

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Delorey v. Callahan, 2009 NSSC 387

Date: 20091214

Docket: 1201-063631

Registry: Halifax

Between:

Allen Wilfred Delorey

Petitioner

v.

Jodie Colleen Callahan

Respondent

Judge:

The Honourable Justice R. James Williams

Heard:

November 2, 2009, in Halifax, Nova Scotia

Counsel:

B. Lynn Reiersen, Q.C., for the Applicant
Sarah Harris, for the Respondent

By the Court:

[1] This is a divorce proceeding between Jodie Colleen Callahan and Allan Wilfred Delorey. The parties began cohabitating in 2001. The parties married May 1, 2007 and separated less than one year later, on March 12, 2008.

[2] They have a child, Ella, born April 3, 2004. The parenting and support issues concerning Ella have been resolved.

[3] Tristen Joseph Dwaine Callahan (b. July 31, 1996) is the biological child of Ms. Callahan and Trevor Hanna.

[4] The issue for the Court at this time is whether Tristen is a "child of the marriage" (of Ms. Callahan and Mr. Delorey) as defined by the *Divorce Act* (and, if so, what his obligation to pay child support should be). Ms. Callahan asserts that Tristen is a "child of the marriage" and seeks child support for him from Mr. Delorey.

[5] Section 2(2)(b) of the *Divorce Act* defines "a child of the marriage" as:

".... a child of two spouses or former spouses includes;

...

(b) any child of whom one is the parent and for whom the other stands in the place of a parent"

Case Law

[6] In *Chartier v. Chartier* (1999) Carswell Man 25 (SCC), the Supreme Court of Canada commented on the issue,

"What then is the proper test for determining whether a person stands in the place of a parent within the meaning of the *Divorce Act*?..."

Whether a person stands in the place of a parent must take into account all factors relevant to that determination, viewed objectively... (at pp. 14, 15).

What are "all the relevant factors"?

[7] In *Chartier* the Supreme Court of Canada suggested they included:

1. The perspective of the child;
2. The nature of the relationship;
3. Intention - and "the Court must also infer intention from actions, and take into consideration that even expressed intentions may sometimes change" (p. 15)
4. Whether the child participates with extended family in the same way as would a biological child.
5. Whether a person provides for the child financially.
6. Whether a person disciplines the child.
7. Whether the person represents to the child, family, the world that he/she is responsible as a parent to the child.
8. The nature or existence of the child's relationship with the biological parent.
9. The time to determine whether someone stands in the place of a parent is when the family is functioning as a unit.
10. Intentions inferred from actions.

[8] Justice Campbell of this Court has, in *Cook v. Cook* (2000) Carswell UNS 20 zt pp. 9-12) commented on these issues:

...It is clear from the *Chartier* decision that the parental status is acquired through the actions of the step-parent and from intentions including those which are inferred from actions. It follows necessarily that there would be actions and intentions which would negate a finding of parental status. This raises the question as to how a step-parent must behave in order to avoid the inference being drawn and the finding being made.

In marriages or relationships involving children of a previous relationship, the adults and children will necessarily show signs of family life together...

...Attention must be paid to the existence of modern day blended families and the realities associated with how the parties would want to behave operating, of course, from the assumption that the relationship will survive. There will necessarily be actions taken on by the step-parent while the children are in that household which may have previously been done by the natural parent. He or she may literally sit at the same chair at the new family's dinner table. A division of labour will unfold and the step-parent may take over responsibilities for which he or she feels particularly skilled, some of which may directly involve the children. The adults may share their income or expenses in some fashion that directly or indirectly benefits the children. Especially when the children have an active participation with their other natural parent, the step-parent may be conscious of the undesirability of replacing the natural mother in the lives of the children. However, the fact that she or he is the spouse of the children's parent will cause their household to look like a family and to appear to the uninformed observer to be a first family. Affection between the children and the step-parent can be quite natural and automatic.

Should she or he be burdened with the obligation for long term child support after having so involved herself or himself in the children's lives in pursuit of a new and happy relationship? The answer will often be in the affirmative. However, in my opinion, the threshold for a parental status finding must be pegged at a sufficiently high point that it avoids the imposition of obligations and the acquisition of access and custody rights except where the step-parent can be clearly shown to have assumed the role of the natural parent and in substantial substitution for the natural parent's role...

In my opinion, it is much easier to meet the test for parental status when the natural parent does not take any, or at least any significant, part in the children's lives. The operative words in the *Divorce Act* are "stand in the place of a parent". In *Chartier*, supra, the Supreme Court of Canada at page 548 adopts the rules of statutory interpretation given by Driedger in *Construction of Statutes* (2d ED 1983) at page 87:

"Today there is only one principle or approach, namely, the words of an Act are to read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."

In their grammatical sense, the words "in the place of" mean "in substitution for" and not "in addition to".

