

FAMILY COURT OF NOVA SCOTIA

Citation: *K.L.E. v C.R.F.*, 2018 NSFC 17

Date: 2018-06-12

Docket: FATMCA-101301

Registry: Antigonish

Between:

K.L.E.

Applicant

v.

C.R.F.

Respondent

Editorial Note: Identifying Information has been removed from this electronic version of the judgment.

Judge: The Honourable Judge Timothy G. Daley

Heard: June 12, 2018, in Antigonish, Nova Scotia

Oral Decision: June 12, 2018

Counsel: Colin Strapps for the Applicant
Roseanne Skoke for the Respondent

Introduction

[1] This decision is about a young boy, C.F., who is four and a half years old, and what parenting arrangement is in his best interests. Specifically, I must decide whether he should reside primarily in the care of his father, C.R.F., who lives in the New Glasgow area in Pictou County, or in the primary care of his mother, K.L.E., who resides in Monastery in Antigonish County.

[2] The parents began their relationship in 2011. They lived together from October 2012 to April 2015. They attempted to reconcile twice but were unsuccessful, and they ultimately separated in 2016.

[3] Shortly after C.F.'s birth the parents moved to a home in New Glasgow, Pictou County and resided there until their separation. C.R.F. continued to reside there until recently. He and his partner then relocated to a nearby home in the same area. As noted earlier, K.L.E. relocated to reside in Antigonish County.

[4] After separation, the parents cared for C.F. in a shared parenting arrangement and continue to do so. Initially, it was in a two-two-three pattern and then in a week-about pattern after K.L.E. moved to Antigonish County.

[5] As a result, C.F. travels between Pictou and Antigonish Counties each week in a shared parenting arrangement. He attends two different day cares/pre-schools.

Issues Not in Dispute

[6] The parties agree that this case is a relocation matter in that K.L.E. has relocated to Antigonish County and she is proposing to have C.F. with her primarily. Given the distance between the homes, it is agreed that this constitutes a request for relocation.

[7] As well, neither parent has provided any alternatives to their two positions, which are primary care with K.L.E. in Antigonish County or primary care with C.R.F. in Pictou County. K.L.E. has made it clear that even if I deny her relocation request, she will not return to Pictou County to reside. I, therefore, will not consider the alternative of a parenting arrangement in which she resides in Pictou County.

The Law and Analysis

[8] When I consider this matter, I must do so within the context of the law. The law applicable in this is found under the *Parenting and Support Act, 1989* RSNS c.160 as amended (the *Act*). There are several sections to be reviewed, but the first two, which are always important in any decision regarding children, are ss.18(5) and (8). Section 18(5) reads,

In any proceeding under this Act concerning custody, parenting arrangements, parenting time, contact time or interaction in relation to a child, the court shall give paramount consideration to the best interests of the child.

[9] S.18(8) sets out the maximum contact principle as follows:

In making an order concerning custody, parenting arrangements or parenting time in relation to a child, the court shall give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child, the determination of which, for greater certainty, includes a consideration of the impact of any family violence, abuse or intimidation as set out in clause 18(6)(j).

[10] The *Act* also addresses relocation. Section 18H, among other sections within the *Act*, indicates that there is a determination to be made initially about where the presumptions and burden of proof lie, when a relocation application is made. Is it on the parent moving or is it on the parent opposing the move? That depends on which type of circumstance they find themselves in.

[11] Counsel have already agreed that s.18H(1)(b) applies in this circumstance, and that section reads:

When a proposed relocation of a child is before the court, the court shall be guided by the following in making an order:

...

b) that the relocation of the child is not in the best interests of the child if the person requesting the order and any person opposing the relocation have a substantially shared parenting arrangement, unless the person seeking to relocate can show that the relocation would be in the best interests of the child.

[12] That is the circumstance before the court. There is no question that the

parties had a substantially shared parenting arrangement from separation to this day. Thus, the burden of proof rests with K.L.E. to prove, on the balance of probabilities, that the relocation is in the best interests of the child. C.R.F. bears no such burden. The presumption is that the current arrangement of the child residing in Pictou County is in the child's best interests unless K.L.E. can displace that by providing evidence which persuades me, on a balance of probabilities, that the child's best interests are in accordance with her relocation proposal.

