respondent mother has been their primary caregiver.

[6] The Applicant father's evidence is he lives in his own home, there are enough rooms for the children, he's a carpenter, he works in HRM, takes classes at Mount Saint Vincent University two days a week, and his 74 year old mother will care for the children while he is working and in class. He has a 70 pound pit bull. He doesn't pay child support because his income is below guideline amount.

[7] He testified that the Respondent mother was a good parent, but he had issues with her being negative, gloomy and not smiling.

[8] The Respondent mother's evidence was that she was on "welfare", the Applicant father worked in HRM daily, she was able to care for the children as he was working, and she still breast fed the baby and wants to until he is a year old. She testified the Applicant was a good parent but their three year old would be upset if he wasn't with her.

[9] Both parents testified to their love of their children.

[10] The Court finds the parties to have a reasonably amicable relationship in that even though it would appear they are no longer a couple, the Respondent mother and their children still have Sunday suppers with the Applicant and his mother at his mother's home. This is commendable as it is important for children to feel comfortable with both parents present whether or not the parents are together as a couple.

[11] The *Maintenance and Custody Act*, chapter 160, RSNS, s. 18(2), gives the Court authority to 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."

[12] The most vital aspect for a Court to consider is what is in the best interest of the child. Oft cited is the case of **King v. Low** (1985), 44 RFL (2d) 113 (S.C.C., McIntyre,J.) at page 126:

“I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be solely determined on the basis of physical comfort and material advantages that may be available in the home of one contender or the other.”

[13] Although this application is not a competing application for custody, it is still necessary for the Court to consider and determine what is in the best interests of the children. And although the Applicant father seeks “shared custody,” he requests that the Court consider an order like the one issued by the Court in 2003 regarding an elder daughter, and in that order, the parties had joint custody, with the Respondent mother having “day-to-day care and control” of the child.

[14] It is important that children have maximum contact with both parents, however in all cases, the best interests of the children have priority and every other aspect has to be weighed against that backdrop.

[15] Given that the Respondent mother is available on a daily basis to care for the children while the Applicant father works and furthers his education, it seems to make little sense to foist the children on a babysitter even if the babysitter is family.

[16] In **Murray v. MacKay**, 245 N.S.R, (2d) 261 (C.A.), the Nova Scotia Court of Appeal held that where a mother was available to care for the child, it wouldn't be appropriate to give the father access when he would have to leave the child in the care of someone else while he was at work.

[17] Based on the Respondent mother's evidence, the children seem to have a close connection with her. The three year old sleeps in the same bed as she does, isn't used to a lot of other people, and has never spent an overnight with the Applicant father without the Respondent mother being there. The baby is still being breast fed, and even though the Respondent mother testified she sometimes expressed for bottles, it didn't seem to be a regular occurrence. That is not to say that the children do not or should not have a close connection with the Applicant father.

[18] The Court does not find that a shared custody order would be in the best interests of the children at this time. Given the evidence with respect to the Applicant father's employment, continuing education, and necessary travel time, when he would be unable to care for very young children, and given the Respondent mother is home with the children and can provide them with the care and attention they need, and given the parties have an amicable relationship, the Court hereby orders as follows:

The Applicant and the Respondent shall have joint custody of the children.

The Respondent mother will have primary care and control of the children.

The Applicant father shall have parenting time with his children when he is not working. He will be responsible for their care when they are with him.

If either parent requires childcare for their children, they will ask the other parent first, and advise the other parent who the alternate babysitter will be.

Given that the parties are comfortable with each other, given they have a seventeen year old daughter who is the subject of a joint custody order, and especially given the younger children may have a level of comfort in the combined presence of their parents the Applicant father's parenting time can and should continue to include times spent together as a family unit on special occasions, whether it's a family Sunday dinner, a child's birthday party, or a time over Christmas. Other than that, the Applicant father needs to have singular parenting time with the young children, and he comes across as being a loving and committed parent.

The Applicant father will have specific parenting time every Saturday from 10 a.m. until 2 p.m. and every Sunday from 10 a.m. until 2 p.m., for the next three months. In three months, the baby will be six to seven months old and perhaps a bit more adept at taking a bottle, so the Applicant father's parenting time will be increased from 10 a.m. until 4 p.m. All parenting time will be contingent upon the weather and the driving conditions, because if the weather and driving conditions are bad, the parties will have to decide on another time. Once the baby is no longer breast feeding, this specified parenting time can be reviewed to include overnights. The Applicant father may have other parenting time as may be mutually agreed upon by the parties. The Applicant father's dog will be carefully confined in a safe and

acceptable area while he has the children in his care, and the children will not be exposed to the dog without extremely careful supervision.

Marci Lin Melvin, J.F.C.