

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Purcell v. Purcell*, 2017 NSSC 253

Date: 20170925

Docket: SFHMCA-093433

Registry: Halifax

Between:

Christine Anne Purcell

Applicant

v.

Leanne Purcell and Craig Smith

Respondents

Judge:

Justice Beryl A. MacDonald

Heard:

June 19, 2017

Counsel:

Cathy Logan, counsel with Christine Purcell
Morgan Manzer, counsel with Leanne Purcell

By the Court:

[1] On October 21, 2014 Christine Purcell filed a Notice of Application and a Notice of Motion for Interim Relief in which she requested leave to apply for and custody of her granddaughter whose mother is Leanne Purcell. Leanne Purcell did not want her daughter to have any contact with Christine Purcell. On December 10, 2014 the court ordered Christine Purcell not to have contact with her granddaughter or with the child's teachers or any third parties involved with her granddaughter until further order of the court.

[2] On December 30, 2014 the parties consented to an order providing supervised visitation between Christine Purcell and her granddaughter at Veith House. Leanne Purcell was to enroll the child in "age-appropriate" counselling, and she was to obtain a mental health referral for herself. The order required Christine Purcell to obtain a mental health referral and enroll in a parenting program that would take into consideration "grandparents and difficulties associated with access".

[3] By March 2015 neither party had obtained the medical health referrals; Veith House supervision had not been arranged and the child was not participating in counselling. The reality is there are few counselling or mental health services

available for individuals who are having interpersonal difficulties. These litigants do not have serious mental illnesses. A mental health referral would be of little assistance. Leanne Purcell suffers from anxiety and may occasionally suffer from depression but she has not allowed these to go untreated. Both parties appear to have personality traits or disorders that cause problems for them and for those with whom they are involved. Conflict results. Sometimes a psychological assessment can assist a court in determining the drivers of conflict. But these must be ordered early in a proceeding because their preparation can take months. The failure to recognize these realities caused substantial delay in addressing the problems suffered by this family. The order requiring the psychological assessment was not issued until May 19, 2015, even though it was ordered on March 15, 2015. The assessment was completed in October 2015.

[4] Further delay occurred when the parties attempted to have the child's biological father served with notice of the proceedings. No efforts had been made to do so at the time the original Notices were issued and a motion for substituted service was required. This oversight continued even though both parties had lawyers representing them from December 30, 2014.

[5] Eventually a date for hearing was scheduled in January 2016 but was later removed when the court was informed the parties had reached an agreement.

Unfortunately, whatever the agreement may have been, it did not result in a consent order and in July the court was asked to provide new dates for a hearing. The biological father still had not been served pursuant to the order for substituted service that had been issued earlier.

[6] The parties and their counsel appeared before me on October 27, 2016 seeking hearing dates and requested 2 days. Had I realized they would not get dates for that hearing until June 2017 I might have found a way to bring this to conclusion earlier but neither counsel called to ask whether I could assist in arranging earlier hearing dates. Perhaps these dates were suitable for their clients. However, the result was the child has had no contact with Christine Purcell since the Veith House supervised visits ended in October 2015. In October 2017, the child will be 13 years old. When this proceeding started, she was 10.

[7] At one point in this proceeding the parties discussed a request for an update to the psychological assessment. While these assessments are often helpful I did not consider that a practical request. They already had an assessment. Nothing new about the parties or the child was likely to be revealed. The parties' low incomes could not support the type of intensive counselling that was required to heal the wounds the parties had inflicted on one another and on the child who is the subject of this proceeding. However, each has recently accessed resources that are

available to learn more about positive parenting. Leanne Purcell has acquired a diagnosis of the child's ADHD and is accessing services for the benefit of her daughter.

[8] Christine Purcell's application was made pursuant to section 18 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160. That *Act* has been amended and is now called the *Parenting and Support Act*. Although the application was commenced under the previously named legislation the provisions contained in the amendments are to be applied. The amendments do not contain any transitional provisions. As noted in *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis, 2014) authored by Ruth Sullivan:

There is no presumption against the immediate application of legislation to an ongoing factual situation, that is, one that is not yet complete when the legislation comes into force. [*Sullivan*, page 761]

[9] The *Act* provides:

18 (1) On application by a parent or guardian or, with leave of the court, on application by a grandparent or other person, the court may make an order respecting

- (a) custody;
- (b) parenting time;
- (c) a parenting arrangement dealing with any of the areas set out in subsection 17A(3);
- (d) a parenting plan made under Section 17A; and
- (e) any other matter the court considers appropriate.