[13] In determining what is in a child's best interests, the *Act* also addresses this. Section 18(6) lists several factors the Court must consider, if applicable, but it is not a closed list. Thus, the court may consider other factors.

[14] The decision of *Foley v. Foley* 1993 CANLII 3400 (NSSC) sets out factors which could be included in such an analysis. I find that, for this decision, it is sufficient to only refer to the factors set out in the *Act*. Most, if not all the factors in *Foley* have been subsumed or included in the factors under s.18(6).

[15] Section 18(6)(a) requires that I consider C.F.'s physical, emotional, social and educational needs, including his need for stability and safety, taking into account his age and stage of development.

[16] C.F. is four and a half years old. He is in either a pre-school or pre-primary program in both counties. He is young and extremely dependent on his parents. A child of C.F.'s age has unique needs and one of the most important is stability. In this case, I accept that each of the parents has a reasonably stable plan for C.F.

[17] But I also must consider his physical, emotional, social, and educational needs, including safety needs. I find that his physical needs are being met by each parent. There is no question that he is being well looked after in their care and that they are more than adequate parents. There is no evidence before me that I find indicates anything to the contrary. In fact, the only issue raised is C.R.F.'s comment that when C.F. comes into his care sometimes he is out of sorts. But in his evidence, and to his credit, he did not necessarily attribute all of that to K.L.E. He suggested it might have to do with the parenting arrangements themselves, and the fact that C.F. is in two different pre-schools, he travels a lot, and perhaps that he can't settle in. C.F. is living out of a suitcase, as one counsel described it, and I find that to be a reasonable probability in the circumstance. I do not find fault with either parent for his behaviour, except to say that the parenting arrangement is untenable. Both parents agree.

[18] Respecting safety, there was one occasion C.R.F. put C.F. on his lap to do a little driving. While I don't condone this unsafe behaviour, C.R.F. acknowledged this as unsafe and I find it does not represent a pattern or a view of parenting, just an isolated incident of bad judgment. It does not impact the assessment of parenting.

[19] Regarding his emotional needs, I find that the parents are looking after him well. However, I do have some concerns around that issue. The first concern, which also relates to stability, is that C.F. has had several residences with his mother, somewhere between six and seven after separation. That is not to say she should not find the best accommodation, but it is to say that this is an unstable environment for C.F. K.L.E. is an adult with all the cognitive abilities to understand what is happening, but for a young child like C.F. that is a lot of change, and it doesn't reflect a stable environment or history.

[20] However, K.L.E. may have found her "landing spot" and that may settle itself out. At this stage, the evidence is clear there has been some instability in the living arrangements. I do not believe that this is due to anything that K.L.E. has brought on herself. It is a function, in some cases, of landlords needing buildings back, or of moving to better or more suitable accommodation. But the simple reality is it is a great deal of change.

[21] Second, I have some concern that C.F. has been affected by the number of new partners to which he has been introduced by K.L.E. She is entitled to have relationships, of which there have been four since separation. The concern is that in each case C.F.'s been introduced to these men and each time the relationship has ended, some more quickly than others. Family Courts are generally aware that children, when they are introduced to new adults who are endorsed by a parent as being a suitable person for them to get to know, will, to one extent or another, bond with that person. K.L.E. would be telling C.F. that this is a good man to know, I have affection for him, he is going to live with us, and so C.F. begins to form a bond. Each time a relationship ends, it is hard on the adults but even harder on the child because that is a loss of a relationship, after they have already suffered the separation of their parents. That is the challenge.

[22] This issue represents instability, for C.F. To her credit, K.L.E. made the appropriate decisions in at least two of those relationships where she discovered or suspected drug use. She did what was necessary, but that led to instability for C.F.

