

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: W.C.C. v. M.C., 2009 NSSC 105

Date: 20090313

Docket: 1207-003283(062314)

Registry: Truro

Between:

W. C. C.

Petitioner

- and -

M. C.

Respondent

DECISION

Editorial Notice

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

Judge: The Honourable Justice J. E. Scanlan

Heard: March 10 & 13, 2009, in Truro, Nova Scotia

Written Decision: April 1, 2009

Counsel: Ms. Peggy Power, Solicitor for the Petitioner
Ms. Leigh Davis, Solicitor for the Respondent

By the Court:

[1] I am going to start by saying that there is absolutely no doubt in my mind that both of these parents love the children dearly. There is no doubt in my mind that both of these parents have made exceptional efforts in trying to deal with challenges that no parent should have to deal with, in terms of the various diagnoses that K. has had and the difficulties that presents.

[2] This is a couple who were married in 1995. They separated, in name only, in January of this year. They have raised two wonderful children. K. for example, for all the problems she has in terms of having been dealt less than a fair hand in life, and I reference the fact she has been diagnosed as having attention deficit hyperactivity disorder, that is a combined type. She was more recently diagnosed with Asperger's Syndrome and Tourettes disorder, a disorder of written expression and a mathematics disorder. Yet she is still described as being a very bright student with above average intelligence. She is dealing with more than her share of psychological and behavioural issues and learning challenges.

[3] These parents deal with the consequences of K.'s difficulties every day. They do about as much as they possibly could to try to maximize her potential, to see her grow into everything that she can be, to help her deal with the consequences of hypersensitivity to many things, for example noise. She just becomes overwhelmed and the words used were "meltdowns", where K. might have something that would not trigger most children and yet in her it triggers a "meltdown". They spend time, sometimes comforting her, rubbing her back, trying to understand and have her understand what stage she is at in a "meltdown". Sometimes she just has to be alone. Sometimes she just has to be quiet. As often as not, I suppose, in the past the parents really did not know what she needed. I think they have been working with her and working with just about everybody they can, to try and find out what is best for her and how to deal with it. They have been working with her, and for her, and with other professionals, trying to have the school understand and come to grips with the problems, obstacles and hurdles, that K. faces on a daily basis. Things which, I am satisfied, the school really did not and could not understand. They simply treated this as a ADHD problem. I suppose in many ways, as was noted by Dr. Tahira Ahmed and even by C. C., some of the teachers thought they were the experts in ADHD. They probably are, in many ways, experts in ADHD. When you put that into the pot

with all these other problems that K. has I am sure it is more of a challenge for them in understanding it and helping her deal with it. These parents never gave up and are not about to give up.

[4] It is interesting that I have talked so much about K. because in doing so I am reminded of what Ms. C. said in her evidence. She kind of broke down when she said she is worried that K. gets lost sometimes with all the attention and efforts that she and, I am sure, Mr. C. have to put into raising K.. She is worried that K. might get lost. Not that they have forgotten about her, not that they do not meet her needs. I think it is appropriate and important that the Court not take anything away from Ms. C. for making that admission. The Court should instead give her credit for it, and give her credit for being conscious of the fact that neither of these parents should let K. get lost as they cope, on a daily basis, in dealing with K. and her difficulties.

[5] Like I said at the beginning, they have two wonderful children here. They both love them unconditionally. They have both put so much into helping these children. K. is just about to become 12 years old and K. is just about to turn 7 years old. I am sure if you had a doctor's report to analyse K. as well, he would

be equally impressed as they are with K.. From everything I hear, she is a wonderful human being as well.

[6] When the Court deals with these cases on an interim basis it is a very challenging situation. We try to make sure that we get it right because the overriding concern is the best interests of the children. That is the paramount consideration. In making an order that deals with the care giving arrangements for the children we are cognizant of the fact the **Divorce Act** says that, keeping in mind the best interests of the children, we still want to maximize the contact as between each of the parents and their children. It is a fine balancing act. Do we ever know if we get it exactly right? I do not think so. We never know how these children and the parenting situations would have developed had we done it some other way, even at this early stage. That does not mean we do not try.

