

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Matthews v. Singer, 2012 NSSC 388

Date: 20121108

Docket: SFPAMCA - 073858

Registry: Port Hawkesbury

Between:

Douglas Matthews

Applicant

v.

Jessica Singer

Respondent

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

September 11, 2012, in Port Hawkesbury, Nova Scotia

Counsel:

Lisa Bevin, for the Applicant

Kimberly Franklin, for the Respondent

By the Court:

[1] This is the Douglas Matthews and Jessica Singer matter.

History

[2] The parties were involved in a relationship from 2003 to 2007.

[3] One child was born of this union, Austin Singer Matthews (Austin) born July 11, 2004. The parties separated when the child was three.

Informal Agreement

[4] While the couple lived together, the father was employed as a trucker. When working out of the local shop, he had fairly regular hours. When he was on the road, away from home driving, his hours varied and night work was required.

[5] After separation, the parties entered into and lived by an informal arrangement with respect to custody, access and child support.

[6] The child was left in the mother's day to day care. The father had access every second weekend and telephone access every day.

[7] The mother allowed him to drop by her home after work to visit with their son.

[8] She allowed the father to have telephone contact every night before bedtime with few exceptions.

[9] The father permitted this parenting regime placing his son in the primary care of the mother for three years because it was far easier at the time to leave the child with his mother. She was employed and was able to support their child.

[10] He advised that the travel time for him visiting the child was more reasonable than if the child lived with him and the mother was forced to travel.

[11] Shortly after separation, the mother began a relationship with Cory Matthews; Douglas Matthews cousin.

[12] Cory Matthews and the mother Jessica Singer had a son together; born July 26, 2009.

[13] Austin, the child who is the subject matter of this proceeding, continued to live with his mother during this second relationship until they separated shortly before Christmas, 2010.

[14] When the mother decided to separate from Cory Matthews, she left their apartment, leaving her sons with Cory Matthews while she looked for an apartment.

[15] Her intention was to keep things peaceable for the children over Christmas until she could find an apartment and resettled.

[16] She left on December 20th and returned to get her son when she had found an apartment on February 1, 2011.

[17] In the meantime, Cory Matthews called Douglas Matthews to come and get his son Austin. Cory kept his own son in his primary care.

[18] The applicant father and Cory Matthews then initiated their emergency applications in January of 2011.

[19] Both cousins wanted custody of their respective children.

[20] Using the evidence and allegations from Cory Matthews' most recent relationship difficulties, both fathers approached the court alleging that the mother of their children was involved in excessive drinking, staying out late, not returning to the family home, and yelling at the children. They cited instances during which her behaviour was called into question.

[21] The father listed a number of his concerns before the court. He alleged the mother neglected the care of their son.

[22] He said he was unaware of her then recent behaviour until he read his cousin's affidavit in January of 2011. He advised that he did have some concerns earlier when they first separated. However, he did not take any action to formally address these concerns.

[23] To support his allegations, the applicant referred to an incident in 2007, during which the mother was injured, the police arrived and called child protection.

[24] However, he has left his child in her care from 2007 to 2011.

[25] In paragraph 12 of the mother's March 30th affidavit, she explains her response to this incident. She arrived home from an evening out with friends. She was unwell but not, as alleged, drunk. Her roommate came home drunk and hit Cory Matthews and she with a beer bottle. Cory Matthews called 911. The mother had a concussion.

[26] The police came and referred the matter to Child Protection. No further action was taken by the Children's Aid Society.

[27] As a result of the allegations contained in both cousins' affidavits, including the fact that the mother did not have a residence at the time, the court granted an Interim Order placing the child in the day to day care of the father with the mother having access at the care giver's (father's) home, Monday to Friday from 5:00 p.m. to 7:00 p.m.

[28] This schedule was meant to address the urgency and residential instability alleged by the fathers, yet ensure the mother remained in daily contact with her children .

[29] The matter was adjourned to April 18th for a pre trial.

Process

[30] This was an Interim Order intended only to resolve immediate issues. For reasons not entirely clear to the court, it took a considerable period of time for the parties to ready themselves for the final hearing.

[31] The child Austin has remained in his father's primary care since January, 2011.

[32] At the request of the mother's counsel, the files were tried separately.

