

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: J.L. v. P.L., 2010 NSSC 113

Date: 20100406

Docket: SFHMCA-068063

Registry: Halifax

Between:

J. L.

Petitioner

v.

P. L.

Respondent

Judge:

The Honourable Justice Elizabeth Jollimore

Heard:

January 12, 2010 and March 8, 2010, in Halifax, Nova Scotia

Counsel:

William M. Leahey, for J.L.
Deborah I. Conrad, for P.L.

By the Court:

Introduction

[1] On December 30, 2009, I granted an *ex parte* order giving custody of a very young boy to his mother. Since the order was made on an *ex parte* basis, I allowed that the father could seek a review of the order on two days' notice to the mother. The matter returned for review in January 2010 and the hearing was completed in March 2010.

[2] This is an interim custody application. The parties have scheduled their trial for November 22 to 24, 2010.

Family History

[3] The parents began to cohabit in December 2005. The father was employed by the Department of National Defence until he was medically released from this employment in August 2007. The couple moved from British Columbia to Nova Scotia in the fall of 2007 and married in September 2008. Their son was born in November 2008.

[4] Following his medical release from the Department of National Defence, the father re-trained as a heavy equipment operator. His employment history since his release has been sporadic. The mother has had a similarly sporadic employment history, working as a hairstylist and housekeeper.

[5] In the summer of 2009, the mother took the child to British Columbia. She has said she was on vacation and, alternately, that she was relocating to that province. The father followed and the family returned to Nova Scotia in the fall of 2009. The parents separated in December 2009 when the mother left, leaving the boy with his father. She had left once before, also leaving the boy with his father.

The Law

[6] Justice Bateman described my task at paragraph 26 in *Burgoyne v. Kenny*, 2009 NSCA 34: "The judge must determine in which parent's custody the children's future will best be served on the basis of the available evidence relevant to the children's emotional and physical well-being." This boy is very young and entirely dependent on others for his well-being. This is an interim application, so my concern is his short-term future.

[7] The parents' relationship has involved considerable verbal abuse and violence which overshadowed all other issues in this application. I was given little information about the young boy. I do not know where he is positioned in reaching milestones regarding speech and language development, walking and toilet training. I have not been given specific information about the boy's attachment and relationship with each parent or with those others (his paternal grandmother and the mother's new partner) with whom he spends time. Certainly, the violence

that has occurred in this relationship is a critical consideration. So, too, are the boy's circumstances. This is particularly so where, during the time that elapses as this matter proceeds to trial, I expect that this little boy will likely develop language and speech, learn to walk and run on his own and start to become toilet trained. His development will require patience and encouragement, the ability to create structure and to adapt to a changing child.

The Mother

[8] In submissions from his counsel, my attention was drawn to the fact that the father was not painting the mother to be a bad mother. The father has no complaint of the care the mother gave the child while they cohabited. He says that the child is a happy little boy who needs the love of both parents.

[9] The father's concerns are that the mother is impulsive, irresponsible and unstable. He argues that the child's "stability should be of paramount consideration". He points to the fact that the mother left him on three different occasions (twice leaving the boy with him) and that when she left in December 2009, she moved in with a man she had met only twelve days earlier. Like the father, her employment has been short-lived. In her case this has been either because her employment was not profitable or, as a motel housekeeper, she was exposed to toxic cleaning agents while pregnant.

[10] The mother has no family or friends in the province, other than her new partner and his family. The mother did not seek refuge at a transition house when she left the father, but chose to move in with someone she had only briefly known. She claims that she was nervous and didn't know what to expect of a transition house. She thought there were "bad drug addicts" and "women from broken homes" at transition houses. She felt that Louisbourg, where her new partner and his parents lived, was a nicer and safer place. She and her new partner have since moved to Urbania, Hants County. The mother works at a call centre and plans to stop working in April when her new partner will return to his work and she can care for the little boy full-time. There is no suggestion of any risk to the child in this situation, though the relationship is new.

[11] On two occasions when the mother left, the child was either in the care of the paternal grandmother or with the father, who relied on the support of the boy's paternal grandmother. The mother's departures were not well-planned or well-organized. Her counsel argues that while the mother's behaviour appears illogical ("impulsive, irresponsible and unstable", to borrow the father's words), this makes sense in the context of an abusive relationship. He urges me to view the relationship in this context, as such is described in Justice MacDonald's recent decision in *L.(N.D.) v. L.(M.S.)*, 2010 NSSC 68.

