SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: LeBlanc v. Khallaf, 2010 NSSC 219

Date: 20100608
Docket: SFHMCA-069695
Registry: Halifax

Between:

Heidi Crystal Elizabeth Jacqueline LeBlanc

Applicant

v.

Mostafa Ahmed Khallaf

Respondent

Judge:	The Honourable Justice Beryl MacDonald
Heard:	May 26, 2010 and June 2, 2010 in Halifax, Nova Scotia
Written Decision:	June 8, 2010
Counsel:	Tammy Wohler, counsel for the Applicant Christine Doucet, counsel for the Respondent

By the Court:

[1] This is an interim proceeding and, as is the case with all proceedings involving children, I must decide what is in the best interest of this particular child. However, the determination of this child's best interest is made understanding that an interim order is intended to be of short duration and is to deal with the immediate problem of where a child should live and what role each of the parents should play until a court has an opportunity to conduct a full investigation into the best interests of the child at a later hearing.

[2] In *Marshall v. Marshall* (1998) Carswell, N.S. 183, the Nova Scotia Court of Appeal approved the test applied by Judge Daley in *W. (L.S.) v. W. (I.E.)* (1989) Carswell, N.S. 410 for interim applications of this nature . At paragraph 6 of that decision Judge Daley wrote:

> "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. With this in mind, the following questions require consideration.
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> (1) Where and with whom is the child residing at this time,
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> (2) Where and with whom has the child been residing in the immediate past; if the residence of the child is different than #1, why and what were the considerations for the change in residence.
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> (3) The short term needs of the child including:
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> (a) age, educational and/or pre-school needs,
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> (b) basic needs and any special needs,
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> (c) the relationship of the child with the competing parties,
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> (d) the daily routine of the child;
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> (4) Is the current residence of the child a suitable temporary residence for the child taking into consideration the short term needs of the child and

> (a) the person(s) with whom the child would be residing;
>
> (b) the physical surrounding including the type of living and sleeping arrangements, closeness to the immediate community and health,
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> (c) proximity to the pre-school or school faculty at which the child usually attends,
>
> (d) availability of access to the child by the non-custodial parent and/or family members;
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> (5) Is the child in danger of physical, emotional or psychological harm if the child were left temporarily in the care of the present custodian and in the present home.

[3] In *Marshall v. Marshall* the Court of Appeal summarized this test and stated in paragraph 26

> "...If there is no reason to change the existing situation, that situation should continue until the trial..."

[4] Courts are also directed to ensure the terms of the interim order are sufficient to maintain the child's relationship with both parents pending trial.

[5] The testimony of the parties and their affidavits confirm the following information:

- The parties commenced a relationship in early 2007 and began residing together in May of that year.
- They underwent some form of marriage ceremony in April 2007. It is not clear that ceremony is recognized in Canada for purposes of the Divorce Act.
- The child was born December 1, 2007 and is now approximately 2 ½ years old.

- The parties stopped living together in early 2008 at which time the Mother moved into her mother's apartment taking the child with her. Approximately 2 weeks later the Father moved into his brother's apartment where he continues to reside.

- The Mother moved into her own apartment in May 2008. Her apartment was in the same building as is her mother's apartment. She has now resumed living with her mother who does assist her in caring for the child.

- The child has an allergy to peanuts severe enough to require the parties to have an e-pie pen available at all times .

- The Father is not a Canadian citizen but he is a permanent resident. His nationality is Egyptian and both he and the Mother refer to him as a "Muslim" . I take this to mean a person who follows the Islamic faith although he does not appear to be a strict observer to the tenets of that faith.

- This child does not have a passport.

- This child attends a day care center, and has done so since January 19, 2009.

[6] All other significant information provided by the Mother and grandmother, both in testimony and in affidavits, differs materially from the information given by the Father in his testimony and affidavits. This difference is, unfortunately, not an unusual situation in these matters. I will never know the "truth" about what really happened. All I can do is apply the legal principles developed by our courts to assess "credibility". The action imbedded in this word requires me to sort out reliable from unreliable information and to assess what information is most persuasive.