[7] In terms of how I make a decision in relation to the interim care giving arrangement, I look at the individuals, that is each of the parents, and what they bring to the table, both good and bad. What they bring to the table in terms of the parenting arrangement that has been in place. What they bring to the table in terms of a plan going forward. I also look to the individuals in terms of the

children and see what their past has been and where they are at this stage. What the potential pitfalls are in terms of the future. Things that I must guard against. Above all what I think may in fact allow these children to flourish given the fact that they are about to and, in this case, have been going through what is obviously a monumental change for them. The family structure they have known, and grown up in, for so many years is no longer. That was the case as of January.

[8] I point out even though the parents had separated in January they did not physically separate in the sense they remained in the same household since January. I might say in terms of everything I have heard about the parenting of these children, perhaps the worst period in terms of the things that you did was the period from January to now. The children witnessed conflict they should not have witnessed. They witnessed parenting they should not have witnessed. They witnessed stress they should not have witnessed. As bad as things were to lead to a break-down in the marriage or a decision to end the marriage in late December or early January, they have had to live through that mess each and every day.

[9] Both parties were in the house together and could not or would not talk to one another. When they did, they had microphones stuck in one another's face in

terms of tape recorders and threats to call the police and all those things. Why? I do not know for sure. I suppose nobody wanted the other side to get an unfair advantage in terms of the type of dispute we are in here now in terms of the care giving arrangement for the children. Maybe somebody did not want an unfair advantage in terms of the occupation of the matrimonial home. I do not know for sure. I do say that in my opinion, from what I have seen and heard, it was a very stressful time for the children. That is why I ordered at the end of the evidence, even before hearing submissions, that Mr. C. leave the matrimonial home on a temporary basis. In saying that I do note it was his position in his brief that he would leave the matrimonial home if, and only if, he got fifty percent care giving. That does not speak to the best interests of the children. Like I said the best interest of the children was to end that conflict as soon as possible.

[10] I spoke of certain things that I take into account in terms of the past, present and future. We heard in the evidence from C.P.. She was the nanny from February of 2003 to March of 2007. Admittedly that is not the situation for the last two years or so but she was there for a fairly substantial period in these children's lives. As I listened to her evidence I got the impression that while both parents were involved in the care giving, that even during that period when she

was a nanny, for the most part Ms. C. was the go-to person. She was the primary caregiver. When I say that I do not in any way minimize Mr. C.'s involvement. I am simply saying she was there more often, doing more of the day to day things in the house.

[11] I heard evidence from Ms. C. as to the type of work Mr. C. did and the fact he was away from home a lot. I know Mr. C. is now saying to the Court well he can change that so that when he is away it is not during the weeks he would have the children. The fact of the matter is his work did require him to be away a fair bit. I take into account the comments of Mr. C.'s counsel that he could not confirm or deny, for example that last year he was away for 72 days. We do have the evidence of Ms. C. that he was away a lot last year. There was reference to the trip to the Barbados. There was reference to other work trips, Newfoundland, etc. I am not sure if 72 days would include fishing trips or hunting trips or anything like that. It really does not matter because Mr. C. really did not know how many days it was. His evidence was that he has spent some time in the past away on fishing trips and hunting trips. I acknowledge his evidence was that he offered Ms. C. the opportunity to take trips and go away. To go with him when he went away. She really just wanted to and did stay home with the children.

[12] I go back to the evidence of C.P.. She spoke of the fact that as a nanny she mostly did the homework with K.. She said that Mr. C. did not do much of the homework. She did speak of the need, she recognized even then, in K. for routine. She said that if K. did not have routine, she did not know her place. She said change is hard for her. She was easily upset and little things set her off. That is quite revealing as to how well Ms. P. knew K. at those times because nobody had diagnosed her with all of the things that it turned out she was suffering from in terms of various disorders. All of the disorders would suggest those same things that Ms. P. spoke of in terms of the need for routine or K. would be lost and she did not know her place.