[12] The father's concerns about impulsivity, irresponsibility and instability have not been demonstrated in direct relation to the child and the child's well-being. The father argues that he is a capable care-giver for his son, so he cannot complain that the mother has failed the child by leaving the child in his care. The mother said that she knew the father would turn to his mother for assistance in caring for the child. The child is familiar with his paternal grandmother and has been cared for by her in the past.

[13] Of her part in the couple's disputes, the mother says that she has hit the father only in self-defence. She admits that she has called the father names, sworn and yelled at him. She was not asked whether these actions precipitated the father's aggression or followed it.

The Father

[14] The mother's concerns about the father are more closely related to the child's well-being. She says that he is impatient, prone to outbursts of anger and violence, and dependent on his mother to meet the boy's needs. As well, she says that the father talks to the boy in ways that are unsuited to the boy's young age, talking to him as an adult and as if he understands what the father is saying.

[15] The father was medically released from his DND employment as a result of his diagnosis with post-traumatic stress disorder. The father and his mother, in their testimony, minimize the impact of the disorder. His mother says, "I can't say that it's [the PTSD] terribly affected him at this point". She says he doesn't usually have a short temper and he can be provoked. The father denies that his PTSD causes a loss of temper or has played any part in the violence that has occurred between him and the mother. He blames the violence on the mother, saying she provokes him.

[16] With consent of both parties, I was provided with the contents of the medical file of the father's general physician. In November 2008, the father applied for the continuation of LTD benefits. In his application, the father described the improvements that had occurred since the commencement of his LTD benefits, writing – the capitals are his - , "I DON'T UPSET AS EASILY BUT SOMETIMES STILL OVERREACT TO THINGS. QUITE EMOTIONAL. STILL VERY SENSITIVE". He described himself as being prevented from engaging in suitable, gainful employment because of "DIFFICULTY DEALING WITH OTHER PEOPLE. STRESSFUL SITUATIONS BECOME EXTREMELY DAUNTING. MOUNTAINS OUT OF MOLEHILLS." This application was completed by the father two days before his son was born.

[17] An application for continued LTD benefits was completed by the father's doctor in March 2009. In it, the doctor notes that the father has "little transition between calm and angry".

[18] The comments I have extracted from the medical file are dated. However, they are echoed in the testimony I heard from the mother and the father. The mother gave evidence that

the father twice experienced episodes of “road rage”. During one of these incidents, the mother and the child were in the car. On both occasions, the father pursued another car to a red light and, when the other car was stopped at the intersection, the father got out of his car and went to the other car to confront the other driver. The father responded to questions about these incidents as if there was nothing unusual about them and says that his intention was to ask the other driver “what were you thinking?” He says that he has been subject to road rage by other drivers.

[19] The father agreed that he’d had employee personnel evaluations which said he had problems getting along with others. He denied that he quit one job because customers said he was “nasty”, without explaining why he left the job. With regard to a second job, he said he wasn’t being paid and the employer wanted him to volunteer, so he quit. It is unclear, but it appears that the two days he worked before quitting may have been an on the job training requirement for which he was expected to work without payment.

[20] After the mother removed the little boy pursuant to the December order, the father followed her in his vehicle, saying he wanted to know where she was taking the child. The RCMP stopped him, handcuffed him and put him in their car. The father says the fact the police handcuffed him was “standard procedure for the RCMP when they pull someone over in a domestic”. The father did not appreciate why the authorities would interpret his conduct as threatening.

[21] The culminating incident occurred on December 19, 2009. While the parents’ versions of this event differ, the father says that after pushing the mother against a wall, he said “I can’t hit you. Maybe I should rape you” or “I oughta try to rape you, you little tart, but I can’t rape you either”. When asked why he would rape the mother if she was leaving, the father answered that “perhaps that’s what she wants from” her new partner. He says she had been investigating bondage websites. He was specifically asked if he thought that’s what the mother really wanted and he said “yes”. He said that “it was exactly what she wanted” and said that “as far as this courtroom is concerned – she was baiting me”. Before she left, he says he grabbed her by the lapel of her winter jacket and pushed her. He did this with sufficient force that buttons came off her jacket and the dress she wore underneath was torn. The father says this was a very old dress.

[22] In November 2009, there was a similarly violent encounter where the father describes himself as pushing the mother to the floor, and sitting on her with his legs astride her, pinning her shoulders to the floor. The father admits the mother has “wanted to leave me for the last four years”. Other incidents occurred in September and October of 2009. The child was present during each.

[23] The father explains that violence occurs as a result of the mother’s provocation. He says that she calls him names and, when he stands up for himself, she becomes physical. The mother says that she was only physical in her own self-defence. The only time the police were called, in September 2009 when the couple lived in British Columbia, it was the mother who was taken away.

