

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: J.F.B. v. S.L. M., 2008 NSSC 395

Date: 20081230

Docket: SFHMCA-036596

Registry: Halifax

Between:

J. F. B.

Applicant

v.

S. L. M.

Respondent

Judge: The Honourable Justice Mona Lynch

Heard: November 3, 4, 5, 6, 7 and 10, 2008, in Halifax, Nova Scotia

Written Decision: December 30, 2008

Counsel: G. Michael Owen, for the Applicant
Deborah I. Conrad, for the Respondent

By the Court:

Background:

[1] An application was made by the father of the three children for custody and access. The three children are: * (hereinafter the oldest child); a girl aged 15, * (hereinafter the middle child); a girl aged 9; and * (hereinafter the youngest child), a boy aged 7. The oldest child was adopted by the mother prior to the marriage of the mother and the father. The middle child is the biological child of the mother and the father. The youngest child was adopted by the mother and father around the time of their separation. The oldest child has developmental delays.

[2] The mother and father met in B. in 1996 where they were working in *. They married on March 14, 1998 in Nova Scotia and they lived in Nova Scotia until the year 2000 when they moved with the oldest child and the middle child to N.. The mother and father separated in October 2001 and the final adoption for the youngest child occurred in December 2001.

[3] The father has been involved in the oldest child's life from the earliest stages of the mother's relationship with the oldest child. Although the father was not a party to the adoption of the oldest child, he has been the oldest child's father since she was approximately three years old. As was stated by the court in N. at the time that the mother and father were divorced, he is the only father the oldest child has ever known.

[4] Divorce proceedings between the parties were commenced in N. in 2002. During the divorce proceeding there was concern regarding sexualized behaviour exhibited by the middle child. Access between the father and the middle child was supervised for a period of time and there were concerns raised regarding sexual abuse of the middle child by the father. These concerns and allegations were determined to be unfounded.

[5] Shortly after the mother and father separated the oldest child began expressing reluctance to visit with the father. Around this same time the oldest child began using only the mother's surname rather than the names of both parents which had been the norm up to that point.

[6] In the divorce proceeding the mother sought sole custody of the children with access with the two younger children and the father to be supervised. The mother did not propose any custodial or access provisions for the oldest child and the father. The mother also sought to relocate with the children to Nova Scotia.

[7] The August 2003 divorce decree from N. awarded the parties joint legal custody of the three children with primary physical custody to the mother. The decree stated, among other provisions, that it was each parent's responsibility to use his or her best efforts to consult with the other party and to inform the other party about any significant event in the children's lives. The mother was permitted to relocate with the children to Nova Scotia. The father was permitted two three-day weekends per month in the "nesting home" (the mother's home in Nova Scotia). The parents were to divide the school vacation week. The parents were to have two non-consecutive weeks of summer vacation time. Christmas vacation for the children was shared with each parent having the children for one half of the vacation and the father would have the first half of Christmas vacation in odd-numbered years and the mother in even-numbered years.

[8] The divorce decree from N. provided for reunification therapy between the oldest child and the father with a named therapist. The parents were also to seek the services of a co-parenting counsellor to assist them in communication.

[9] In October 2003 a further order from N. amended the provisions to reduce child support based on the transportation costs for the father to travel to the "nesting home." The amending order also required the mother to travel with the children to the father's home approximately every four months for a long weekend.

[10] Reunification therapy could not start with the therapist named in the N. decree as the named therapist did not offer that service. There was a delay in the commencement of reunification therapy but it commenced in March 2004. Reunification therapy progressed until June 2004 when there were accusations of sexual abuse of the oldest child by the father. The Department of Community Services and the Halifax Regional Police investigated. Both the oldest and middle child were interviewed and no disclosures of sexual abuse were made.

[11] Reunification therapy commenced again in the late fall of 2004 but there was conflict between the parents as to how the therapy would proceed. Further

reunification therapy was terminated by the therapists in early 2005 because of the conflict between the parents as to how to proceed with the therapy.

