

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Churchill v. Kennedy, 2009 NSSC 309

Date: 20090514

Docket: SFHMCA-046782

Registry: Halifax

Between:

John Allen Churchill

Petitioner

v.

Heather Cecilia Kennedy

Respondent

Judge: The Honourable Justice Deborah Gass

Heard: May 5, 6, 7 & 13, 2009, in Halifax, Nova Scotia

Oral Decision: May 14, 2009

Written Decision: October 26, 2009

Counsel: Vanessa Tynes, counsel for John Allen Churchill
Lynn Reiersen, counsel for Heather Cecilia Kennedy

By the Court:

[1] This decision is with respect to an application under the *Maintenance and Custody Act* generally relating to parenting issues. The application was brought by John Churchill under Section 18 of the *Maintenance and Custody Act* respecting the issues of custody, access and maintenance for the child, Zahlee Heather Kennedy Churchill who was born June 21, 2005. Zahlee's mother, the Respondent, is Heather Kennedy.

[2] The parties were able to resolve almost all of the issues and they are to be commended for their efforts to do that. However, the one unresolved issue was the nature and extent of the father's parenting time with Zahlee and, unfortunately, almost four days of court time were consumed by this very narrow issue.

[3] I would like at the beginning just to repeat what I said very early on in this process that this is a situation where no matter what I do at the end of the day you will continue to be parents of Zahlee and communication, and by communication I mean healthy communication, is the key. Regardless of how you feel about each other it is necessary for you to put aside those feelings and focus on your daughter when communicating with each other.

[4] I am not going to go over any of the evidence in any detail, it's fresh in everyone's mind. I will more likely do what one would consider to be touching on the flavour of the evidence and how it impacts on the decision I am being asked to make today.

[5] There was a lot of sniping in this proceeding, a lot of "he said, she said" and I had to keep reminding myself to keep things in perspective, that we were dealing with the very narrow issue of parenting time and what is in Zahlee's best interests, and not who did what to whom. In an effort to keep things in perspective I had to keep reminding myself of that and it seemed at times that the parties lost sight of what was before the Court. Notwithstanding the fact that they had agreed on so many of the issues the litigation that occurred was equivalent to what one would have expected in a fully contested hearing on all of the issues and that's unfortunate indeed.

[6] Zahlee is soon to be four years old. Her parents separated in March of 2006, although it appears from the evidence that the relationship suffered turbulence and

was marked by separations throughout. From the evidence I conclude that this family was under extreme stress following Zahlee's birth. Zahlee had significant feeding issues and health problems. Heather had a caesarian section which was major surgery in and of itself, not to mention the usual post partum issues of extreme fatigue, trying to breast feed and recovering from child birth. Added to that was the significant problem of an infant who couldn't feed, who had a bleeding open wound on her mouth and required both parents' involvement in order to try to give her nourishment. It does appear that during those first three months of her life both parents got little sleep and were absorbed in trying to keep the child alive essentially. The father was working at the same time outside the home.

[7] There was a particular incident that occurred that a great deal of evidence was devoted to and that was the incident when the grandmother was there helping out and it was an occasion when the father wanted to go for a bike ride. He indicated that on top of the extreme fatigue and worry with respect to Zahlee he was also under some significant pressure at work and he felt that he needed the release of getting out for a bike ride. It sounded from the evidence that when this became an issue it was at a very critical point in time and that mom, in her situation at that moment, became almost desperate and panicky because she needed her baby's father to be with her at that particular moment and he stood his ground wanting to go for the bike ride. The grandmother intervened and he apparently went on his way. That was a particularly difficult time in the life of this family as I have indicated and it seemed to have been marked by that incident.

[8] After the parties separated in March of 2006, finally, and there have been a number of separations and on one occasion Mom took Zahlee and went down to Bridgewater and stayed with her sister for a month where she was able to get the help she needed in terms of getting Zahlee transitioned into something other than breast milk and her being able to deal with the issues of feeding and having the rest and help she needed. That was one of the periods of separation.

[9] In any event, it appears the parties agree that the final separation occurred in March of 2006 and from that time until about the end of December 2007 or late in 2007 the Applicant, the father, continued to visit Zahlee at her mother's home, having dinner with them most evenings and for many months, approximately 18 months, he also drove the mother to work. This did become an issue and eventually mom found other transportation. It also appears that this arrangement

began to wear thin in late 2007 and the father was not coming around as often. It does appear that the parties, in spite of their separation, did make efforts to keep the relationship going on some basis for the benefit of their daughter. But things became strained and deteriorated and Mr. Churchill was not coming around as often although he was there for Christmas.