[13] She did speak, as well, of the fact that Mr. C. did work at home but that he did not appreciate interruptions in his work when he worked at home. He would sometimes shout at the children if they interrupted him. The point I make is that even though his work did allow him to work from home, and he did up until even the recent past work from home, it did not mean that he was providing care for the children the whole time he was there.

[14] In the last two years Ms. C. has, for a large part, been a stay-at-home mom. She does do the lunch program at school for an hour and a half or so per day. She does take children into her home after school but that is when her own children are there. I might point out by the way in terms of the economic advantage to this family, as I did the math in terms of what this family was paying for out-of-home or even in-home child care, it was probably close to \$10,000.00 per year. Maybe it was even a little more, for a caregiver to come into the home. In terms of what Ms. C. does now and has been doing for the last two years that money is not going out of the house anymore. In addition she is still able to bring in perhaps as much as \$10,000.00 a year. That is a fairly substantial contribution and has been a fairly substantial contribution to the household in the last two years. It is money saved, not money that comes in to pay the bills.

[15] Having said that I am satisfied that Ms. C. has not wasted any of her money or, in fact, even spent any of her money on anything other than the household. She buys groceries, she pays for the gas in her car and a number of other bills. They were all referred to in the evidence. She does not spend much on herself.

[16] It was interesting as well, I spoke of how impressed I was by Ms. P/ when she was describing the symptoms and the way that K. acted or reacted to change or upsets. We had so many people working with this family trying to figure out what was going on with K., both in terms of the educational support networks and the medical support networks. K. was diagnosed as ADHD and Tourettes and the recognized problems she had with the written word and mathematics. Ms. C., who had done extensive research on the various diagnosed afflictions, said there is still something else wrong here. She is not a professional. It was interesting even after Dr. Ahmed had met with the parents, and I understand with the child as well, Ms. C. was saying there is something else wrong here. It was only subsequent to that time when Dr. Potter, as I understand it, diagnosed Asperger's Syndrome as well. What I am saying is Ms. C. was alive to all of the things that were going on in her child's life. It is reflective of just how involved she was in dealing with all of the issues and challenges that faced K..

[17] That is not to say that Mr. C. was not at all involved. He was involved as well. He went to every specialist's appointment. He met with the various people in the education system when Dr. Ahmed went. He was there as an advocate along with Ms. C. and along with Dr. Ahmed. I find it amazing, I think maybe on two

other occasions in the 16 years I have sat on this bench have I heard where a professional such as Dr. Ahmed actually went to the school so that they could lobby on behalf of a child. That shows the degree of her commitment. Even though the parties might have questioned something as simple as K. being allowed to wear her pj's in a co-ed camp, understand how extraordinary that was for Dr. Amhed to take her time to go to that school on behalf of K. and on behalf of Mr. and Mrs. C.. That type of advocacy we do not see very often. Certainly not often enough.

[18] In terms of the long haul, over the past I am satisfied that Ms. C. has been more involved on a day to day basis and she has been the primary driving force in dealing with the challenges that K. faces. She has tailored her work in such a way that she is at K.'s school for the lunchtime program. I assume that allows her a little more time with K. even though it is with a number of students, I am not sure how many. At least she sees her.

[19] She was concerned over fairly recent events, as I understand it, where K. did not get on the bus. She explained, for example, that sometimes K. because of the difficulties she has in dealing with situations may hide at school. She may feel

that she is not able to take the bus because of a “meltdown” that she is having. Ms. C. now has a cell phone so she can be contacted immediately. It is an appropriate step, one that most parents do not have to take. She as a parent has to take it because of the child she is dealing with. She is there every day for her daughters, both of them. Just the nature of her employment means that she is not out-of-town if or when they call. Dad on the weeks or days that he does not have care of the children may well be out-of-town. Ms. C. will always have to be the one who is on call in this arrangement.