Analysis

[24] In this interim application I am not able to determine which parent is correct in identifying the perpetrator of the violence in their relationship nor, for my purpose, is that necessary at this stage. I accept Justice MacDonald's conclusions, stated at paragraph 35 of *L.(N.D.) v. L.(M.S.)*, 2010 NSSC 68, that a parent who perpetrates domestic violence, who remains untreated and in denial of it, is not a good role model and that a child is harmed emotionally and psychologically when living in a home where there is domestic violence. There is no evidence that domestic violence has been a part of any other intimate relationship in which the parents have been involved. Until this matter is tried, when this issue will doubtless rise again, my task is to secure the child's short-term emotional and physical well-being.

[25] In performing my task, the questions highlighted by Justice MacDonald at paragraph 15 in *L.(N.D.) v. L.(M.S.)*, 2010 NSSC 68 are relevant. Her questions explore the relationship between each parent (each parent's appreciation of the young boy's needs, method of meeting them and empathy for the boy's experience) and the child. My ability to answer her questions is constrained by the abbreviated nature of an interim application and the fact that, as I have said, so much evidence focused on the parents' conduct and so little on their son's circumstances.

[26] I accept the father's assessment that mother is not "a bad mother". The impulsivity she has demonstrated has occurred in the context of ending her relationship with the father. That relationship has now ended. The father has not identified impulsive behaviour in other contexts. While I may question the wisdom of moving in with a new partner, rather than seeking refuge in a transition house, the mother has an explanation for her choice. Her decisions to leave unprofitable or harmful work are similarly rational.

[27] The father's behaviour is inappropriate and, in fact, frightening. In the evidence and in his reaction to questioning, it was apparent the father did not appreciate that others experienced his behaviour as inappropriate and frightening. He thought it was sensible that he would pursue another car to ask its driver "what were you thinking?" He believed that his wife, who he said had wanted to leave their relationship for four years, really wanted to be raped on the evening she left. He saw nothing wrong in following her car after she left with the child in late December and dismissed the RCMP response as "standard procedure".

Conclusion

[28] The child is young and depends entirely on others. The boy is at an age where he is developing and he will make many mistakes as he learns. He requires patience and guidance. I cannot depend on the father to demonstrate patience and to appreciate that he is dealing with a young, immature and still-developing child. Nor can I depend on the father to empathize with what the boy is feeling, to understand what is frightening to him (particularly if the frightening behaviour is the father's) and when he will require comfort and security from his father.

[29] I dismiss the father's claim for interim custody of his son. The child shall remain in the primary care of his mother. He shall spend time with his father each weekend from 10 o'clock on Saturday morning until 4 o'clock on Sunday afternoon. If the father is not working, the child shall be with him from noon on Wednesday until 5 o'clock on Wednesday afternoon. The mother shall advise the father of any health concerns the child has and any visits to the child's doctor. The father shall be entitled to seek and obtain information about the child directly from the child's doctor.

[30] In December, I ordered the mother provide the Department of Community Services with a copy of the materials she had filed with the court. I order that she and the father do the same with the materials that have been filed regarding this interim application.

[31] The trial will address the mother's application to return to British Columbia with the child. Until that issue is resolved, neither parent may remove the child from Nova Scotia for any period of time without the written permission of the other or a court order.

[32] There shall be no costs. Costs are in my discretion and are to be withheld where there is a principled reason to do so. One principled reason that costs may be withheld in custody cases is because a child's best interests are at issue and fear of a costs award might deter a parent from pursuing matters that are relevant to a child's best interests. Money should not overshadow a child's best interests.

[33] In *Nemorin v. Foote*, 2009 NSSC 23, Justice Gass dismissed an application for costs on the principled reason that the child's best interests were in issue and the risk of a costs award could deter litigating this issue. *Nemorin v. Foote*, 2009 NSSC 23 was a mobility case where there was a genuine issue to be tried, each parent had a reasonable position and was motivated by the child's best interests. Justice Gass said, at paragraph 6, that "[t]he question of reasonableness is significant in these matters" and she dismissed the claim for costs because, while Ms. Nemorin's claim failed, "her application, her reasons, and her conduct were genuine and, in balancing all of the factors, it was a decision that could have gone either way" [at paragraph 8].

[34] Unlike Ms. Nemorin's application, this was not a decision that could have favoured either parent. However, the father's application, his reasons and his conduct in reviewing the *ex parte* order were genuine.

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

Halifax, Nova Scotia