[10] At any rate, in January 2008 he sought access with Zahlee outside the home. This was problematic for Zahlee's mother. This was January 2008 and Zahlee was by then two and a half years of age. While one could perceive mom's reaction as being overly protective, by the same token this was a child who was very ill starting out, who had had significant feeding issues which seemed to have been overcome by then and a child for whom the mother and grandmother had been essentially meeting all her needs during this time.

[11] Although dad was coming and having supper with the family and assisting, doing dishes etc., it does appear from the evidence in general that he was only peripherally involved with Zahlee and her care when he was there. He engaged in playing with her and that sort of thing but it appeared from the evidence that he wasn't as involved in other aspects of her care when he was visiting. So it is understandable to some extent why mom would be resisting the request to take Zahlee out, although it would be an inevitable event that would eventually occur. Mom would have to accept that it would be inevitable that the child as she got older should be able to go with her father.

[12] When I indicate about peripheral involvement that does appear to be evidenced by one of the statements in one of the emails wherein he wanted to know what her favourite food and snacks were, something of that nature. Although he had been in attendance at the home while the child was eating, it does appear he needed some further information with regard to what she was eating when he was going to be taking her with him.

[13] At any rate an application was started. There was an issue with mom letting Zahlee go with dad and he was forced to basically start an application and the parties eventually entered into an Interim Order in April of 2008. It was agreed upon as a temporary order until such time as the matter could be fully heard or the parties could come to a global agreement on all of the issues. Since the Order it does appear from the evidence that the parties have operated reasonably well. It's

certainly not been without its problems but essentially the access appears to be going reasonably well.

[14] The father does however complain of lack of flexibility on the part of the mother. There was reference in particular to the issues that arise with respect to the Friday afternoon pick up and dad basically has indicated that he wants to have more time with Zahlee. It does appear, however, that the mother has been quite flexible when it comes to pick up times when dad has asked to have it changed. She doesn't always agree with the changing of the pick up time but it does appear that for the most part many of the requests are made the day of and sometimes even later in the day of the day the child is to be picked up, and not with any notices that would appear to be anticipated, that other access would occur on 48 hours notice and in scheduling the parties did agree to be flexible taking into account the employment schedules of the parties. But very often the requests were made at virtually the last minute. It does appear that although she dug in her heels on occasions and did not comply with his request there were times when she was flexible and as well, when it came to dad's hockey there was some flexibility and discussion built into the parenting time around his hockey. As well, there were extended periods of time when dad went away and no access occurred at all.

[15] It does give rise to some extent as to what the issue is with respect to parenting time because the father has indicated that he wants more time with Zahlee and he would like to have 50/50 shared parenting, but essentially he's indicated, and he's agreed to joint custody with mom having primary care, so he has also indicated that he would accept more access. So he wasn't hard and fast with respect to the 50/50. Mom operated on the premise that he was seeking 50/50. Now that's understandable to a large extent because he did say that he wanted to have an occasional opportunity to keep her with him on Mondays until 5 o'clock on occasion, the overnights twice a week with some flexibility in determining when those would be. So if one added all of that up it may well amount to be close to a 50/50 parenting time. But by the same token he also indicated that he was just seeking more time with his daughter.

[16] In looking at the overall evidence and the best interests of the child, I conclude that more often than not, when listening to the evidence. The father tended to put his own needs before those of the child and the mother appeared on the basis of the evidence to be more child focussed. While I can certainly appreciate the extreme stress on the family and on Mr. Churchill personally and

professionally in those post partum months, he was in a position to walk away from the situation. The mother was not able to do that. Even with the grandmother providing respite by taking the baby, and I am referring back to that particular incident as an example of what this family was going through, the mother still had to and at that particular time her evidence was that she still had to express milk in order to relieve the pain and pressure that she was experiencing at that time. So the father was in a position to be able to get that complete respite by going off on his bike ride but the mother was in a desperate state and even with the grandmother taking the child she still had things to deal with.

[17] Certainly, this mother and father were fortunate to have the grandmother there to help out as she did. But even putting that in perspective, this occurred during a very high stress time in the life of this family and it was an incident that occurred three years ago. Zahlee is now almost four years of age.

[18] I also concluded from listening to the evidence that the applicant, that is the father, was quick to attribute the worst of motives to the mother when she was unaccommodating to him. But I did find on the basis of the evidence that for the most part she did make the effort to be accommodating. There were times when she was not but she generally had an explanation for those times and strictly speaking under the Order, although there is a provision for the parties agreeing to be flexible taking into account the employment schedules of the parties, there was a provision for 48 hours notice. Although it was not 48 hours notice at pick up and delivery, but rather 48 hours notice of deciding what other evening of the week the parties would arrange for Zahlee to go with her father. But what this comes down to is that it is not about rights and what works for the parents it is a question of responsibility. And, it did appear that the father, on occasions when he was able to get off work, wanted the flexibility to pick up Zahlee because he was able to do so. But that was not always the case where it was convenient for the caregiver or for the child.

