IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
CITATION: C. M. v R. P., 2008 NSSC 268

Date: September 11, 2008
Docket: 59303
Registry: Sydney

Between:

C. M.

Applicant

v.

R. P.

Respondent

DECISION

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Theresa M. Forgeron

Heard: July 8, 2008 and September 2, 2008

Oral Decision: September 10, 2008

Written Decision: September 11, 2008

Counsel: Jill Perry, counsel for C. M.
Mark Zink, counsel for R. P.

By the Court:

I INTRODUCTION

[1] D. is almost three years old. Her parents, R. P. and C. M. separated in November 2007. Parenting disputes surrounding D.'s primary care did not arise until June 20, 2008. Since June 20, 2008, D. has been subject to an ongoing emotional and physical tug-of-war between her parents.

[2] Mr. M. filed an application and intake form with a parenting statement on June 16, 2008. These documents were provided to Ms. P. on June 20, 2008. Mr. M. filed an emergency application on June 23, 2008. Both parties appeared in court on July 2 and an interim hearing was held on July 8 and September 2. The following people testified during the hearing: C. M., Cst. Michael Baccardax, R. M., R. B., R. M., C. A. S., R. P., A. L., N. M., and T. P.. The matter was adjourned until today's date for oral decision.

II ISSUES

[3] The following issues will be addressed in this decision:

a) What is the impact of domestic violence on the custodial determination?

b) Who should be provided with interim, primary care of D.?

c) What interim, parenting arrangement is in the best interests of D. pending trial?

III ANALYSIS

[4] **What is the impact of domestic violence on the custodial determination?**

[5] *Position of Ms. P.*

[6] Ms. P. argues that the assault conviction against Mr. M., which arose immediately before the parties' separation in November 2007, is virtually determinative of the interim parenting decision which I must make. Ms. P. further asserts that the criminal conviction also negatively impacts upon Mr. M.'s credibility.

[7] *Position of Mr. M.*

[8] Mr. M. states that the assault conviction does not impact on the parenting arrangement. He states that the assault was a one time infraction, and that he deeply regrets the assault having occurred. As such, Mr. M. states that the assault does not affect the interim parenting decision.

[9] *Analysis*

[10] In **Shaw v Shaw** [2008] O.J. 1111 (Ont.C.J.) Pugsley J. reviewed some of the distinctions between criminal and family law proceedings. Pugsley J. confirmed that family courts decide custody and access based on the governing legislation and case law, and in reference to the best interests of the child. The criminal justice system, on the other hand, pays no heed to the best interests of the child because the criminal justice system is not designed to do so, nor are the participants trained to do so.

[11] Parental conduct, including domestic violence, may affect the ability of a parent to provide proper care, nurture and example to his/her child. Domestic violence demonstrates an inability to problem solve in a healthy manner. Domestic violence shows the absence of respect and dignity for the other parent. Domestic violence demonstrates a reactive personality with poor impulse control. Domestic violence is emblematic of poor parenting skills.

[12] Domestic violence will usually impact on the court's determination as to whom should be assigned primary care of a child. This is one factor, albeit a significant one, which determines the best interests of the child. The seriousness of the assaults, the frequency of the assaults, the circumstances of the parties, and the circumstances of the child, all must be examined and balanced in determining the best interests of the child.

[13] Further, although a criminal conviction does impact on credibility, it is not conclusive. Credibility determinations are fact based and must be assessed in light of all of the evidence.

[14] In the case at bar, domestic violence issues impact upon the custodial determination which I must make. I find, however, that issues of domestic violence are not exclusive to Mr. M.. I find that both Mr. M. and Ms. P. have anger management and impulse control problems. I find that both present with poor conflict resolution skills and each are prone to be reactive when he/she feels threatened. Although Mr. M. was the party convicted of an assault, I find that Ms. P.'s conduct on July 8 far exceeded Mr. M.'s wrong doings on July 8 and at any time in the past.