(2) On application by a parent, guardian or grandparent or, with leave of the court, on application by another person, the court may make an order respecting

(a) contact time;

(b) interaction; and

(c) any other matter the court considers appropriate.

(2A) The order referred to in clause (2)(b) may include any provision respecting interaction, including provisions permitting the person granted interaction to

(a) attend specified activities of the child;

(b) send gifts to and receive gifts from the child;

(c) communicate with the child whether orally, in writing or by other means; and

(d) receive from a person designated in the order, photographs of the child and information regarding the health, education and well-being of the child.

[10] Section 2 of the Act defines “contact time” and “interaction” as follows:

(aa) “contact time” means the time when, under an agreement or a court order, a person who is neither a parent nor a guardian is with the child;

(eb) “interaction” means direct or indirect association with a child, but does not include contact time or parenting time;

[11] While the Act requires the court to grant “leave” if a grandparent is seeking custody or parenting time, leave is not required when a grandparent requests contact or interaction with the child.

[12] There are legal principles to be applied to leave applications. The overriding principle is the best interest of the child. The analysis conducted by Judge Gabriel in *Brooks v Joudrey* 2011 NSFC 5, is an accurate statement of the applicable

principles. Essentially the person applying for leave must meet a threshold test satisfying the court the grant of leave is likely to be of benefit to the welfare of the child. Section 18 (5) of the Parenting and Support Act states:

In any proceeding under this Act concerning custody, parenting arrangements, parenting time, contact time or interaction in relation to a child, the court shall give paramount consideration to the best interests of the child.

[13] There are a number of factors the court can consider in conducting this analysis. The list is not exhaustive. Some of the factors suggested are:

- 1) Is there a sufficient interest and/or connection between the child and the Applicant and is there an obvious benefit to the child?
- 2) Is the child emotionally attached or bonded to the Applicant, or is the connection one of which the child is aware?
- 3) Does the Applicant have a familial relationship she/he wants to foster?
- 4) Is the application frivolous and vexatious?
- 5) Are there other appropriate means to resolve the issue? (For example, mediation, or access in conjunction with the other parent (if this is a grandparent application).
- 6) Are there risk factors apparent on the evidence that would preclude the Applicant from having contact with the child if the leave application was granted?
- 7) Will the grant of a leave application place the child in more risk of litigation and uncertainty?

8) Are there extenuating circumstances? (Such as the death of a parent, or a parent not exercising parenting time due to being in jail, or out of the province for extended periods of time).

9) Is, or would, the involvement of the Applicant be destructive or divisive in nature?

10) Would leave put undue stress on the custodial parent, if the Applicant was successful?

11) Would granting leave, and the possibility thereafter, granting access, threaten the stability of the Family unit?

12) Would a Court Order preserve a positive relationship between the child and the Applicant?

13) To what extent does the custodial parent's decision effect the child and is it a reasonable decision in the particular circumstances of each case?

[14] Christine Purcell and Leanne Purcell have had a conflict-ridden relationship since Leanne Purcell's early teens. Leanne Purcell left her mother's home to live with her father when she was 19. When she was pregnant with the child Leanne Purcell reconnected with her mother who had regular contact with the child until the fall of 2014. This contact was not without consequences for Leanne Purcell. She felt her parenting was undermined by her mother's belittlement of her. Christine Purcell was relentless in her criticism of her daughter. She acknowledged having called her daughter fat and lazy. She alleged the reason why Leanne Purcell discontinued contact between her and the child was because of an argument they

had over Leanne Purcell's failure to properly attend to the child's treatment for head lice. My analysis of the factual situation accepts Leanne Purcell's reason. She no longer considered her mother's contact with this child to be in the child's best interest.

Credibility

[15] In this proceeding I will never know the "truth" about what happened. All I can do is apply the legal principles developed by our courts to assess "credibility". The action imbedded in this word requires that I sort out reliable from unreliable information and assess what information is most persuasive on a balance of probabilities.

[16] In assessing credibility, I have considered Justice Warner's decision in *Novak Estate, Re*, 2008 NSSC 283 and in particular his comment that it requires "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, 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'". I also recognize that I am "not to rely on false or frail assumptions about human behavior".