In my opinion, it is not the object of the Act or the intention of Parliament that those words were intended to be used to maximize the number of persons paying support for or exercising access to children of broken marriages. Parliament

intended that the fundamental responsibility of a child of separated parents would be shared by their parents and that such rights and duties should be extended in appropriate cases to those persons (usually step-parents) who have intentionally acted or can be inferred to have acted so as to substantially replace the natural parent's role...

Bastarache, J. stated in *Chartier* at page 552:

"Spouses are entitled to divorce each other, but not the children who were part of the marriage."

The converse is also true: a decision by the adults to marry each other is not an offer by the one to adopt the children of the other.

The list of factors giving rise to a parental status finding enunciated by the Supreme Court in *Chartier*, supra was stated not to be exhaustive. It did not refer to the duration of the subject relationship. However, most of the factors listed would evolve over time and therefore it is implied based on common-sense, that parental status is earned over a reasonable passage of time. Even an expressed intention to assume responsibility would not be sufficient in some cases of very short marriages especially those involving an active natural parent. Admittedly, the *Chartier* marriage was very short but the actions of the step-parent in adopting (not in the legal sense) the child as his own combined with the complete absence of the natural father and the decision to cause the child to believe that the step-parent was the natural parent...

It makes sense that subject to obvious exceptions, the propensity to find parental status should be directly proportional to the length of the marriage and inversely proportional to the involvement of the natural parent...

Background / Evidence

[9] Ms. Callahan's evidence (that Mr. Delorey is a parent to Tristen within the meaning of the *Divorce Act*) included assertions:

1. That Mr. Delorey "acted as father" to Tristen since Tristen was about 2 years old, ie. prior to Ms. Callahan and Mr. Delorey's common law relationship;
2. Tristen's biological father "became involved" in Tristen's life in approximately February 2007, before the marriage to Mr. Delorey (her affidavit of February 11, 2009);

3. That Tristen did call Allen (Delorey) "Allen" and not Dad, but as the years went on Tristen referred to Allen amongst his friends, neighbors and other family as "Dad"... Tristen and Allen formed a father-son relationship (clause 3 Affidavit of May 22, 2009);

4. Allen was involved in raising Tristen including:

- school, homework
- extracurricular activities
- parent-teacher nights
- visits to pediatrician
- emergency contact at school

5. Teachers knew Mr. Delorey as Tristen's "Dad".

6. Mr. Delorey said Tristen would always be his son on occasion.

7. "Tristen first met his biological father, Trevor Hanna, for he first time at a parade in 2006. There was no attempt to initiate ongoing contact at this time. After a while, contact between Tristen and Trevor became a topic that Allen and I as parents discussed together. In late 2006, early 2007, Allen and I decided that Tristen should have a friendly relationship with Trevor. It was made clear to Trevor that Allen was Tristen's parent. Trevor said he would respect that. To date Trevor Hanna still has no parental decision-making power when it comes to Tristen." (Clause 7 affidavit of May 22, 2009). (Ms. Callahan's oral evidence contradicted, to some degree, the assertion that Mr. Hanna's reinvolverment was a "joint decision" of she and Mr. Hanna)

8. (In her oral evidence) that:

- when she and Trevor Hanna broke up there was an armed stand-off with police. The evidence suggests Mr. Hanna had a weapon and was later jailed.
- she and Mr. Delorey discussed adoption and/or a name change re Tristen but this was not pursued.
- when Mr. Hanna wanted to have contact with Tristen, Mr. Delorey was against it.
- Mr. Hanna came back into Tristen's life in late 2006.

- she has not asked Mr. Hanna for child support
- Mr. Delorey disciplined Tristen.
- she is in a new relationship with Mr. Rechter (sp)

[10] Trevor Hanna testified. He indicated that:

1. he came back to Nova Scotia (from Alberta) in 2007;
2. he loves Tristen;
3. he has not paid support for Tristen, though he indicated he provided money "when I can";
4. he has never been asked for support;
5. Mr. Delorey did not deal with him re his contact with Tristen;
6. he attended some extra-curricular activities of Tristen, but played a secondary role to Mr. Delorey;
7. Mr. Delorey's parents had a relationship with Tristen.

[11] Mr. Delorey's evidence indicated that:

1. Tristen did not call me "Dad", he called me "Allen". I conclude Tristen did call him "Dad" on occasion.
2. Tristen had a relationship with Mr. Hanna's family from 2005 on, including overnights. Tristen had contact with Mr. Hanna through them.
3. He played no role in Mr. Hanna's contact with Tristen; that he said he did not want Mr. Hanna around the house or Ms. Callahan (presumably), at least in part, due to the "armed stand-off" incident. He said the question of Mr. Hanna's contact with Tristen was Ms. Callahan's "call". I accept his evidence on this issue.
4. The evidence indicated he helped with school, wrote notes, drove to doctors, occasionally disciplined Tristen - did many of the day to day things a person in a parenting role within a household would do. In October, 2007 he signed a school note indicating he was proud to call Tristen "my son".