[15] On July 8, Ms. P. placed her own interests ahead of the best interests of D. for a two-hour period. Ms. P.'s conduct on July 8 jeopardized D.'s physical and emotional safety to an extent not often seen in this court. Ms. P. was oblivious to the trauma she and her supporters were causing D.. This finding does not minimize in any way the negative implications of Mr. M.'s assault on Ms. P. in November 2007.

[16] In reaching this conclusion, I make the following five findings of fact:

a) The assault in November 2007 was not preplanned. The July 8 incident was. Ms. P. left court on July 8 without consenting to an order because she planned to take D. from Mr. M.. I do not accept that it was pure coincidence that the parties and their

supporters all ended up in the same location following court. Ms. P. denied that she knew that D. was at R. M.'s apartment. However, Ms. P.'s father, sister, and partner said that they were aware that D. was at R.'s apartment. Ms. P. intended to remove D. from Mr. M.'s care and did so at her first opportunity on July 8;

b) The assault in November 2007 was of short duration. The July 8 incident played out over a two-hour period. D. was traumatized by the July 8 incident. D.'s short term trauma was apparent by her screaming, crying, clinging to her father, and by D. urinating in her clothes. The long term trauma is not known yet. The court was not impressed by Ms. P.'s dismissive attitude. I accept Mr. M.'s description of the emotional problems which he said D. was experiencing;

c) Ms. P. and her entourage tried all within their power to provoke Mr. M. and his brother to respond in a physical fashion against them. Mr. M. and his brother were subject to threats of physical harm from Ms. P.'s father and partner. This occurred in the presence of Ms. P. and with her approval. Such conduct did not occur in November 2007;

d) Ms. P. and her partner entered the residence of R. B. and R. M. without permission. Ms. P. and her brother refused to leave the residence despite the conflict and despite the trauma and danger to which D. was exposed. This did not occur in November 2007; and

e) Ms. P., her partner and brother prevented Mr. M. from leaving the residence with D. despite Mr. M.'s repeated attempts to do so. This did not occur in November 2007.

[17] On July 8, Ms. P. created a situation which jeopardized the safety and well being of D.. Ms. P. was focussed on her own agenda, blind to the best interests of D..

[18] I reject Ms. P.'s attempt to characterize her role on July 8 as that of a victim. Ms. P. created the situation. Ms. P. was the instigator. Ms. P.'s conduct led to an escalation of the conflict. If Ms. P. was truly concerned about D.'s best interests, or had concerns for her own safety, she would not have engaged in the following:

a) she would not have attempted to approach the van where Mr. M. and his brother were;

b) she would not have entered the apartment where Mr. M. was; and

c) she would not have stayed in the apartment uninvited, screaming, shouting and conducting herself in the manner that she did.

[19] I accept the evidence of R. M. and R. B. as most helpful. Both witnesses withstood the rigours of cross examination. Neither wished to take a position on the custody question. Their descriptions of events were likewise confirmed by R. M. and C. M.. I reject the evidence of R. P., T. P.

and A. L. where it conflicts with the evidence of Mr. M., R. M., R. B., and R. M..

[20] I do accept that at one point Mr. M.'s shoulder touched Ms. P. on July 8. Whether or not such contact constitutes an assault, will not be determined by this court, but rather will be determined by the provincial court.

[21] The anger, violence, hostility, impulsivity and reactive conduct are not in D.'s best interest. This behaviour must cease. The parties must act with maturity and responsibility. They are parents. To assist the parties to act maturely and responsibly, the following provisions are ordered:

a) R. P. and C. M. will each enroll and participate in anger management courses;

b) C. M. and R. P. will each enroll and participate in counselling to acquire a better understanding of the effects that violence has on children; to help the parties resolve relationship issues; and to acquire better parenting skills;

c) R. P. will not permit A. L., T. P., or D. P. to be alone with D. unless such individuals successfully complete an anger management course;

d) Neither party will speak disrespectfully, nor negatively of the other, or of their extended family in the presence of D., or within the hearing distance of D.. If any third party speaks disrespectfully or negatively of the other or of his/her extended family, that party will forthwith remove D. from such environment; and

e) Both parties will apply their best efforts to use age appropriate vocabulary in the presence of D., or within the hearing distance of D..