[17] Also, “In assessing credibility 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 of, or all a witness's evidence, and may attach different weight to different parts of a witness's evidence”. (ibid para. 37)

[18] The complete deterioration of the relationship between Leanne Purcell and her mother began in April 2014 when Leanne Purcell requested police assistance because of the domestic disturbance in her home. Her then partner had been drinking and was abusive. When the police arrived, they realized that he had breached conditions not to consume alcohol and keep the peace. He was arrested. Shortly thereafter Leanne Purcell ended her relationship with him, but because there was a child in the home the police had made a report to the Minister of Community Services. The investigation by the Minister was concluded in July 2014 with a decision and that there were no parenting concerns in Leanne Purcell’s home. Cristine Purcell did not agree. On September 2nd, 2014 the Minister received information from Christine Purcell that she had concerns about the safety and well-being of her granddaughter. She asked the agency to take the child away from Leanne Purcell reporting that Leanne Purcell had a \$35 a day drug habit. She believed Leanne Purcell was selling her prescription medication, and that she had no food in the house. She reported that the child had to get herself ready for school

in the mornings because her mother had to work at 7 a.m. She also reported that Leanne Purcell had engaged police assistance to prevent Christine Purcell from attending at her property.

[19] Leanne Purcell later informed the Minister's agent that her mother would be in her apartment when she came home even though she asked her not to go into her home. Her mother would drive around the neighborhood looking for the child and would park outside of Leanne Purcell's residence. Christine Purcell does not deny her intrusive efforts to gain access to her granddaughter. She admits she would drive around on stormy days to see if the child was getting to school safely. I agree with Leanne Purcell's interpretation of her mother's actions. Christine Purcell was "stalking" her daughter in an attempt to find parenting inadequacies.

[20] The Minister decided to investigate the complaint but assigned it a low priority. On September 5, 2014 Christine Purcell once again called the Minister very upset about the well-being of her granddaughter. She wanted to know whether someone would be investigating her complaint. Shortly thereafter Leanne Purcell contacted the Minister and explained she been having a lot of difficulty with her mother recently. She took 2 weeks off work because of the stress this was causing her. She informed the Minister Christine Purcell was telling the child she was a drug addict and that she had no money for food or basic necessities. Later in an

interview with the child she confirmed her grandmother had said those things about her mother. She also reported that:

- “Nanny is always rude about mommy”
- “she (nanny) thinks she (mommy) is treating me badly when she isn’t”
- “Nanny thinks she can take better care of me”
- “I wish I could fix it but I can’t”
- “Nanny tells me all the time that she wants me”
- “Nanny says there is no food and there always is”
- “I want to see both of them all the time”
- “I don’t know why Nanny lies about those things”
- “My Nanny is my best friend and I miss her every day.

[21] While Christine Purcell may have told the child that her grandmother is “always rude” or that she “says there is no food”, I believe the child has also heard these comments directly from her grandmother. She clearly loves both her mother and grandmother and is a child who has been placed squarely in the middle of the conflict between these adults.

[22] On September 18, 2014 when a social worker contacted Christine Purcell about her discussion with Louanne Purcell, Christine Purcell was adamant that “she is a parent to this child and (the child) deserves to be in her care”. When informed about the child’s statements, Christine Purcell believed the child was “being coached”.

[23] The Minister, once again, concluded there were no protection concerns.

Christine Purcell persisted in her attempts to have contact with the child.

[24] On November 26, 2014 the Halifax Regional Police advised the Minister it had received a complaint from Leanne Purcell who was having difficulty with her mother. She informed the Police her mother had picked up her granddaughter from daycare without Leanne Purcell's knowledge. The officer involved spoke with Christine Purcell who agreed to stay away from her daughter and granddaughter at that time.

[25] In her testimony Christine Purcell made it evident she does consider herself to be the "parent" of this child. She does not respect the mother's ability care for the child. She believes she will neglect to follow up medical and dental appointments. She is seeking joint custody, the right to take the child to her appointments with the mother, access 2 nights per week and every Friday after school until Saturday evening, shared holidays and regular telephone or face time contact whenever the child wishes to be engaged in that contact. This is the type of relationship a parent would typically request with a child.

[26] Until the fall of 2014 Christine Purcell often cared for the child when Louanne Purcell was working. The child was a frequent visitor at other times.

However, as Louanne came to realize how much her mother disrespected her she

attempted to reassert her parental role and rely less on her mother's assistance.

Christine Purcell did not accept this evolution.