[23] C.R.F. has raised some safety concerns related to the most recent relationship of K.L.E. with D.M. I am not going to spend much time on this, except to say the ultimate termination of that relationship, about a week or so before this hearing, was the result of K.L.E.'s discovery of D.M. using drugs on at least one occasion. Parents can't police or do criminal records checks on everyone in their lives. Thus, I do not criticize K.L.E. for having relationships with people who are ultimately found to be unsuitable. But it is a cautionary tale about new relationships, particularly with people that we don't know and with whom we have no history. I do not draw from that any inference that K.L.E. has acted inappropriately.

[24] There was some question with respect to D.M. about some violence and arguing. K.L.E. admitted they argued and that the child was sometimes in bed. There was at least one occasion when a cup or glass was swept off a table and broken. I do not find that sufficient evidence to conclude that D.M. was a risk to the child, but, in the end, the risk was at least the drug use and K.L.E. took the appropriate steps in ending that relationship.

[25] With respect to health and educational needs, some issues were raised. First is the cough and infection that seems to plague C.F. I understand that children sometimes are prone to infections such as ear infections, at certain ages, But there is nothing before me that suggests that either parent has been negligent, or is not properly addressing the cough, the ear infections and the related antibiotic use. I find that the evidence simply indicates that C.F. has a bit of a challenge and that, in each home, it may manifest in different ways. Each parent seems to understand what needs to be done.

[26] There is the allegation raised by C.R.F. of K.L.E. neglecting to send along antibiotics on one occasion, but she has satisfied me that she had a plan to get them to him. C.R.F. went to the pharmacy and obtained a supply. K.L.E. points out, and it is not controverted by C.R.F., that there was at least one occasion where the opposite happened and he did not send the medication. I do not interpret that to represent any significant risk to the child. To the contrary, I find generally the parents have acted appropriately with respect to that whole issue, and it will sort itself out over time, with the help of the physician.

[27] The second issue raised about education is that of speech. For C.F., there is a delay and, like many children with good parents, early intervention was sought. C.R.F. admits he did not have a lot of experience with young children and did not catch the delay, but certainly has not contested that the child needs the

intervention. K.L.E. got Early Intervention involved in Pictou County. When she relocated to Antigonish County she again continued with a different service and the child is getting the appropriate service. That speaks to me of an appropriate reaction, supported by C.R.F.

[28] C.R.F.'s evidence is that if the child returns to live with him in Pictou County, he has already spoken to the school C.F. would attend and confirms that they have two speech pathologists on staff who can address this issue. If they recommend other intervention, he will abide by that to the extent that he can. It speaks highly of the parents that they jumped in early, the father deferred to the mother where appropriate and they are addressing it appropriately. I do not draw any negative inferences from that evidence.

[29] The second factor I must consider under s.18(6)(b) is each parent's willingness to support the development and maintenance of the child's relationship with the other parent. I will be brief. There is no evidence before me to suggest that this is an issue for this family. The evidence I have is that the parents cooperate and communicate regularly. I would be surprised if there weren't occasional hiccups and challenges, but they are able to communicate. At exchanges, they are civil, supportive, and there is no conflict.

[30] Their own support networks, including C.R.F.'s common-law partner, and both extended families seem to be supportive of each parent. There is no evidence before me of ongoing or even incidental conflict between any extended family member and either parent. Thus, I have no concerns around that issue.

[31] I find that the parents are prepared to support each other's relationship with C.F. That is reflected in the fact that, since separation, they have successfully parented in a shared parenting arrangement despite the logistical challenges. I do not have any evidence that would persuade me that they are anything other than supportive of one another's relationship with C.F.

[32] I next must consider under s.18(6)(c) the history of care for the C.F., having regard to the child's physical, emotional, social and educational needs.

[33] C.F. is young, four and a half years old. The history of care of the child when the parties were together is not entirely clear to me, but it would appear they supported one another and co-parented him effectively.

[34] Since separation they have had a shared parenting arrangement. C.R.F.

fought to continue that arrangement despite K.L.E.'s relocation to Antigonish County. He has never given up the position that C.F. should be in Pictou County.