[7] In assessing credibility I adopt the outline set out in *Novak Estate, Re*, 2008 NSSC 283, at paragraphs 36 and 37:

> [36] There are many tools for assessing credibility:
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> a) The ability to consider inconsistencies and weaknesses in the witness's evidence, which includes internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses.
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> b) The ability to review independent evidence that confirms or contradicts the witness' testimony.
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> c) The ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in ***Faryna v. Chorny***, 1951 CarswellBC 133, it is "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions", but in doing so I am required not to rely on false or frail assumptions about human behavior.
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> d) It is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it should be done with caution ***R. v. Mah***, 2002 NSCA 99 at paragraphs 70-75).
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> e) Special consideration must be given to the testimony of witnesses who are parties to proceedings; it is important to consider the motive that witnesses may have to fabricate evidence. ***R. v. J.H.*** [2005] O.J. No.39 (OCA) at paragraphs 51-56).
>
> [37] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See ***R. v. D.R.*** [1966] 2 S.C.R. 291 at paragraph 93 and ***R. v. J.H.*** *supra*).

[8] In assessing the credibility of each of these parties I have been urged by the Mother to accept all of the evidence she has provided as reliable and to reject the evidence of the Father. I am not satisfied all of her evidence is reliable or that all of the Father's evidence is unreliable. He has admitted he lied to her friends in an attempt to make arrangements to see the child. I do not draw the conclusion from those events that everything else he has said is a lie.

[9] The Mother has nothing positive to say about the Father, notwithstanding her admission that she had tried to repair their relationship after their separation. This negativity calls into question her objectivity in recalling past events. For example, the Mother, in paragraph 12 of her affidavit sworn March 26, 2010, states, “Since our separation in March, 2008, (the father) has never asked to see (the child) alone or to take her to his place. He told me that he didn’t want to take her out....” . The Father in his affidavit sworn May 17, 2010 states in paragraph 9 (c) , “.... I would also sometimes take (the child) to the Halifax residence of my mother’s friend, * who would cook us a traditional meal.....” In her reply affidavit sworn May 26, 2010 in paragraph 13 the Mother states, “...(the child) has only been to (his mother’s friends house) in ** two times of my knowledge nor has she been alone in his care long enough for him to have taken (the child) without my knowledge, especially for a traditional Arab dinner.” Then she states in paragraph 21" (The father) has never taken (the child) anywhere without one of my family members present.” But because she admits the Father has taken the child to his mother’s friend’s house he may have done so while alone, as he suggests, and it is implicit he went there without her or one of her family members. In short she often exaggerates or overstates her case and this does effect the reliability of her evidence. The reality is neither of these parents have provided completely reliable evidence and I must analyze their evidence allegation by allegation.

[10] In this interim preceding the Mother is requesting the child be placed in her sole custodial care with supervised access for the Father at Veith House. She had proposed a number of persons who were prepared to act as supervisors but the Father is not prepared to have his access supervised by them.

[11] The Father is seeking a joint custodial arrangement with unsupervised access. He has not provided a specific schedule for that unsupervised access. He has recognized, because the child has not seen him for approximately 4 months, a period of supervised reintroduction would be appropriate. He proposes that his first two weeks of access should be supervised through Veith House twice weekly for one evening visit and one daytime visit.

[12] The *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, does provide direction about the relationship between parents and their children and directs:

> 18(4) Subject to this Act**,** the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise
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> (a) provided by the Guardianship Act; or
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> (b) ordered by a court of competent jurisdiction.