[20] I noted from the evidence that Mr. C. was somewhat critical, or at least I sense that he was critical, of the financial contribution that Ms. C. made to this family unit. I simply repeat what I said earlier and that is that she contributes not just with the \$10,000.00 she earns and takes into the household but the money the family saves by not having to hire an outside caregiver. I might say the very substantial effort that she makes in terms of research in terms of the time she spends with K. doing homework is something that would be extraordinary for a hired caregiver to do on an ongoing basis. I can only imagine the challenges that Ms. P. faced in trying to work with K. over the years when nobody knew or understood the challenges that K. faced.

[21] I note, as well, in terms of the expenses, so far as I can tell and I have already referred to this in passing that although mom spends little or nothing in terms of outside social or extracurricular activities it is not so clear for dad. In fact his budget shows fairly substantial amounts were necessary to support his extracurricular activities. When I say fairly substantial, I do not mean that in comparison to Mr. C.'s income, but rather in terms of if he is saying he has nothing or cannot pay then some of the places he would cut first would be those extracurricular activities.

[22] In terms of the background, again I refer to historically Ms. C. has been the rock in terms of doctors appointments, in terms of homework, in terms of advocacy, in terms of what she has done with, for example, L. L. and the Centre of Excellence and the communications network that she has set up with her. I note the comments of Ms. C. in relation to what has been happening since January. I can understand her perceiving that dad was looking over her shoulder all the time trying to interfere. All I can say is that I do accept that in relation to the system that was set up in terms of communication between the Centre of Excellence and Ms. C. it was working, or at least appeared to be working. I would be reluctant to

do anything that would upset that apple cart. In fact I would do everything I could to get it back to where it was pre-January so there is no accusation that somebody is interfering. That is not to say that dad cannot be and must not be kept informed in terms of what is going on. The communication they have between themselves and Ms. L. , I am satisfied be kept as narrow as possible so they understand what is going on and they continue to foster that communications link. From dad's perspective I can understand, however, that he is interested in his children and he should not be thought of as a spy if he looks at something. On the other hand, I say to Mr. C. if there is a contract as between K. and anybody else in terms of her caregivers that there are certain things that are going to be kept private as between them and nobody else, I expect he will respect that privacy. K. and mom should be able to tell dad if there is a section in any book that is private as between the two people, or three people, whoever is doing it.

[23] I do accept the evidence of Ms. C. that Mr. C. has reinvented himself since the separation. She said he no longer smokes marijuana daily. He is seeing a doctor. He is much calmer. He is there a lot more and interested more on a daily or consistent basis in his children. That is not to say he has not been interested in the past. I do accept that there has been some substantial change. The status quo

was really what existed prior to January of 2009. As I said, a lot of what has happened since January 2009 where dad has been more involved has not necessarily been healthy because of the conflict, or the environment of conflict in which it occurred.

[24] I am satisfied there is a need, especially in this period of transition where these children are just going to be getting used to the fact that mommy and daddy do not live together every day now. There should be as many rocks in terms of stability as possible. That we upset the apple cart as little as possible. That is especially so when we are talking about K..

[25] There was reference in some of the case law to the fact that children are in many cases very adaptable, more adaptable and resilient than we might even imagine. Every indication is in this case that K. is not one of those people who is more adaptable than we might imagine. She is less adaptable and more sensitive than the average child. She is anything but average when it comes to adaptability to change. If she gets “lost” it can trigger a “meltdown”. As I understand it K. has just been starting to improve and it is reflected in things, for example the number of times she calls home has been decreasing. That is thanks, in part I am

sure, to further and better understanding as to the various diagnoses. Specifically the diagnoses of the Asperger's Syndrome. That is something the parents both are now just understanding, and the educational professionals are now just understanding.

[26] What we do in terms of a parenting arrangement should continue to give K. the most stable rock possible, or provide the least upset. Can we do it in such a way that it recognizes that perhaps K. is a little more resilient than K.?