[22] **Who should be provided with interim, primary care of D.?**

[23] *Position of Mr. M.*

[24] Mr. M. states that he was the primary care giver before and after separation until June 2008. Mr. M. states that this situation evolved as a consequence of the parenting roles which the parties assumed. Mr. M. notes that he and D. have a close and loving relationship. Mr. M. states that he has more patience than does Ms. P.. Mr. M. states that he did more of the day-to-day nurturing tasks. Mr. M. states that he had significant concerns regarding parenting of Ms. P.'s parenting.

[25] *Position of Ms. P.*

[26] Ms. P. takes the opposite position. She states that she was the primary caregiver of D., both before and after separation. Ms. P. notes that the only time D. spent more time with Mr. M. than with her, after separation, was between June 7 to 20 when she had mononucleosis. Ms. P. also acknowledged that Mr. M. looked after D. when she was working and during the nights when she got off work late. Ms. P. questioned Mr. M.'s parenting skills. She denied the accusations made by Mr. M..

[27] Ms. P. states that she was the primary care parent and that D.'s room, clothing, books, toys, and personal effects are located at her residence. Ms. P. notes that D. does not have her own bedroom when she stays with Mr. M..

[28] Ms. P. states that D. has a strong and loving relationship with her and that D. requires more time with her than with Mr. M..

[29] *Law*

[30] Section 18 of the *Maintenance and Custody Act* provides this court with the jurisdiction to make an order respecting custody and access. In

granting such an order, the court must apply the best interests of the child test as stated in *s.18(5)* which provides:

> 18(5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration. R.S., c. 160, s. 18; 1990, c. 5, s. 107.

[31] Generally speaking, during interim proceedings, it is the status quo which gains preeminence. In **Pye v. Pye** (1992), 112 NSR (2d) 109 (TD) Kelly J. approved the comments of Daley J. at para 5 which reads in part:

> [5] I concur with Grant, J.; in **Stubson v. Stubson** (1991), 105 N.S.R. (2d) 155; 284 A.P.R. 155 (N.S.S.C.,T.D.) that the test in such an application was properly set out in **Webber v. Webber** (1989), 90 N.S.R. (2d) 55; 230 A.P.R.. 55 (F.C.), by Daley, F.C.J. at p. 57:
>
> > Given the focus on the welfare of the child at this point, the test to be applied on an application for an interim custody order is: what temporary living arrangements are the least disruptive, most supportive and most protective for the child. In short, the status quo of the child, the living arrangements with which the child is most familiar, should be maintained as closely as possible...

[32] Similar comments were also echoed by Goodfellow J. in **Foley v. Foley**, 1993 CarswellNS 328 (SC).

[33] The status quo which ordinarily is to be maintained is the status quo which existed without reference to the unilateral conduct of one parent, unless the best interests of the child dictates otherwise. This is reviewed by Wright J. in **Kimpton v. Kimpton** 2002 CarswellOnt. 5030 (SCJ), at para 1, which reads as follows:

> 1 There is a golden rule which implacably governs motions for interim custody: stability is a primary need for children caught in the throes of matrimonial dispute and the *de facto* custody of children ought not to be disturbed *pendente lite*, unless there is some **compelling** reason why in the interests of the children, the parent having *de facto* custody should be deprived thereof. On this consideration hangs all other considerations. On motions for interim custody the most important factor in considering the best interests of the child has traditionally been the maintenance of the legal *status quo*. This golden rule was enunciated by Senior Master Roger in Dyment v. Dyment [1969] 2 O.R. 631 (Ont. Master), (aff'd by Laskin J. A. at p. 748) [[1969] 2 O.R. 748 (Ont. C.A.)] by Laskin J.A. again in *Papp v. Papp* (1969), [1970] 1 O.R. 331 (Ont. C.A.), at pp. 344-5 and by the Nova ScotiaCourt of Appeal in *Lancaster v. Lancaster* (1992), 38 R.F.L. (3d) 373 (N.S.C.A.). By status quo is meant the primary or legal status quo, not a short lived status quo created to gain tactical advantage. See on this issue *Irwin v. Irwin* (1986), 3 R.F.L. (3d) 403 (Ont. H.C.) and the annotation of J.G. McLeod to Moggey v. Moggey (1990), 28 R.F.L. (3d) 416 (Sask. Q.B.).

[34] This law has been repeatedly followed by Nova Scotia courts, and indeed by courts throughout Canada.

[35] In addition to the *status quo*, the factors set out by Goodfellow J. in **Foley v Foley**, supra, as well as Daley Fam.Ct. J. in **W.(L.S.) v W.(I.E.)** 90 NSR(2d)55 (Fam.Ct.),para 6 must likewise be balanced.

[36] *Analysis*

[37] I find that before the parties separated, both were involved in D.'s care, although I accept that Mr. M. performed the greater share of the ordinary, nurturing tasks. I accept that Ms. P. experienced difficulty in settling D. and in coping as a new mother. I find that as a result, Mr. M. increasingly assumed the day-to-day child care tasks, even when the parties separated. Neither were perfect parents; each made mistakes.

[38] I find that since the parties separated for the final time in November 2007 until June 2008, D. was in the primary care of Mr. M.. I make this finding for the following reasons:

a) Mr. M.'s position fits with the sequence of events which has unfolded. Mr. M. filed an application for custody on June 16, 2008. His parenting statement filed in conjunction with the

application states that D. was living primarily with him and that Ms. P. saw D. on an irregular and unpredictable basis. Mr. M. sought a regular schedule of access. Ms. P. received these documents on June 20, 2008. There were no parenting difficulties until after Ms. P. reviewed the application for custody and parenting statement of Mr. M.. Ms. P. became upset and angry and immediately arranged to remove D. from Mr. M.'s primary care. Obviously if Ms. P. had in fact been the primary caregiver of D. she would not have removed D., nor would she have prevented contact between D. and Mr. M. as she did;

b) C. A. S., the babysitter before June 20, 2008, confirmed that D. spent more nights with Mr. M. than with Ms. P.. C. A. S. is Mr. M.'s sister. She, however, is a friend and confidante of R. P.. She testified on R. P.'s behalf. Although she stated that D.'s primary residence was with Ms. P. since November 2007, she nonetheless agreed that since Christmas 2007 until the end of June 2008, D. had spent more nights with Mr. M. than with Ms. P.;

c) R. M. and R. B. confirmed that D. spent the vast majority of her time with M. in March and April 2008. R. M. and R. B. resided with Mr. M. for the months of March and April. Their evidence is pivotal as they are disinterested and refuse to take sides in the custody dispute. Further they provided evidence in a straight forward and credible fashion. In particular R. M. was careful in responding to all questions and ensured that she answered in an accurate and truthful fashion. Both she and her partner stated that D. was with Mr. M. approximately 75% to 80% of the time during the two months that they resided in the same home;

d) I accept the evidence of R. M., Mr. M.'s brother. He too presented in an honest and straightforward fashion. He visits his mother's home where Mr. M. lives on a daily basis. The length of the visits vary from day to day. He noted that D. was consistently with Mr. M. at his mother's residence;