[35] I find that the history of care of C.F. is one of support and appropriate behaviours, and I have no serious concerns. I am going to address specific instances that have come forward, but I find that the parents have been appropriate, the history of care has been appropriate and the parents have parented C.F. well, both before and after separation.

[36] I have to consider, under s.18(6) (d), the plans proposed for the C.F.'s care and upbringing, having regard to his physical, emotional, social and educational needs. I find that both plans, considered alone, are quite adequate. K.L.E.'s plan, if relocation is approved, describes support systems in the form of her family that are supportive. The child has a good relationship with those family members and they step in when asked. Her parents live separately and she and C.F. have been to each of her parent's homes on many occasions. C.F. has slept over at their homes with K.L.E. Those relationships are positives for C.F.

[37] K.L.E. has a plan with respect to C.F.'s speech pathology to continue. She has a plan for his education. She has a plan for his care and his child care. I see nothing in her plan that is not adequate and it is quite satisfactory.

[38] The same can be said for C.R.F.'s plan with respect to speech pathology, health, and dental needs. He has already registered C.F. for school. He has a very good support system, including his common-law partner. I see nothing in his plan that is lacking.

[39] I must consider under s.18(6)(e) C.F.'s cultural, linguistic, religious and spiritual upbringing and heritage. In this case, there is nothing in the evidence about any of those factors for me to consider.

[40] I must consider under s.18(6)(f) C.F.'s views and preferences where possible but he so young I have little before me on those preferences. The parties did attempt to introduce hearsay evidence of C.F.'s statements but I am not considering those hearsay statements to a parent as accurate, other than to explain the parent actions and perceptions. Thus, I do not have C.F.'s views and preferences before me.

[41] I must consider under s.18(6)(g) the nature, strength and stability of the relationship between C.F. and each of his parent. I find that each parent has a very

deep and loving relationship with C.F. There is no evidence before me that either parent is inadequate or inappropriate. The relationships of C.F. with each parent are strong and stable.

[42] I must consider under s.18(6)(h) the nature, strength and stability of the relationship between C.F. and each sibling, grandparent and other significant person in his life. There are no siblings. There are grandparents and other significant people in his life. I am satisfied that all those relationships, whether common-law partners, aunts, uncles and grandparents, are appropriate and supportive of C.F. Each person and relationship has a challenge such as work schedules or temporary limitation to physical activity. That is the nature of every family. The question is, are they supportive, are they contributing to the well-being of C.F. and are they contributing to the health and stability of that circumstance for C.F.? I find that the families are very effective supports for each parent and C.F. In fact, that is the reason K.L.E. moved, to seek that support.

[43] I must consider under s.18(6)(i) the ability of each parent to communicate and cooperate on issues affecting C.F. The evidence is clear that the parents have been able to communicate and co-operate effectively. There were some challenges in 2015 around the singular episode described and admitted to by C.R.F. I am sure there have been other challenges but there is no evidence before me that there is any pattern or continuing problem with communication and cooperation. I find that, generally, the parties have done a good job of communicating.

[44] I must consider the impact of any family violence under s.18(6)(j) the following:

The impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

[45] I have also considered s.18(7), which articulates the factors I must consider in determining the impact of family violence.

[46] There has been admission as to what occurred in April 2015. I won't go over that evidence in this oral decision but C.R.F. has said that he admits to it, he is ashamed of his behaviour, and he apologizes for it. He was intoxicated at the time. It was because of his concern over the relationship K.L.E. had with a person

at that time. I am satisfied that his behaviour was wholly inappropriate. Considering the definition of family violence under s.2(da) of the *Act* I find that this incident of April 2015 did amount to family violence. But the evidence is that it was the only occurrence. It is now almost three and a half years later. There is no evidence that anything similar has occurred since. While it certainly would have had an impact on C.F. at the time, there is also no evidence of what subsequent or ongoing impact that has had on him.