[12] A further allegation of sexual abuse of the oldest child by the father was made in June of 2005. The referral to the Department of Community Services was made by the oldest child's teacher. In November of 2005 all three children were interviewed. The two younger children made no disclosures. During the interview by the social worker and police officer, the oldest child described sexual abuse by her father. The allegation of sexual abuse was to have occurred in N. and a referral was made to the police in that state. An investigation in N. was commenced but did not proceed.

[13] The father made efforts to recommence reunification therapy with the oldest child and searched for a therapist. A new therapist was retained in the summer of 2006 and contact between the father and the oldest child recommenced in November of 2006. This contact continued until the fall of 2007. The mother reported that the oldest child became very upset before and after the sessions with the father. The therapist interviewed the child and the child was clear that she did not want to see her father. The therapist stopped the reunification process after determining that it was not in the best interests of the oldest child to continue. The father has not seen the oldest child since the spring of 2007.

[14] In the fall of 2007 a further concern was raised regarding sexual abuse of the middle child. This was based on a drawing made by the child in February 2007. The child was interviewed by a psychologist in late 2007 and a report was provided in early 2008 from the psychologist explaining the drawing. As a result of this drawing access between the two younger children and the father was restricted to public places or supervised from September of 2007 until January of 2008.

[15] With the exception of the restrictions on access noted, the father has exercised access with the two younger children as set out in the divorce decree from N. since 2003. The father travels from his home in M. twice a month for access with the children. The father resides in the mother's home for the weekend with the two young children. The mother and the oldest child leave the family home for these weekends.

[16] The father is seeking custody of all three children which would result in the three children moving to live with him in M.. If custody is not changed, the father

seeks an order for reunification therapy between himself and the oldest child to commence again. The father seeks longer block periods of time with the children during the summer, Christmas and March break.

[17] The mother seeks to abandon the “nesting home” arrangement and requests that the father exercise access at a place of his choosing while he exercises access in Nova Scotia. The mother also requests that she have the final say on decisions regarding the children. The mother also requests that any further disputes regarding custody and access be resolved through mediation.

Issues:

- [18] a) Should primary care of the three children be changed to the father?
b) Should reunification therapy between the oldest child and the father recommence?
c) If primary care of the three children does not change to the father, what are the best parenting arrangements for the children?

Analysis:

a) Should primary care of the three children be changed to the father?

[19] As with all decisions regarding the parenting of children, my primary and only consideration is what is in the best interests of the children. The father is concerned that the mother has alienated the oldest child from him and that she will do the same to the younger two children. Certainly some of the mother’s actions have been concerning. I have concern that she changed the oldest child’s name from the combined surnames of the parents to only the surname of the mother. As the psychologist involved in the first reunification therapy testified, this could have the effect of symbolically cutting the father out of the child’s life, making the child feel rejected and confusing the child.

[20] The mother has, contrary to the current court order from N., taken the oldest child to therapy without consulting the father. The mother has not kept the father informed about the oldest child’s significant life events and she has not tried to enhance the oldest child’s relationship with the father. The mother believes that

the father sexually abused the oldest child and that belief colours all of her judgment regarding the relationship between the father and the oldest child. The mother's actions are concerning to the court.

[21] On the other hand, the children appear to be thriving in the mother's care. The children are very involved with the mother's extended family and they are very involved in their community. The children are well established in their schools and have friends and connections in Nova Scotia. It would be very disruptive to the children to move them from Nova Scotia.

[22] While the actions of the mother are concerning, it is not in the best interests of the children to change primary care. The children are attached to the mother and their lives in Nova Scotia. The oldest child has not seen the father for over a year and when last interviewed was expressing that she did not want to see her father. If reunification therapy with another person present would be upsetting to the oldest child, changing her primary residence to her father would likely be more upsetting. While the other children have a good relationship with their father, it would not be in any of the children's best interests to separate the two youngest children from the oldest child. The primary residence of the children will remain with the mother.

b) Should reunification therapy between the oldest child and the father recommence?