[13] Joint custody or joint guardianship is a difficult concept for many to understand. It does not refer to physical closeness to the child nor to shared day-to-day parenting. It is a philosophical concept in many ways. It requires parents to remain as committed to their children as they were when living together. When a child is ill and treatment must be chosen, when a choice must be made about schooling, when there is a decision to be made about religious training, when a child is in trouble with the law or has behavioural problems, joint custody means the parents will discuss these issues and come to a joint decision, as parents do in intact families. Children benefit from joint decision making because they will receive a decision based upon the expedience, knowledge and analysis provided by both of their parents.

[14] Joint parenting does not mean one parent has the right to micro-manage the daily care of a child by the other parent. Each has the right to make independent decisions in that sphere when the child is in his or her physical care. Absent evidence to the contrary the expectation is that each parent loves the child and would do nothing to cause harm to the child. Parenting styles may be different, but unless there is clear evidence that the style of parenting harms the best interest of the child in some material way, the style of parenting is generally not relevant to the choice of a parenting plan.

[15] Conflict between parents does not necessarily mean joint custody is inappropriate. *(Gillis v. Gillis* (1995), 145 N.S.R. (2d) 241 (N.S.S.C.); *Rivers v. Rivers* (1994), 130 N.S.R. (2d) 219 (N.S.S.C.)). It has been suggested that parents who have joint custody may be less likely to consider their parenting role to have been diminished and therefore be less likely to withdraw from meaningful contact with their children. Continuing to respect the role and responsibility both parents have in fulfilling parental obligations may encourage parents to overcome existing conflict between them. These are suggestions found in reported decisions. However, joint custody must not be granted as a form of wishful thinking. The

nature and extent of the conflict between the parties must be analysed to determine if joint custody is in a child's best interest.

[16] There has been conflict between these parents. They no longer have face to face contact. Their conflict may have been fuelled by the existence of these proceedings. Excerpts appearing on pages 56 an 59 from Norris Weisman's article entitled, *On Access After Parental Separation*, 36 R.F.L. (3d) 35 explain this phenomena:

> ...the adversarial nature of litigious proceedings can shift the focus of the hearing away from the children and their needs towards an emphasis on the martial sins of the parents; revive and escalate the conflict between the parents; harden their positions; and tempt them to exert pressure upon the child to choose one parent over the other.....
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> ...the litigation itself is often motivated by a need for public vindication, to ward off depression, or salvage shattered self –esteem. These parents enter into litigation to prove that the other spouse has behaved badly or is wrong, and, by contrast, that they themselves are good and right.

CUSTODIAL ARRANGEMENT

[17] I am satisfied that these parties have not had a particularly good relationship from the very beginning. It is apparent that neither fulfilled the other's expectations, some of which may have been culturally influenced, although the evidence of that is inconclusive. Presently neither parent has respect for the other although I have noted the Father appears more kindly disposed toward the Mother than she is toward him . The Mother has nothing positive to say about the Father nor is she prepared to admit that he has any genuine desire to parent his child. On the other hand I am satisfied the Father was not significantly involved in carrying out parental responsibilities when the parties were living together nor after their separation. I have no concrete examples before me suggesting these parents have exercised joint decision-making in respect to this child. The evidence I do accept is that the Father was more wrapped up in his own life and in his relationship with the Mother than he was in discussing arrangements to be made from time to time for the child. He expected the Mother to look after these details and she did. In addition the Father is awaiting a trial on a charge of assault against the Mother and he may only have contact with her through third parties for the purpose of arranging access. This is not a circumstance under which a joint custodial

arrangement can be organized. At the present time the child's best interest, on an interim basis, is to be in the sole custody of her Mother.

ACCESS

[18] The Mother is seeking to have the Father's access supervised. In *Miller v. McMaster*, 2005 NSSC 259, Justice Forgeron commented upon the situations in which it is appropriate to require a parent's access to be supervised:

> [11] Supervised access is not a long-term solution to access problems which usually arise in high conflict custody and access cases where distrust and negative parental allegations abound. Supervised access is appropriate in specific situations, some of which include the following:
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> [a] where the child requires protection from physical, sexual or emotional abuse;
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> [b] where the child is being introduced or reintroduced into the life of a parent after a significant absence;
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> [c] where there are substance abuse issues; or
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> [d] where there are clinical issues involving the access parent.
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> [12] Supervised access is not appropriate if it's sole purpose is to provide comfort to the custodial parent. Access is for the benefit of the child and each application is to be determined on its own merits.