[27] Absent exceptional circumstances, grandparents are expected to play a supportive, but not a primary, parenting role in raising their grandchildren. They are expected to cooperate with and follow the requests of their children when caring for a grandchild. They are to help, not take over. They should give advice only when asked. Christine Purcell has overstepped these boundaries and I am not satisfied she has gained sufficient insight to discontinue that behaviour. It is true Leanne relied on her mother in the early years of this child's life but as Leanne matured in her parenting she recognized the corrosive effect Christine Purcell's constant criticism of her could have on her daughter and on her own mental health.

[28] In paragraph 26 of her affidavit contained in Exhibit 1 tab 8 Christine Purcell says:

I believed that Children Services was going to take (the child) out of the Respondent's care so I applied to the court to have (the child) put in my care. I had concerns all along but I was there to pick up the slack because I was very involved. Once I was no longer able to be a support to the family, I was concerned that the respondent couldn't do it all on her own.

[29] At no time was there any indication from the Minister that this child was going to be taken out of her mother's care. The alleged concerns Christine Purcell had about her daughter were completely unfounded. She also has ignored the fact

that the 2nd investigation by the Minister was prompted by the complaint she made in September 2014. It is not surprising that by the fall of 2014 Leanne Purcell began to restrict contact between her mother and the child.

[30] There is no question that this child loves her grandmother and does want to have contact with her. However, Christine Purcell's parental involvement in the life of her granddaughter may be destructive and it has been divisive. It has and would continue to put undue stress on Leanne Purcell.

[31] Christine Purcell has not satisfied me that leave to pursue her application for joint custody and parenting time is likely to be of benefit to the welfare of this child. Leave would not contribute to her best interest. Leave is denied. However, this does not dispose of the matter. The *Parenting and Support Act* does authorize the court to provide a grandparent with "contact time or interaction with a child". I must decide whether this would be in the child's best interest and if so, how should this time or interaction be structured.

[32] By now this child may be confused about her relationship with her grandmother. She has not had personal contact with her for some time. However, for many years her grandmother was an important presence in her life. I am not satisfied it is appropriate to remove that presence completely or to require supervision of the grandmother's contact with the child. The child has a realistic

understanding about her mother's parenting. She knows her mother has food in the house and attends to her medical, dental and emotional needs. Given her age she is less likely to be swayed by her grandmother's opinions about her mother if her grandmother continues to be disrespectful about her mother. But it is not in her best interest to regularly be exposed to this potential outcome. Contact must be limited as a result.

[33] There is always a possibility the relationship between Christine Purcell and Leanne Purcell will improve. That is a challenge I must leave to them. I cannot presume this will happen and I must act in the child's best interest to define the relationship Christine Purcell will have with her based upon the information presently before me.

[34] Christine Purcell must have contact time with the child as follows:

- Once every two months, not including the month of December, for three hours on a Saturday or Sunday. Counsel for the parties are to discuss the week of the month and the time chosen for this contact time. If the parties cannot agree I retain jurisdiction to resolve this issue.
- Either Christmas Eve, December 24 or Christmas Day, December 25, for two hours, the date and time to be resolved between the parties. If the parties cannot agree I retain jurisdiction to resolve this issue.

[35] Christine Purcell must have interaction time with the child as follows:

- Once every 4 months Leanne Purcell must send Christine Purcell a short report about the child's progress in school, what recreational school or other events or activities the child will be attending in the next 4 months that may be attended by the public and information about any significant physical or mental health concerns the child is experiencing.
- Christine Purcell may attend any recreational, school or other event or activity in which the child is participating and to which members of the public may attend.
- If there are any special ceremonies or events involving the child, for example, school graduation, school Holiday concerts, Leanne Purcell must provide Christine Purcell with an invitation to attend if these ceremonies or events are arranged to include extended family members.
- Christine Purcell may provide a gift for the child at Christmas and on her birthday.

[36] Counsel for Christine Purcell is to prepare the order incorporating this decision.

[37] Costs remain as an issue. Christine Purcell has been granted some contact with her granddaughter but it is limited. Her success may be considered marginal. Leanne Purcell has not achieved her request for supervised contact. Christine Purcell must file with the court and copy to Leanne Purcell her written submissions about costs within 15 days from her receipt of this decision. Leanne Purcell must file with the court and copy to Christine Purcell her written submissions about costs within 10 days from her receipt of Christine Purcell's submissions. If Leanne Purcell has made a submission on costs not contemplated in Christine Purcell's

submissions, Christine Purcell may file additional submissions with the court and copied to Leanne Purcell within 5 days from Christine Purcell's receipt of those submissions.

Beryl A. MacDonald, J.