[23] Reunification therapy has started twice and stopped twice. During both attempts there were disagreements between the parents as to how the reunification therapy should proceed. The mother, in both instances, attempted to become more involved in the reunification process than was contemplated or suggested by the therapists. The initial reunification therapy was stopped because of the parents disagreements and conflict. The second attempt was stopped due to oldest child's discomfort with seeing the father.

[24] The mother believes that the father sexually abused the oldest child and she does not want the oldest child to have contact with the father. An examination of the impartial evidence does not support a finding that the father sexually abused the oldest child. The first investigation resulted in no disclosure by the child. The child's evidence was tainted by the mother's three hour discussion with the oldest child prior to the child being interviewed by professionals. The child's disclosure

during the second interview with the social worker and the police officer resulted in disclosures which can only be described as scripted. The child used the same words to describe what she said happened between herself and the father. When asked to provide outside details, the child could not. The child spoke in a monotone. Some of the events described by the child could not have happened.

[25] Every professional to whom the child disclosed the allegation of sexual abuse by her father remarked on the child's demeanor when making the allegation. Remarks were made about the child using more words than would be her norm. Remarks were made about the child's lack of emotion. Remarks were made about the child using the same verbatim statement without being able to provide consistent details outside of those words.

[26] The social worker who interviewed the child during the second interview raised the concern of the influence of previous questioning and discussions about the allegations.

[27] The oldest child's behaviour during the reunification process was troubling as well. Both witnesses who were involved in the reunification therapy testified that the reunification therapy was going well up to a certain point. In the first attempt the sessions were about to be moved out of the therapist's office when the sessions were stopped as a result of the allegation of sexual abuse in 2004. The psychologist involved in the first reunification effort testified about the "puzzling" behaviour of the oldest child. In the presence of the mother the child was described as not appearing to want any contact with the father. This was contrasted with the child's behaviour with the father in the therapy room when there would be physical contact between the child and the father. The video recording of the initial session between the father and oldest daughter also reveals the closeness in the relationship despite the two not having contact for about two years. The child touches the father's feet with her feet and she appears to be very comfortable in her father's company.

[28] In both reunification attempts the reports from the mother of the oldest child's discomfort with the process was in sharp contrast to the observations of the professionals facilitating the contact between father and child. The professionals would describe progress and the mother would describe the child being very upset. The mother's discomfort with the process and belief that the father sexually abused could have been felt by the child. The child may have been picking up on the

mother's discomfort. This could account for the contradiction in the child's behaviour when in the mother's presence and when not in the mother's presence.

[29] The mother has expressed concern regarding the training of the professionals who interviewed the child and their ability to properly interview a child with the developmental delays of the oldest child. The police officer testified that she had received level two training for interviewing children. A review of the interviews does not raise any concerns for the court in the process or interviewing techniques used in either interview of the oldest child.

[30] There is nothing in the evidence before the court which would cause the court to order a suspension of contact between the father and the oldest child. Reunification therapy should start again.

[31] The father is to seek the assistance of a professional to recommence reunification therapy. If the father is able to find a professional to assist in the reunification therapy, a plan will be formulated by the professional as to how the reunification of the father and oldest child will proceed. The mother and father will be consulted but the final say on the plan will be with the professional. Once the professional develops the plan both parents will follow the plan. The mother will not be able to unilaterally stop the unification process.

[32] The therapist who is currently seeing the oldest child should be consulted to see if he would be willing to be involved in the reunification therapy. The professionals involved in the first reunification attempt should be consulted to see if they would be willing to become involved again. The conflict between the parents will hopefully be resolved by the court order. If there are any concerns or questions about the reunification process, either party may apply to the trial judge for clarification and the trial judge will remain seized of the matter.

[33] The costs of the reunification therapy will be shared by the parties in proportion to their gross incomes.

c) If primary care of the three children does not change to the father, what are the best parenting arrangements for the children?