[19] To this list I would add that supervision is often appropriate where there are material concerns about a parent's ability to perform parenting tasks .

[20] The Mother's reasons for her request for supervision are as follows:

- Because of the Father's family ties in Egypt and Kuwait she is concerned he will be able to obtain an Egyptian passport for their daughter and remove her permanently from Nova Scotia.

- The Father is an abuser of marijuana and because of this abuse the child will be at risk if in his care unsupervised.

- The Father has verbally and physically abused her and therefore presents a risk of harm to the child.

- The Father has made threats to physically harm the child.

- The Father minimizes the significance of the child's allergy to nuts and nut products and therefore will be inattentive to her safety.

- The Father has not had contact with this child since January 2010.

- The Father's parenting skills are inadequate and he would need training prior to caring for this child unsupervised.

FLIGHT RISK

[21] If the Father attempted to flee with this child to Egypt or elsewhere he would encounter numerous difficulties. Nevertheless the Mother suggests I should accept this as a risk proven on a balance of probabilities on the evidence before me. The only "evidence" provided is that the Father is from another country and still has family living in Egypt and Kuwait. She has suggested he has threatened her with removal of the child which he has denied. Given the volatile nature of their relationship I would not be surprised if in anger he may have made a statement that he would take the child away from her but the evidence does not suggest a realistic likelihood of his doing so. The Mother also suspects he may be able to obtain a passport for the child from Egypt that would permit him to remove the child from Canada but she offers no information to suggest how this might be possible nor to support her argument that the insertion of a clause preventing the issuing of a passport to the child without consent of both parents will prevent this from occurring. I cannot act on suspicions. I must act on evidence and I have none to justify the insertion of this clause . Canadian passport authorities will not issue a passport for a child without the consent of both parents unless the parent requesting the passport is a sole custodial parent and there is no specific access provided to

the other parent. As a result there is no means by which the Father can obtain a Canadian passport for this child.

[22] The threat of removal of the child from her present residence in and of itself would not be a sufficient reason to order supervised access. There must be evidence to suggest there is a real likelihood that the parent making the threat has the capacity and will to carry out the threat. In this case that evidence is lacking.

MARIJUANA USE

[23] The Father has admitted to marijuana use. The Mother alleges he abuses this drug to the point of impairment and when impaired he would be unable to properly supervise the child or exercise good judgment in respect to the child's care. There is little evidence to substantiate this allegation. The Father does acknowledge he uses marijuana but he denies abuse. In addition, his evidence is that he would not use this substance while caring for his daughter and would be prepared to abide by a condition that he not be under the influence of marijuana at least 12 hours before the time when he would exercise access with the child. I am satisfied the child's interests will be protected by the inclusion of this provision in the order.

DOMESTIC ABUSE

[24] The evidence convinces me that the Father has made hurtful and unkind remarks to the Mother. I am also satisfied there was an altercation between them during which he damaged her jacket. This is admitted by the Father. What he does not admit is any one sided slapping or pushing. Both he and the Mother were pushing and shoving each other. The words "domestic violence" do and have defined a number of behaviours including isolated or rare incidents in a relationship - a push, a shove, rudeness, disrespect, and name calling all of which are unpleasant to those on the receiving end of these behaviours but which should not necessarily be accepted as an indication that the relationship requires judicial intervention. If these behaviours have no pattern of repetition and leave little if any lasting impact upon the recipient they need not be monitored with the same vigilance as will be the case when coercive control is involved. Counselling programs for persons who are "unpleasant" toward others may be quite different from those designed for persons who resort to abuse as a mechanism of coercive control. Differentiation must be made between these two dynamics when both may be and frequently are referred to as "domestic violence". In this decision I use the

term only to refer to violence against an intimate partner which has as its purpose coercive control over that partner.