e) Ms. P. was not a credible witness. She was unable to acknowledge any deficits in parenting and even something as simple as stating that parenting as a single mother could be stressful was denied. Her affidavit evidence and the evidence provided under cross examination were not consistent in all respects. The affidavit leaves the impression that Mr. M. spent very little time with D. whereas on cross examination Ms. P. conceded that Mr. M. cared for D. during the times that she was working. This amounted to three days and nights each week;

f) N. M. and T. P. did not have the opportunity to observe on a consistent basis as to where D. resided. Further I found their evidence suspect. I preferred the evidence of Mr. M. and his witnesses where such conflicts with the evidence of N. M. and T. P.;

g) Mr. L. has resided with Ms. P. since June. During much of this time, all concede that D. spent the majority of her time with Mr. M.; and

h) Mr. M. provided more specific details as to bedtime routines and other routines than did Ms. P.. Mr. M.'s recollections are consistent with his evidence that he was the primary caregiver of D. since separation in November 2007.

[39] The fact that Mr. M. was the primary caregiver of D. does not end the analysis. I must determine if the best interests of D. supports the continuation of the *status quo* which existed before the unilateral conduct of Ms. P. in June 2008 and July 2008.

[40] I have considered the legislation, case law, the affidavits and the evidence presented during the hearing. I have listened intently to the cross examination and *viva voce* evidence of the witnesses. I have weighed the submissions of counsel. I have determined that it is in the best interests of D. to be placed in the primary care of Mr. M. during the interim. In reaching my decision, I make the following additional findings of fact:

a) Prior to the court proceedings, D. was in Mr. M.'s primary care. This is the arrangement which evolved without upset or conflict. My decision to allow D. to remain in her father's care is a continuation of the *status quo* which had evolved naturally between the parties;

b) I recognize that from November 2007 until June 20, 2008, Ms. P. requested D. be returned to her care for approximately 30 additional evenings. Mr. M. did not accede to this request because D. was already in bed for the night. Ms. P. did not make application to court and her acquiescence at the time confirmed her acceptance of the *status quo;*

c) I find that Mr. M. had more "hands on" parenting of D. than did Ms. P.. I find that Mr. M. was more patient and spent more time with D. than did Ms. P. prior to Ms. P.'s unilateral action;

d) Ms. P. is not being punished for working as she suggests. The focus is not on Ms. P., but rather on D. and the parenting arrangement which will provide her with the most stability, continuity and nurture;

e) I find that both parties require counselling and anger management courses. However, as indicated previously, Ms. P.'s issues exceed those manifested by Mr. M.;

f) Mr. M.'s assault of Ms. P. took place in November 2007. Ms. P. acquiesced to the parenting arrangement which evolved after November 2007 such that D. was placed in Mr. M.'s primary care from November 2007 until June 2008. This does not minimize the assault. However, the assault in and of itself cannot determine the parenting of D. in the unique circumstances of this case;

g) D. has a close and loving relationship with her father. I find that she looks to him for nurture, guidance and acceptance. I find that she has a healthy attachment to Mr. M.. I find that Mr. M. is able to meet D.'s needs during the interim;

h) Mr. M. on occasion used marihuana recreationally. He indicated that he would no longer do so. This was something that Ms. P. recognized occurred before June 20. She left D. in Mr. M.'s care notwithstanding this fact. Such acceptance by Ms. P. does not minimize the seriousness of this issue. Marijuana is an illegal substance. Its use is contrary to the best interests of D.. Should Mr. M. resume its use, such will constitute a change in circumstances; and

I) Ms. P. attempted to restrict and circumvent any meaningful relationship which D. had with Mr. M. after she secured primary care. On June 20, 2008, Ms. P. removed D. from the babysitter and would not permit D. to visit with Mr. M.. After July, Mr. M., through counsel, agreed to an order which would provide Ms. P. with interim, primary care of D. with access to him. He agreed not because Mr. M. felt such was in D.'s best interest, but because some access with D. was better than none pending the conclusion of the hearing. Notwithstanding Mr. M.'s consent on the primary care issue, Ms. P. dramatically restricted the time that D. would have with Mr. M.. Indeed she even insisted upon supervised access. Supervised access was not something that had occurred previously. I find that Ms. P. used this temporary access order as a means to punish Mr. M., at the expense of D..