[33] At the time of this hearing, the Cory Matthews v. Jessica Singer matter has been resolved by consent.

Case Specific Evidence on Best Interest Considerations

Maintaining Contact with the Other Parent

[34] The court directed Douglas Matthews to seek direction on how to facilitate healthy contact between the mother and the child.

[35] The matter was adjourned to June 7th at 1 p.m. for an Interim Access Haring and October 17th and 18th for a Hearing in the matter. The Pre Trial Memorandum outlined directions for filing.

[36] The matter came before the court on June 7, 2011. After reading the affidavits, the court:

- noted there had been a dramatic shift in the child's status quo that destabilized the child;

- cautioned the fathers that they were not to use access as an instrument to punish the mother;

- directed that all parents register for and attend the Parent Information Program and access community resources to become more fully informed about parenting issues after separation; and

- informed the parents that a supervision order was not intended to be a long term prospect. The court directed the parties to settle the matter or have the matter set down for hearing.

[37] Ms. Singer continued to try to obtain unsupervised access to her child outside Douglas Matthews' home.

[38] While the applicant and his fiancée said they understood that contact with his mother was good for Austin, the mother's presence in the home was an inconvenience to all parties.

[39] The applicant's fiancée confirmed that they tried to restrict her visits to only that which was ordered. They were focussed on abiding by what they believed the order meant to impose.

[40] The father and his fiancée did not appear to have much insight regarding the need to be flexible and to promote contact with the mother.

[41] Ms. Creighton, Douglas Matthews' fiancée, said that the mother came to the home when she could and they tried to work around the mother's work schedule.

[42] The matter came again before the court on July 4, 2011. There continued to be problems obtaining suitable parenting time and difficulties between the parties.

[43] Mr. Matthews was not prepared to allow overnight access.

[44] The matter was further adjourned at the request of counsel.

[45] The matter came before the court again on August 9, 2011. The court issued an Interim Order reflecting parenting time for the mother every other weekend from Friday afternoon to Sunday evening beginning September 19, 2011, and access every week on Tuesday evening starting at 6:00 p.m. to Wednesday evening at 6:00 p.m. Filing deadlines were set for the parties.

[46] The matter came before the court on February 16, 2012, by way of Telephone Conference Call. The parties agreed to a Settlement Conference.

[47] The Settlement Conference occurred on June 27, 2012. Having failed to reach agreement, the matter was before the court for hearing on September 11, 2012.

The Law

[48] Section 18 (5) of the *Maintenance and Custody Act* R.S.,c.160,s.1;2000,c29 states as follows:

“(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.”

[49] The best interests test is the ultimate test, **Young v. Young**, 1993 CanL1134.

[50] There are many factors enumerated in case law. Most notably in **Foley v. Foley**, 1993 CanL11 3400 (N.S.S.C.); Goodfellow J. itemized what is now a well worn list of factors to consider, including:

statutory direction, physical environment, **discipline, role model, wishes of the children**, religious and spiritual guidance , assistance of experts, **time availability of a parent** , the cultural development of the child, physical and character development of the child by such things as participation in sports, **the emotional support to assist the child develop self esteem and confidence, the financial contribution to the welfare of the child and the support of extended family , uncles , aunts grandparents etc, the willingness of a parent to facilitate contact with the other parent.**

This last refers to **the recognition of the child’s entitlement to access to parent and each parents obligation to promote and encourage access to the other parent** , the interim and long range plan for the welfare of the children and the financial consequence of custody and any other relevant factors.”

[51] I have highlighted those that are relevant to this case and about which I have some limited evidence.

Addressing the Child's Special Needs

[52] When the parties were in court, both parents indicated that they wanted to obtain counselling for their child. While the child has been with the father and as of the current court date that counselling has not been put in place.

Continuity of Care

[53] The mother believes she was the primary parent when the parties lived together.

[54] She alleges that the father left the home each night staying out late, leaving the parenting to her.

[55] The father believes he was an equal parent.

[56] The bulk of the evidence supports that historically, by agreement, the mother was with the child as a primary parent more than the father; certainly before the Interim Order. Historically, many of the day to day details were left to the mother.

[57] The father maintains he was always actively involved in the care of his son from birth. Indeed, he is a significant person in his child's life.