[25] Children are harmed emotionally and psychologically when living in a home where there is domestic violence whether they directly witness the violence or not. Exposure to domestic violence is not in the best interests of children and those who are the perpetrators of domestic violence, who remain untreated and who remain in denial, are not good role models for their children. The fact that there is no evidence the perpetrator has actually harmed the child is an insufficient reason to conclude the perpetrator presents no risk to his or her child. One risk is that the perpetrator will continue to use violence in intimate relationships to which the child will be exposed in the future. Another is that the child may model aggressive and controlling behaviour in his or her relationships with others. There are many other risks some of which are summarized on the Government of Canada Department of Justice website providing information about spousal abuse. On the evidence before me I cannot categorize the violence that occurred between these parties during the incident in question, nor the other unpleasant events that have occurred in their relationship, as domestic violence requiring the Father's access to be supervised. Both parties during the most recent incident had an opportunity to prevent escalation. The Mother could have allowed the Father to take the jacket and leave. The Father could have left without getting into a tug-of-war over the jacket. Both made a very bad judgments.

THREAT TO HARM THE CHILD AND ATTENTION TO ALLERGIES

[26] The Father does not admit the allegations made by the Mother about threats to harm the child nor about his placing the child in situations where there are peanuts present. The evidence is inconclusive and as a result the Mother has not proven these allegations on the necessary balance of probabilities.

LACK OF RECENT CONTACT

[27] It is a fact the Father has not had contact with the child since January 2010 . Given her age the parties agree there would need to be a gradual reintroduction between Father and child and that this should be managed by utilizing the services provided by Veith House.

PARENTING ABILITY

[28] The Mother was the primary care parent during her relationship with the Father. While I am satisfied the Father loves the child and would do no purposeful harm I am not satisfied he fully understands how to properly care for a 2 ½ year old child. This does not mean he cannot learn how to perform the tasks that will be required of him and to assist him in that regard I will require him to attend a course in parenting such as those offered by Family SOS, for example, so that he will be better prepared to take on these tasks in the future. I am not entirely satisfied the Father understands the nutritional requirements of a child this age and therefore concerned about the meals he might prepare. I do believe he is capable of cooking and expect he will seek out information, perhaps from Family SOS, about the types of meals suitable for children of different ages. These deficiencies do not suggest he could not care for the child for a two to three hour period unsupervised.

TERMS OF THE ORDER

[29] As a result of these findings the Interim Order will contain the following terms:

[30] The Mother shall have sole custody, care and control of the child.

[31] The Father shall have supervised access for the maximum time available through Veith House twice a week. After exercising this access for a period of six weeks Veith House personal are to prepare and provide a report to the parties about the interaction between parent and child and if no significant concerns are identified access shall be as follows:

- Two weeks after the receipt of the report from Veith House the Father shall begin unsupervised access to occur twice a week, the first visit on a weekday afternoon/evening for a period of two hours and the second visit on a weekend for a period of four hours, the date and time to be reflected in the order based upon the agreement of the parties. If the parties cannot agree upon the date and time I retain jurisdiction to do so.

- If the report from Veith House reflects significant concerns supervised access is to continue until a positive report is received after which the provisions for unsupervised access shall apply. The reports are to be prepared by Veith House personal and provided to the parties in six week intervals.

[32] If the parties disagree about the significance of any concern reported by Veith House personal I retain jurisdiction to adjudicate upon this matter.

[33] The Father is not to be under the influence of any non-prescription drug 12 hours before and while he has the child in his care.

[34] The Father is to attend a course in parenting such as those offered by Family SOS so that he will be informed about child development and understand how to appropriately parent the child.

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Beryl MacDonald, J.S.C.