[19] The problem is in situations such as this that we have court orders in place or agreements in place for a particular reason. And that reason is apparent from hearing this case. In this case it appears that there has been far too much negotiation between the mother and father which is a very emotionally taxing and draining occurrence for both of the parents. It exacerbates the tension between them and it generates anxiety which in turn has an impact on the child. Life is complicated in a split family. There is a whole layer of complexity superimposed

on the daily regular demands and challenges of parenting. On top of school, programs, dentist, doctors, childcare, getting to work, there is the additional layer of scheduling a child's time and involvement with the other parent.

[20] In this case the court is mindful that this is a case not about the parents and what works for the parents but what it is that works best for the child, and certainly in a situation such as this there needs to be some structure, some routine and predictability. Behaviour tones and attitude do reflect frustration and some of dad's frustration is certainly justified. But all of that reflects on his interactions with the child's mother and that in turn impacts on the child. Transition times have been problematic so it would appear that one of the remedial steps the court can take is to try to reduce those transition problems.

[21] The tone of the emails that I reviewed and listening to the evidence would tend to indicate that the mother has attempted to be conciliatory in most of the tones of her emails, whereas the father has been quick to jump on the mother and blame her and put the lowest motivation on her and not whether her response is dealing with what is in the interest of the child or the fact that she has a caregiver engaged to look after the child and there might have to be changes in plans. On the other hand, he refused to give the mom a direct contact person when he was in Thailand and there was an issue as well with his provision of the consent to travel.

[22] Accommodation is a huge part of this but one must be mindful of the fact that as a parent it is necessary often to make arrangements with one's work to accommodate one's parenting obligations. In this situation it does appear that the mother has, for the most part, accommodated him, his work and as well his leisure activities. I was also mindful of the extensive information that the mother appears to have provided from the evidence before me with respect to issues regarding the school program and medical information.

[23] Having said all that and having indicated that I have found the mother to be more accommodating than the father would suggest, and that she has been reasonable, I also conclude that Zahlee is of an age now where she is old enough to spend more quality time with her father and in a way that minimizes conflict between the mother and the father and maximizes his ability to eventually be involved in such things as taking her to school and other activities. The important thing is to have some predictability and not to have to revisit the issue of parenting every week. It is also important to note that most of the difficulties that Zahlee

experienced from the hemangioma have been resolved and while mom is understandably protective, there is no evidence to suggest that more time with her father is not in Zahlee's best interests. Therefore, the court is crafting an order that lengthens Zahlee's time with her father but minimizes conflict. There may have to be adjustments to this when Zahlee is undergoing surgery down the road but otherwise the order I am making is intended to carry her through into her school years, absent any other changes in circumstances.

[24] Thus, I am making an order that incorporates to a large extent those provisions in the Interim Order that the parties agreed would be incorporated and the provision will be that, in terms of parenting time, the dad will have parenting time with Zahlee each Wednesday night from 4:00 p.m until 8:00 a.m. Thursday morning. Paragraph (b) of the Interim Order would be eliminated. Paragraph © would provide that the alternating weekends be extended from 4:00 p.m. on Friday to 8:00 a.m. on Monday. I am making the extension to Monday morning, the alternating weekends to Monday morning and the overnights on Wednesday nights, in order to enable the father to be involved in preparing her for the following day and getting up with her on what is a regular kind of work day and going through that routine with her and eventually being involved in being able to take her to school on those occasions.

[25] The other paragraphs (d), (e), (f), (g) and (h) remain and (I). Paragraph (j) will be added that provides that "such other access or arrangements as may be agreed upon from time to time, upon a minimum of 48 hours notice" It is intended by that provision that what is required is 48 hours notice either to have other access or to change the arrangements for pick up and drop off of the child. In other words, an attempt to minimize the ongoing negotiation that seems to have occurred on a regular basis. If there are to be changes in the pick up and drop off times the discussion has to be given on a minimum of 48 hours notice. Now that's not to say that there aren't going to be circumstances that will arise within the 48 hours and again, common sense has to prevail, but that there isn't always the expectation that the time is going to be changing on a regular basis.

[26] The provisions that the parties have already agreed upon will be incorporated as well. Each parent will have reasonable telephone access with the child while the child is in the care of the other person and each parent will inform the other forthwith of any medical emergencies and the father will have the right to make independent contact with caregivers, that is, teachers, doctors, dentists, etc. to

receive information with respect to how she is doing. The mother will have the primary day-to-day decision making authority that goes with primary care. That and the rest of it is what the parties have agreed upon.

[27] As I say, I have fashioned this order in an attempt to try to minimize the transition conflict that seems to occur and as well, to try to put into place something that is stable and predictable so that it is not being revisited every week.

J.