[58] After separation, when he was not on the road, the father called his son (he says) every night, visited him on the way home from work, took him to visit with his extended family and, generally, was as attentive as his job would allow.

[59] When the mother was living with Cory Matthews and working, Cory Matthews would call the father to come over and settle his son Austin because he, Cory Matthews, was unable to do so.

[60] The father blames the mother because Austin would not listen to Cory or anyone else he thought was not his parental figure.

[61] This child, very early in his life - from birth to 3 years of age - lived in a relationship with his mother and father (2004-2007). From 2007 to December, 2010, he lived with his mother and Cory Matthews.

[62] Since then it appears, however, that each parent had a number of different partners in and out of Austin's life. Currently each parent has a partner. For Austin, his mother's current partner is the third who will be in a quasi parental role with him .

[63] The father has been in relationship with 2 women subsequent to the mother, exposing Austin to yet additional parental figures.

[64] He visited with his father when he was in a relationship with another woman and, subsequently, when he entered into a relationship with his current partner with whom he is currently engaged.

[65] That may have had a considerable impact on his unwillingness to take orders from anyone other than his mother or father.

[66] This child's life dramatically changed when he moved to his father's home in September of 2011.

[67] For a considerable period of time, he was only allowed to visit with his mother in a supervised setting.

[68] This continued well into the 2012 year, well beyond what was appropriate.

[69] The father and his fiancée acknowledge that Austin wanted to visit with his mother and go home with her.

[70] Unfortunately, the mother spent a considerable period of time unsuccessfully fighting for more access to her son.

[71] The evidence is inconsistent regarding the mother's contact with her son. At one point the father suggested that she missed visits and did not show up. Yet other evidence from the father's fiancée confirmed that the mother did not often cancel a visit. More to the point, she actually attempted to obtain more time with her son.

[72] Neither the father nor his current fiancée were sufficiently informed about child development issues to understand how detrimental this restrictive approach to parenting was to Austin.

[73] The evidence also supports a conclusion that, but for a few scheduling problems, the mother encouraged and facilitated contact between the father and son.

[74] Timothy Matthews, Douglas Matthews' brother, confirmed that when Austin lived with his mother, she facilitated access with him as a member of Austin's extended family. He admits he was never denied access to Austin.

[75] The evidence I heard caused me to conclude that the father had liberal access to his son when his son was in the day to day care of the mother.

Allegations

[76] The father sought supervised access on his initial appearance in court largely based on evidence contained in the cousin's affidavit, written at the time of his separation.

[77] These allegations largely fizzled out by the time of trial.

[78] Cory Matthews did not testify for the father, as was expected. Other scheduled witnesses did not testify.

[79] I had very little further evidence or new information on this point.

[80] In addition to the father's allegations against the mother, the mother alleged that in 2006 the father came home drunk, collapsed in the hallway and was taken into the hospital.

[81] His explanation was that he suffered from esophagus pain. He was ill and vomiting, causing a rise in his blood pressure, ultimately leading to convulsions. He went to the hospital and was released Christmas Day.

[82] It seems there may be some truth to the allegations each make of the other; that they both misused alcohol.

[83] The father accused the mother of yelling and cursing at the child. While the mother denies this, the father's fiancée witnessed the mother yelling at the child.

[84] The father prefers to use time out and his brother indicates he can be stern when necessary but is certainly most loving.

[85] Obviously, yelling and screaming are rarely constructive and a calmer approach is likely more productive.

[86] The applicant and his partner spoke of the difficulties they encountered with the mother. They describe her impatience with the children on Christmas morning; her making promises to come see Austin and then cancelling; her reluctance to facilitate liberal access when Austin was in her primary care.

[87] None the less, it is apparent that both the father and the mother care deeply for Austin.

Schedule

[88] The father's work schedule is Monday to Friday, starting at 7:00 a.m. and home most nights by 5:20 p.m. If he is travelling, he might leave anytime of the day or night and arrive home much later. His fiancée helps him with care giving before and after school and in the evenings when he is not available.

[89] He has had to have considerable support from his family to cover the child's needs when he was unable to be home.

[90] In April 2011, due to an injury to his finger, the father was off work. He has been off work twice due to separate injuries.

[91] He is on an eight week program of physiotherapy. He was hoping to return to work by October 11th. His schedule would be 7:00 a.m. to 5:00 p.m. when working in the shop.