[34] The father has shown remarkable dedication to his children by consistently, for five years, making the trip twice a month between his home and the mother's home. It is clear that he loves his children and wants to be a part of their lives.

[35] The children will remain in the joint custody of both parents. The mother will consult with the father regarding all major decisions involving the children including decisions regarding education, health and overall welfare. The mother will keep the father informed of all significant events in the children's lives.

[36] The mother has asked for a final say in all decisions. I have found that the mother has not always complied with the current order regarding keeping the father informed and consulting with the father. I, therefore, have concern about the father receiving information and being consulted if the mother is given the final say. The provisions regarding consultation and providing information will remain unchanged.

[37] If the reunification process is successful, the parenting time between the father and the oldest child shall be the same as for the two younger children.

[38] The divorce decree from N. was made when the children were much younger and so the vacation time in the summer was for two non-consecutive weeks. This has caused problems for the father travelling long distances to visit extended family. The father shall have the children in his care for three consecutive weeks each summer. The provision in the divorce decree regarding choice of the vacation weeks in the summer will remain unchanged.

[39] The father has expressed concern that the weekends before and after school vacations at times such as Christmas have not be included in the calculation for sharing time between the parents. Weekends before and after school vacations are to be included in the time to be shared between the parents.

[40] The mother has requested that the "nesting home" arrangement stop as it is too disruptive for both the mother and the oldest child to leave their home every second week. The mother's position is that the "nesting home" arrangement was a temporary arrangement as it was anticipated at the time of the divorce decree that the father would be moving to Nova Scotia. The wording of the divorce decree does not lead me to the conclusion that it was made in contemplation of a move by the father to Nova Scotia. There is provision in the decree for changes should the

father move to Nova Scotia and there was discussion of such a move at that time. The nesting arrangement was ordered to facilitate access between the father and the children at the time the mother was permitted to move with the children from N. to Nova Scotia.

[41] The mother has suggested that the father rent an apartment in Halifax in which he would exercise access. That is not a practical or feasible solution. This would require the father to incur the expense and responsibility of leasing housing space in Halifax to use for access on four or five days a month. A hotel room is not an attractive alternative as it is a confined space for two days of access and it is very expensive.

[42] The “nesting home” arrangement is still in the best interests of the children as it allows for contact between the father and the children in a location familiar to the children. The father is able to move into the children’s lives for a brief period of time each month.

[43] The inconvenience to the mother is outweighed by the need to facilitate access between the children and the father. In the future, the access may include the oldest child and she will no longer be inconvenienced. The mother’s alternative is to take the children to M. for two weekends a month at her expense.

[44] The mother asks that the court order mediation of all future parenting disputes between the parents. If the parents agree that is how they will resolve their disputes in the future, they are free to seek the assistance of a mediator but it will not be a provision in the court order.

[45] The parents are to engage in the co-parenting communication counselling which was ordered in the divorce decree.

[46] The provisions of the divorce decree not changed by this decision remain in effect and should be incorporated into a consolidated order.

Conclusion:

[47] The children will remain in the joint custody of both parents with primary care to the mother. The parents shall consult on all major decisions regarding the children and both parents shall inform the other parent of any significant events in the children's lives that occur when the children are in their care.

[48] Reunification therapy shall commence again as determined by a professional engaged by the father. The parents shall proportionately share the cost of the reunification therapy.

[49] If the reunification process is successful, the parenting time between the father and the oldest child shall be the same as for the two younger children.

[50] The father shall have the children in his care for three consecutive weeks each summer.

[51] Weekends before and after school vacation time to be shared by the parents are to be counted in the time to be shared.

[52] The "nesting home" arrangement will continue.

[53] The parents are to engage in the co-parenting communication counselling which was ordered in the divorce decree.

[54] The provisions of the divorce decree not changed by this decision remain in effect and should be incorporated into a consolidated order.

J. S. C.