[27] Neither Mr. C. or Ms. C. are bad parents. They are both extremely good parents. Nobody's perfect. Mom has had periods of upset in the past. Some situational depression it would appear. Dad has had his problems. There was reference, for example, to him driving the car and slamming on the brakes one time with the children in the car. There is reference to his daily drug use which appears to have been curtailed substantially in the last couple of months.

[28] Mr. C. has a demanding job and he is very good at it by all accounts. It is reflected in the income he makes. I am satisfied he will have to travel extensively. I am satisfied, however, that he has some flexibility and he will be able to curtail

some of his travel so it does not interfere with the time he has, or wants to contribute, to be with his children. In saying that I am not entirely comfortable with the children being taken to Mr. C.'s mother's and left to be cared for by her. I do not know enough about that situation. I only know that they know their grandmother and they have spent some time there in her house.

[29] I say as well that I am concerned with some of the comments in the evidence in relation to Mr. C.'s mother's dogs and the fact that they have, if nothing else, been aggressive to one another. That does not mean it is not a household in which Mr. C. can take his children. I am just saying, be careful and take precautions to make sure that they are not left in a dangerous situation, if the dogs are present with the children. I think one of them is referred to in Mr. C.'s evidence as a Shepard or a large dog. All I am saying is be cognizant of the fact there is a danger if these dogs are aggressive to one another.

[30] I would note, as well, as I understand the evidence, certainly for K. hygiene is an issue. Mom has to be consistently working with and encouraging K.. Mom has been the one who most often assists K.. Even Mr. C. in his evidence indicated he had backed off some aspects of the girls hygiene as they matured. That is to be

expected. As I understand it personal hygiene for K. is especially difficult because of her hypersensitivity to touch in some situations. It is one more challenge that these parents have to deal with for this young woman.

[31] As I said in relation to the care giving arrangement, staying is not an option. I was clearly satisfied of that earlier. Mr. C. cannot stay in the matrimonial home. I am satisfied in terms of a care giving arrangement it is important, and in the best interest of the children, that they continue to have one place they call home. That is the home they have known for many, many years. That is not to say that dad should be reduced to a weekend parent. He does not want to be a weekend parent. These children, especially K., cannot be going back and forth on a week to week basis. The home in which dad will be residing, at least on a temporary basis, is not one in which they have been living and are used to. It will take some time for them to adjust to it.

[32] I am satisfied the care giving arrangement should be to have dad continue to take the girls with him swimming on Monday nights. He can pick one other night per week when he has both children with him. He will have both children with him every second weekend. In each two week cycle, in relation to K. only,

he can designate one additional overnight with him. That will give him some time to be with K. where he does not have the added burden of trying to deal with K.. In addition it will make mom's life a little bit simpler, that one night every two weeks. He can designate that. When I say designate I do not mean randomly designate it. I mean set up a pattern so mom knows, going into the future, as to which nights he is going to have K. alone. Understand as well, when you consider it is one night each week swimming, one overnight each week with both children, an extra night with K., and then every other weekend, it amounts to a fairly substantial amount of time with both these children. It just does not mean they have to pack up and go back and forth every other week. I am satisfied it would be contrary to the best interest of these children to do that.

[33] In terms of maintenance, I am satisfied based on the evidence that Mr. C. makes a fairly substantial income. It is not entirely clear as to how much is properly deducted in terms of expenses. I do not accept the \$129,000.00 per year figure that Mr. C. gives. Even some of the things he is deducting I am satisfied are things that have an indirect benefit for him in terms of house expenses for example.

[34] It is difficult to know exactly what he is going to be making on a go forward basis as well. Counsel for Ms. C. suggests that I should be using \$139,000.00. Counsel for Mr. C. said I should be using \$129,000.00. When I look at the tables, \$139,000.00 would result in \$1,790.00 a month in child support. \$129,000.00 would result in \$1,679.00 a month. It is not all that much difference. I am satisfied that an appropriate amount to use is \$135,000.00. The table amounts in terms of child support will be used referencing that amount and maintenance will be \$1,746.00 per month.