[41] **What interim parenting arrangement is in the best interests of D. pending trial?**

[42] The interim parenting schedule will provide as follows, in addition to the terms and conditions previously stated:

a) Mr. M. will have interim, sole custody of D. R. born October *, 2005. I cannot permit joint custody given the conflict and the present inability to communicate. A joint custody order would be destructive and contrary to the best interests of D. at this time;

b) All access will be arranged through an access facilitator in accordance with para j. In the event C. A. S. agrees, she will be the access facilitator. If not, R. M. will be the facilitator;

c) Provided the provincial court undertaking is revised and permits communication, the parties will keep each other informed of important matters affecting the health, education, and general welfare of D. while she is in the care of the other of them. Such information will be relayed by the parties via written communication. Mr. M. will purchase a notebook for access communication. The access notebook will be provided to the access facilitator and exchanged during the access visits. Only communication affecting the health, education and general welfare of D. will be placed in the access notebook. All communication in the access notebook will be respectful and will be child focussed. If the provincial court undertaking is not amended, then this provision is not enforceable;

d) Each party will forthwith register and attend the parent information program through the Family Division of the Supreme Court of Nova Scotia;

e) Neither party will remove D. from the province of Nova Scotia without first having secured an order from a court of competent jurisdiction or the written authorization of the other party, except in the case of a medical emergency which requires medical treatment outside the province of Nova Scotia. In the event of such an emergency, the party removing the child from Nova Scotia shall provide to the other party and to the court, written confirmation of the emergency and the need for medical treatment outside the province of Nova Scotia. Such written confirmation shall be provided to the other party and to the court as soon as possible in the circumstances;

f) Neither party will smoke in the presence of D.. Neither party will permit the D. to be in the presence of any third party who is smoking;

g) Neither party will use street drugs nor illegal substances, including marijuana. Neither party will permit D. to be in the presence of any third party using street drugs or illegal substances;

h) Mr. M. will not take D. with him on any * trips or to work;

i) Mr. M. will forthwith acquire a bed for D. and within 60 days will provide D. with her own bedroom;

j) The interim access schedule will follow a two week rotation. On week one , Ms. P. will have D. in her care from 10:00 a.m. on Monday until 4:00 p.m. on Thursday. On week two, Ms. P. will have D. in her care from 10:00 a.m. on Monday until Wednesday at 4:00 p.m. and from 10:00 a.m. to 4:00 p.m. on Saturday. At all other times D. will be in the care of Mr. M..

The access facilitator will be present for the access exchanges. Ms. P. will transport D. to and from the access facilitator for all access visits;

k) As it is unlikely that the final hearing will be held before Christmas 2008, the following Christmas schedule will apply and will replace the provisions of para. j. Christmas is deemed to cover the period from December 23 to January 3. Mr. M. will have D. in his care from 3:00 p.m. on December 23 until 3:00 p.m. on December 25 and from 3:00 p.m. on December 28 until 3:00 p.m. on December 31. Ms. P. will have D. in her care from December 25 at 3:00 p.m. until December 28 at 3:00 p.m. and from December 31 at 3:00 p.m. until January 2 at 3:00 p.m. at which time the parties will revert back to the regular schedule. In the event the parties reach an alternate Christmas schedule which is placed in writing and witnessed, such schedule will replace the Christmas schedule stated here.

IV CONCLUSION

[43] It is in the best interests of D. to be placed in the interim custody of Mr. M. with specified access to Ms. P. in accordance with the schedule stated and subject to the terms and conditions outlined.

Ms. Perry will draft the Order. Thank-you.

_____
Justice Theresa M. Forgeron