5. That he had as little to do with Mr. Hanna as possible.
6. That talk of his adopting Tristen caused conflict and was abandoned.
7. Tristen had a relationship with his Mr. Delorey's parents.

[12] The evidence of both parties is that since their separation Tristen's contact with Mr. Delorey has ceased - and suggests that his contact with Mr. Hanna increased.

Conclusions

[13] Tristen is the biological son of Ms. Callahan and Mr. Hanna. He was born July 31, 1996. Mr. Hanna and Ms. Callahan dated off and on until breaking up in 1998. There was an armed stand-off when they broke up. Mr. Hanna went, it appears, to prison, then out west, and for a time had little involvement in Tristen's life. It is unclear what degree of ongoing contact Tristen had with Mr. Hanna through Mr. Hanna's parents. It appears there was some contact - at least from 2005 forward.

[14] Mr. Delorey and Ms. Callahan lived common law from 2001 until May 1, 2007 when they married. Tristen lived with them. Tristen visited his paternal grandparents and also developed a relationship with Mr. Delorey's parents. Mr. Delorey acted in a parenting role. He supported Ms. Callahan, Tristen (and Ella) financially. He had no legal duty to support Tristen, and no possible legal duty to do so. (prior to his marriage to Ms. Callahan as the *Maintenance and Custody Act* imposes no such possible responsibility) Tristen would have seen Mr. Delorey as a parent in late 2006.

[15] Prior to Ms. Callahan and Mr. Delorey's marriage there was a decision made by, or primarily by, Ms. Callahan to allow Mr. Hanna back into Tristen's life. This was late 2006 or early 2007. I conclude that Mr. Delorey did not support this decision but left the decision to Ms. Callahan.

[16] Ms. Callahan and Mr. Delorey were together, as husband and wife, for some 10 months. It was by any measure a very short marriage.

[17] Mr. Delorey saw Tristen briefly after the separation, he says Tristen then rejected him, Ms. Callahan would say Mr. Delorey didn't try enough.

[18] Neither an adoption nor a name change of Tristen by Mr. Delorey was pursued during the marriage, though it seems it was discussed early in the common-law relationship of Ms. Callahan and Mr. Delorey.

[19] The decision to allow Mr. Hanna to become reinvolved with Tristen before or near the time of Mr. Delorey and Ms. Callahan's marriage, and the apparent abandonment of Ms. Callahan and Mr. Delorey's earlier discussion of Tristen being adopted by Mr. Delorey are, I conclude, inconsistent with a conclusion that Mr. Delorey stood in the place of a parent, Mr. Hanna at the time of the parties' separation. Tristen's relationship with his natural father (Mr. Hanna) was growing, not diminishing, during the months of the Delorey-Callahan marriage.

[20] I conclude that the decision to allow Mr. Hanna to have contact with Tristen was Ms. Callahan's. I am uncertain why she made this decision. I conclude that Mr. Delorey did not support it, felt Mr. Hanna offered little to Tristen and was a potential danger to Ms. Callahan. This was an important decision - Mr. Delorey did not "stand in the place of a parent" when this decision was made. He stood, or was stood, aside.

[21] Tristen had a relationship with both Mr. Hanna's and Mr. Delorey's extended family at the time of separation.

[22] Did Mr. Delorey stand "in the place of a parent" at the time of the parties separation?

[23] Mr. Delorey's time in a parenting role with Tristen was relatively lengthy - from Tristen's point of view. That parenting role was diminished before and during the marriage by Ms. Callahan's decision to allow Mr. Hanna back into Tristen's life. Mr. Hanna re-established his contact with Tristen before and during the marriage. Mr. Hanna's involvement with Tristen increased during the Delorey-Callahan marriage.

[24] I agree with the view expressed by Justice Campbell of this Court - in *Cook* - that the threshold for a finding of parental status is high and reserved for these cases where a step-parent can be clearly shown to have assumed the role of the natural parent in substantial substitution of the role of a natural parent.

[25] I have considered the provisions of the *Divorce Act*, the nature length of Mr. Delorey's relationship with Ms. Callahan and Tristen, Tristen's perspective on these relationships, the length of the marriage, Mr. Hanna's involvement with Tristen, that of his and Mr. Delorey's extended family and the other factors referred to in *Chartier v. Chartier* and *Cook v. Cook*. I conclude that Mr. Delorey was generous and concerned in his support and caring for and of Tristen - but that he did so at the time of his separation from Ms. Callahan, as a person in addition to, not in the place of, a parent.

[26] I conclude that Tristen is not a child of the marriage of Ms. Callahan and Mr. Delorey.

[27] I conclude that this is not an appropriate case for an award of costs.

J.S.C. (F.D.)

Halifax, Nova Scotia