[47] There is no circumstance under which family violence is acceptable. Children can be affected directly or indirectly even if they are not present for the incident. That can occur because a parent is traumatized or injured (physically, psychologically, emotionally or spiritually) by the violence. This is particularly so if the family violence is ongoing over time. It has an inevitable effect on the children because the abused parent and abusing parent are interacting with them, they learn dysfunctional behaviours and it affects them, especially if they witness the violence. That is not what occurred here. As regrettable as it was, it was a one-time occurrence that has not formed a pattern of abuse, intimidation or family violence since.

[48] This is a request for relocation and I must therefore consider s.18H(4) of the *Act*. It requires that I consider all the circumstances listed in subsection 18(6) which I have just reviewed.

[49] I must consider under s.18H(4)(b) the reasons for relocation. K.L.E.'s evidence is that the reason she relocated was to be closer to family and have them as physical support including child care, emotional support and for C.F. and simply to be closer to her parents and family. She now has a home, she has had to move less frequently since then, and, hopefully, she has found her "landing spot". I do not find those to be improper reasons at all. There is no evidence that relocation was undertaken to frustrate the parenting time of C.R.F. In fact, the shared parenting arrangement has continued even after relocation.

[50] I note that s.18H(4)(c) requires I determine the effect on the child of any changed parenting time and contact time due to relocation. This is the critical issue in this case because I only have two choices available based on the positions of the parties, and there will be an impact on C.F. no matter what I do here. If he is relocated back to Pictou County with C.R.F., he will lose some parenting time with K.L.E. The same applies to his parenting time with K.L.E. if he remains in Antigonish County.

[51] But I also consider that a decision on relocation will reduce some of the stress on C.F. I find that some of the behaviours of C.F., as C.R.F. describes them, are not the fault of the parent but rather because C.F. is “living out of a suitcase”. He attends two day-cares, he travels between two homes, two sets of families, and he is on the road a lot. This can be a challenge for many children and the younger, often the more vulnerable.

[52] Every child is different. Some children adapt to shared parenting and travelling between communities, but many never do. C.F., it seems, is the latter and I find that is what is happening here. The good news is that whatever the decision, it will settle things down for C.F. He will have less travel, one school to attend, a primary set of friends at school, and, of course, a set of friends when he visits his other parent. It will provide C.F. with greater stability. I find that the effect of the changed parenting time has both a negative and a positive consequence of C.F. which will affect him equally whatever parenting arrangement is ordered.

[53] I have considered under s.18H(4)(d) the effect of C.F.’s removal from the family, school and community due to the relocation. He has family in Pictou County and Antigonish County. He has day-care/preschool in both communities. I am sure he has friends in both places. He isn't involved in activities, though K.L.E. talks about registering him for some now, but C.F.’s life is currently centred around his day-care and his family time. A change will affect him when he is removed from one of those environments. But I also find the effect on him will be the same whatever the decision.

[54] S.18H(4)(f) requires consideration of compliance with previous court orders and agreements by the parties to the application. In this case, there have been no previous court orders. There have been agreements and the parties have abided by them. I have no concerns that that they will not abide by an order going forward.

[55] Since there were no previous court orders or agreements on relocation, I will not consider s.18H(4)(g) respecting any restrictions placed on the relocation in previous court orders and agreements.

[56] In reviewing ss.18H(4)(h) and (i) which require consideration of additional expenses that may be incurred by the parties due to relocation and the transportation options available to reach the new location, the travel between the homes is roughly one hour. Given the current arrangement, which requires that travel, the parties already incur that cost in the shared parenting arrangement. I

find that there are adequate transportation options and the expenses are not so severe that it would impact on either parent's parenting time.

[57] I am satisfied under s.18H(4)(j) that adequate notice had been given by this application and response.

Decision

[58] I now return to the burden of proof. I find that both parents, their plans, and their support systems are appropriate. They have each addressed C.F.'s health and educational needs including his speech impediment. I find that their history of parenting has been appropriate for each parent. There is simply little to choose between the plans.