[92] He advises that while it is difficult to walk or work, it does not affect his parenting.

[93] The father moved from Port Hawkesbury to Louisdale to be in closer proximity to Austin's school. He drives Austin to school, goes to Sydney for therapy and picks him up after school.

[94] He lives in a two story home with three bedrooms, Austin has his own room and a yard to play in. The home is two minutes from his school.

[95] The father keeps Austin in contact with his step brother.

[96] The mother promises to keep this child in his current school and within the same district. She has a varied work schedule with both daytime and night time shifts. She has every Wednesday and every second weekend off work.

Father's Second Family

[97] The fiancée advises that the applicant works from 7:00 a.m to 5:00 p.m. when in town; when on the road he could be working much longer and variable.

[98] Currently, the applicant is attending physiotherapy and his fiancée is with Austin most of the time. He has been on Workers' Compensation since March, 2012. He has a back, shoulder and neck injury.

[99] Ms. Creighton has had minimal interaction with the respondent.

[100] This witness refers to some concerns she has about the mother's parenting. These concerns were not well articulated.

[101] She admitted that when the mother visited initially, the child did not want the mother to leave.

Reliance on Extended Family

[102] While the Matthews' family testified that the mother relied heavily on the grandmother to care for Austin, it is clear that Douglas Matthews as well required a great deal of assistance from his family to care for their child.

Extended Family

[103] Austin has access to a large and loving extended family and both parents seem interested in continuing this contact

[104] The father himself, his fiancée and the father's extended family, the child's paternal grandmother, and his uncle in particular, invested a great deal of their time and energy meeting Austin's needs; particularly while the child was in the father's care.

[105] Timothy Matthews also testified that he was very involved in assisting Douglas when he first assumed day to day care of Austin.

[106] This witness drove Austin to and from school and kept care of Austin when the applicant's work took him away from the home at two or three o'clock in the morning with a later night return.

[107] This uncle was frequently called upon until the last academic year when the father was disabled due to issues with his back.

[108] For the 2012 school year, this did not continue because the applicant moved closer to the school, away from this witness.

[109] This witness has far less contact than he did initially with Austin.

[110] Both parents have had to rely on extended family to get them through difficult times.

Conclusion

[111] In the end, after all this time, the foundation for the emergency hearing was not sustained.

[112] It may be that the dramatics surrounding the termination of the relationship with Cory Matthews and the mother's residential instability gave support for the fathers' cause against the mother at what appears to be an opportune time.

[113] I do not wish to minimize the effect these multiple relationship changes in both parents' lives have had on Austin. Clearly, they have had significant impact on him.

[114] Nor do I suggest that the parents behaviour has always focussed on the best interests of their son. Certainly, the misuse of alcohol has played a part in both parents' lives.

[115] I cannot draw any conclusions about alcohol use or misuse at the time of the hearing as I do not have that evidence.

[116] It appears that both parents are involved in their son's life, the mother certainly has been more significantly involved for the first seven years of the child's life.

[117] It also appears that both parents love him and want what is best for him.

[118] Both have had family, social and work related difficulties that have been problematic. Both have misused alcohol in past. Both have had multiple relationships and that has exposed Austin to some uncertainty in his life.

[119] Overall, considering the frailties and strengths of both presenting plans, it is the mother who is far more flexible in promoting contact between the child and his father.

[120] In contrast, the parenting time afforded the mother since September of 2011 has been hard won. The father and his fiancée have had to be pushed to increase and expand his contact.

[121] There appears to have been little need after the mother settled into a new place and currently no evidence before me of an identifiable risk requiring supervision of the mother's access to continue.

[122] The mother has been the primary parent for a considerable period of time before this change to the status quo made necessary by the allegations of the father and his cousin.

[123] What would serve this child best is to have **frequent, peaceable, positive and nurturing contact** with the two most significant persons in his life, his parents.

[124] He has two step brothers and that contact should be nurtured as long as it remains a positive benefit to him.

[125] Extended family is his safety net.

[126] This child should return to his mother's primary care in a **joint custody** arrangement. Each parent thereby continues to be equally responsible for him.

[127] Any major decisions made respecting him shall be made with his interests as the paramount concern.