[35] In addition, Mr. C. will keep both Ms. C. and the two children on his medical plan unless, or until, otherwise ordered by this Court. He will be required to pay the mortgage on the matrimonial home, the taxes, insurance, heat and lights, as well as any necessary repairs and Ms. C.'s van insurance. He will be entitled to deduct as spousal support equivalence one-half of the mortgage, all of the taxes, insurance, heat, lights and repairs as well as the van insurance. The only one that I cut in half was the mortgage payment because he is benefiting from that as much as she is. In large part he is preserving an asset.

[36] There was a suggestion that I would also require him to pay the tax consequences. I am not satisfied at this point in time, although it is not closed forever, that I should further order that he be responsible to pay the taxes on those amounts. She has a fairly substantial child maintenance component which was not built into her budget originally. It is an extra amount now. There is no tax consequences for him. He simply deducts those indirect amounts as spousal support other than one-half of the mortgage which he is not going to be deducting.

[37] I am not in a situation where I am satisfied the extraordinary expenses have necessarily been proven to be all that extensive. There was the evidence before me he is paying a fairly substantial child maintenance amount and I would assume that she could afford normal child activities out of those amounts. He is taking them swimming, he will be paying for the swimming.

[38] I might point out, certainly as time goes on, it may well be that K. shows more adaptability than expected and the risk is less. I would hope that Mr. C. could get more time if that is the case.

[39] The parties should be fair to one another. If it looks like she is adapting better than is hoped it may well be in her interest if she can have additional time. In addition when she is not in school I expect that she will be wanting to do activities with her father. For example, March break is next week. Summer vacation follows not all that long after that. I would expect that there will be more substantial blocks of time afforded to dad. Dad be fair to K. in this regard. If she can come over and spend time with dad without “meltdowns” increase them by all means. I would encourage dad to have her with him more often during the summer. There is reference to the fact that he would take them to the cottage sometimes through the summer.

[40] In terms of exclusive possession of the cottage, Mr. C. can continue to have exclusive possession of the cottage. He can also continue to gain access to the garage for the purpose of him carrying on his business. It is not healthy that he continue to operate in the house in terms of his business. He can come and go in the garage and that is it. I say to Mr. C. do not abuse it in terms of using it as an opportunity to get there and have the children come out to the garage on a regular basis where they did not do it before. Whatever the operations were before is what they are going to continue as. I understood from the evidence there were

some potentially dangerous chemicals, in terms of cleaning detergents and agents, in the garage. I do not expect the children to be out around there all that often.

[41] In terms of special events, I expect the parties will share those as much as possible in terms of birthdays, birthdays with grandmothers, and special events. March break, the parties have agreed they will share time at the March break. If Mr. C. is away during an entire week and he is suppose to have the children for one night overnight that week, he will be able to make that time up on a weekend, for example he can keep them an extra day.

[42] Summertime access, the parties have agreed the regular schedule will continue through the summer except for Mr. C. will have the children in his care for his two week vacation.

[43] The parties have agreed if there is a special event, such as a family member's birthday or something, Mr. C. can take the children to the said event so long as he informs Ms. C. in advance.

[44] Mr. C. will be entitled to be informed of, and to attend at, any doctors appointments, medical appointments, or school events, pertaining to the children. Both parties will be entitled to attend those appointments. Ms. C. will give Mr. C. as much notice as possible of any such appointments or events.

[45] Mr. C. will have to provide to Ms. C. a copy of his income tax return and notice of assessment no later than June of 2009 and on a go forward basis on June 1st of each year if this interim order is not revisited.

[46] I expect, as well, the parties will be negotiating in terms of things like division of matrimonial property, etc. I expect that sometime when it is appropriate this matter will be back before the Court to have those issues dealt with.

[47] The family, no doubt, will be under very substantial financial burdens where they are trying to operate two households now instead of one. The Court recognizes that. It may not necessarily go on forever that way.

[48] I wish you luck.

J.