[59] Because of my finding that this is a substantially shared parenting arrangement, the burden of proof lies with K.L.E. to establish, on a balance of probabilities, that the relocation is in C.F.'s best interests. Given the restrictions in the plans of the parties, that they will remain in their respective counties regardless of this decision, I only have two choices; order that C.F. reside primarily in Antigonish County with his father or primarily in Pictou County with his mother.

[60] Considering my finding regarding the various factors for assessing C.F.'s best interests set out earlier, I find that K.L.E. has failed to meet that burden of proof. As, well, K.L.E.'s position has removed the options of continuing the shared parenting arrangement in Pictou County or ordering that she have primary care of C.F. in Pictou County.

[61] I therefore order the following:

- a. The child will be returned to the County of Pictou into the primary care of C.R.F.
- b. The parents will have joint custody of C.F. The parents will keep each other informed of all major issues concerning C.F. They will share information openly and communicate about those issues. The parents will meaningfully consult on all major decisions concerning C.F.'s health, education, religion and general well-being and will make joint decisions on those issues. If they cannot resolve any issue, they may make application to court for resolution.

- c. Each parent will have equal and full access to any information and attend any meetings with any third-party service provider, including, but not limited to, schools, teachers, doctors, dentists, hospitals, therapists, and speech pathologists.
- d. K.L.E. will have parenting time three out of every four weekends from Friday after school until Sunday at 5 p.m. When C.F. begins school, that parenting time will be expanded to include any in-service days on Fridays and any statutory holidays on Mondays that may fall on those weekends of K.L.E.'s parenting time.
- e. C.F. shall have reasonable telephone or video conferencing contact with each parent.
- f. The parents will share parenting time at Christmas on an approximately equal basis, such that during the Christmas school break, one parent will have C.F. with them from the beginning of the Christmas school break by picking him up at school, and will keep him until Christmas day at 2:00 p.m. The other parent will have C.F. from Christmas day at 2:00 p.m. until he returns to school. If it is K.L.E.'s year to have him for the second half of that break, she shall return him to C.R.F.'s care at 5:00 p.m. the day before school starts. Each year this schedule will rotate. K.L.E. shall have C.F. for the first half of the Christmas break schedule in 2018.
- g. Easter break will be divided and rotated approximately equally such that one parent shall have C.F. from Thursday after school to Saturday at 2:00 p.m., and the other parent shall have C.F. from Saturday at 2:00 p.m. until Monday at 5:00 p.m. K.L.E. shall have C.F. with her for the first half of the Easter break in even number years and C.R.F. will have C.F. with him for the first half in odd number years.
- h. Commencing in the summer of 2018, during the summer school break, the parties shall enjoy parenting time with C.F. on a week-about basis. The exchange will take place on Sunday at 5:00 p.m. each week, unless otherwise agreed. Summer school break parenting time will begin for K.L.E. on the first Sunday after the end of the school year. C.F. shall be returned into the care of C.R.F. at least four days prior to the commencement of school.

- i. School spring break shall be divided approximately equally such that whoever has C.F. for the weekend preceding the beginning of March break, will keep him until Wednesday at 5:00 p.m. The other parent will have him from Wednesday at 5:00 p.m. until either Friday at 5:00 p.m. or through the weekend.
- j. There will be no special arrangements for C.F.'s birthday.
- k. K.L.E. shall have parenting time on Mother's Day from 9:00 am to 5:00 pm and C.R.F. shall have parenting time on Father's Day from 9:00 am to 5:00 pm.
- l. Transportation will be shared by the parties such that the parent who is coming into care of C.F. for their parenting time will pick the child up at the other parent's home unless otherwise agreed.
- m. Both parents are absolutely prohibited from excessive consumption of alcohol or being intoxicated at any time when in the care of C.F.
- n. Both parties are absolutely prohibited from introducing any new partners to C.F. for four months after the commencement of the relationship, and they must discuss with one another the plan for the introduction of that partner.
- o. Considering all the circumstances, including the extra costs of transportation for parenting time and the incomes and other circumstances of the child and the parents, no child support shall be payable by either parent.

[62] Counsel for the Applicant will draw the order.

Timothy G. Daley, JFC