[128] The parents are to consult and ultimately agree in advance on all major decisions including his schooling and medical well being.

[129] They shall keep each other informed of their work schedule in advance.

[130] The child shall not be removed from his current school district without consent of the parties or order of the court.

[131] The child's residence in Inverness-Richmond shall not be changed unless agreed upon in advance or by court order.

[132] The father shall have liberal contact with him, including every second weekend from Friday after work to Sunday at 6:00 p.m. (These weekends shall be arranged around the parents' schedule to put him, as much as possible, with a parent who is able to spend the weekend caring for him.)

[133] The parent shall have the first right to have their son with them if they are available when the other parent works evenings or night shift.

[134] The father shall also have the right to have his son for a supper time a second night during the week, either to coincide with the mother's work schedule or his own. This night is to be agreed upon in advance. If the parents cannot agree on how they go about selecting a night, they may bring the matter back to the court.

[135] Neither party shall be under the influence of alcohol while the child is in their care.

[136] Should the father's weekend be on a long holiday weekend or an in service weekend, the father may have the extended day (the in service or holiday) returning him to his mother's care at 6:00 p.m. on the night before he returns to school.

[137] The parties shall equally share holidays, such as Christmas, March break, Easter and summer vacation.

[138] This Christmas break runs from December 21st to January 2nd. Depending on the parents schedule, the child shall be with his mother for Christmas Eve at noon to Christmas day at 4:00 p.m.

[139] On Christmas day he shall be with his father for Christmas day to Boxing day at 4:00 p.m.

[140] The balance of the Christmas vacation shall be shared between the parents.

[141] Since there are 13 days vacation this year, it is the intent of this decision that the parents have equal vacation time with the child with the mother on Christmas Eve and the father Christmas day.

[142] In each even numbered year hereafter, it shall be the mother's turn to have him with her Christmas Eve and every odd numbered year the father shall have the right to have the child with him Christmas Eve, using the above noted schedule reversed such that the father may have Austin with him Christmas Eve and the mother Christmas day .

[143] The intention is to alternate Christmas and to share the remaining vacation days as equally as possible.

[144] The parents are free to agree to a change of schedule that better suits their work schedule providing they agree in advance, in writing.

[145] Each parent shall be entitled to reasonable direct access to information from third party service providers (educational, medical, etc.).

Child Support

[146] The father believes he paid \$200.00 every month for child support, although the arrangement was never formalized. The mother disputes that he kept up his payment of \$200.00 every month. She advises he never paid child support.

[147] No discussion regarding prospective of child support took place.

[148] The parties may bring that matter before the court. Child support will be owing by the father to the mother. The parties may want to have the court conciliator assist them in arriving at a settlement or the matter may be set down for hearing.

[149] It would be appropriate to avoid incurring arrears in child support should this matter be delayed. That would cause hardship to both families.

[150] Therefore, the father and mother shall exchange:

- a) copies of their last two consecutive income statements (for example, pay stubs, Employment Insurance stubs, social assistance stubs) or a letter from their employer or income provider stating their gross income so far this year;
- b) copies of all notices of assessment from Canada Revenue Agency for [2009, 2010, and 2011, the last three years] (they can obtain copies from the Canada Revenue Agency by calling 1-800-959-8281 or going online at www.cra.gc.ca/myaccount);
- c) copies of all income tax returns, whether filed with the Canada Revenue Agency or not, completed with all schedules, attachments, and information slips (also available from the Canada Revenue Agency), for [2009, 2010, and 2011, the last three years]; and

d) if one or both are self-employed, or a member of a partnership, or a trustee, administrator or beneficiary of a trust, or they control a corporation, they must comply with the directions in the statement of income.

If they are unable to provide the applicable attachments listed above, they must provide a letter detailing why they cannot provide them.

[151] The intent of this decision is to restore what was the child's status quo before the Interim Hearing. This status quo **better addressed his interests** than the current plan.

[152] This plan I am imposing is meant to ensure this child has frequent contact, quality parenting time and liberal access to both his parents.

[153] The parents are not to interfere with the other parents time unless agreed to in advance in writing.

[154] The mother seems more able to facilitate this kind of agreement than the father.

[155] The mother's counsel shall draft the order.

Moira C. Legere Sers, J.