

No. 1201-57326 SFHD-021127

**IN THE SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION**

Citation: *Luke v. Luke*, 2003 NSSF 40

BETWEEN:

ROSAMOND LUKE

APPLICANT

-AND-

DAVID LUKE

RESPONDENT

DECISION

**HEARD: BY THE HONOURABLE JUSTICE LESLIE J. DELLAPINNA
ON SEPTEMBER 2, 9,16, 23 AND OCTOBER 15, 2003**

DECISION: OCTOBER 22, 2003

COUNSEL: DEBORAH CONRAD - APPLICANT

LYNN REIERSON - RESPONDENT

DELLAPINNA, J.

This is an application for interim custody made by Ms. Rosamond Luke pursuant to subsection 16(2) of the **Divorce Act**.

The parties are husband and wife. They were married in London, England

on September 4, 1982. Although both Mr. and Ms. Luke were born in Sierra Leone, throughout the majority of their marriage and in particular since the children were born they have made Canada and specifically Nova Scotia their home.

Mr. and Ms. Luke have three children namely William born [...], 1984; April born [...], 1988 and Sarah born [...], 1993. This application is with respect to April and Sarah.

William is a second year student at McGill University. He appeared as a witness. He is intelligent and mature. He has excelled academically as well as athletically. His sisters, from all accounts, are also bright. All three children were described by Mr. Gary O'Meara, the Headmaster of Armbrae Academy where the children were once students, as "well-adjusted, confident, positive and overall very nice kids", a description not contested by anyone.

The parties separated in October of 2002. Mr. Luke initiated these divorce proceedings in November of that year. Regrettably, Mr. and Ms. Luke have not been able to agree on any of the issues associated with their divorce. The Court has already completed the hearing of an interim support application initiated by Ms. Luke and there have been many Court appearances by the parties relating to

the interim custody of their daughters.

Background

Until July, 2002 Ms. Luke was the primary caregiver for the children. Mr. Luke is employed with the United Nations and he is required to travel extensively and live outside Canada. As a result, he and his wife have lived apart since 1992. In 1992, Mr. Luke's position required him to live in Addis Ababa, Ethiopia. At that time William was seven, April, two and Sarah was not yet born. Since then, he has had to move a number of times including to Geneva, Harare in Zimbabwe and most recently to Pretoria, South Africa.

In 1991 it was agreed between the parties that Ms. Luke would remain living in Nova Scotia and the children would stay with her and Mr. Luke would visit with the family when his circumstances permitted. In spite of the distance between Mr. Luke and his family, he managed to maintain a close relationship with the children. In one of Ms. Luke's affidavits, she stated that the children had a "very loving relationship with their father".

Ms. Luke did not seek employment outside of the home. Rather, she attended university. At the time of this hearing, she is a Masters of Business Administration student at Dalhousie University. In addition to managing her

studies Ms. Luke cared for the children and for the majority of the time was effectively cast in the role of a single parent. The children seem to have flourished under her care.

In December, 2001 after learning that she had been accepted to the M.B.A. program, Ms. Luke discussed with Mr. Luke the care arrangements for the children. As she stated in her affidavit sworn March 5, 2003:

David and I discussed the acceptance and how I would be able to complete this program with the responsibility and duties of caring for April and Sarah. We agreed that it would be easier for me if David shared some of the childcare responsibility for a time, so that I could complete my education. We agreed that the children would move to Zimbabwe until 2004, when they would return to Halifax and their school, Armbrae Academy.

In the Summer of 2002, Ms. Luke and the children went to Zimbabwe to meet with Mr. Luke. While there they looked at houses and made other arrangements for the children's relocation. April and Sarah have been living with their father since that time.

Unknown to Ms. Luke when she began these discussions with Mr. Luke in December, 2001, Mr. Luke had entered into a new relationship with A.D.. He hid this fact from her and the children until after the children moved in with him in Zimbabwe. In fact Ms. Luke learned of his relationship with A.D. from the

children. While Mr. Luke admits that he did not disclose the existence of his relationship with A.D. to Ms. Luke he states that he “hinted” at it and that, in any event, both parties were aware that the marriage was breaking down.

The children were introduced to A.D. in November, 2002 and by February, 2003 April realized the full nature of A.D.’s relationship with her father. Not surprisingly the girls were upset with their father, upset with having to share meals with and being cared for by A.D. and for periods of time having to share their home with A.D..

Ms. Luke’s response to this revelation was emotional. She sent the children inappropriate emails and said things to them regarding Mr. Luke and A.D. which she should not have said. She encouraged the children’s mistrust of A.D. and their father.

Mr. Luke appears to have been less sensitive to his daughters’ reaction to A.D. and their parent’s separation than he could have been. Rather than limiting the children’s interaction with A.D., he effectively tried to force the children and A.D. to have a relationship. That only further exasperated matters. Mr. Luke admits that on one occasion in August, 2003 after he, April, Sarah, A.D. and her daughters attended church together, April became openly hostile to him and called him an “adulterer”. He slapped April on the back and

shoulder area. He admits losing his temper and attributed April's use of the word "adulterer" to information given to her by an adult - presumably her mother. Mr. Luke believes the children's dislike, distrust and hostility towards A.D. and her children are as a result of Ms. Luke's interference. He contends that if the children receive the proper encouragement, they will adjust.

In October 2002, Mr. Luke announced to his daughters that he was being transferred to Pretoria, South Africa. It is there that he and the children now reside. They live in one of four homes in a gated community. Because of the high crime rate, a security firm is paid to guard the houses in the community. Mr. Luke confirmed that in the short time that they have been in Pretoria, the home next to theirs was victimized by an armed robbery.

Prior Proceedings

This application by Ms. Luke was initiated in March, 2003. In May of this year, Mr. Luke made an ex parte application to this Court for interim custody. Based on communications between Ms. Luke and the children, he feared that she would go to Zimbabwe and take the children. As it turned out, his concerns were well founded. Ms. Luke did go to Zimbabwe and moved into the home occupied by Mr. Luke and the children. She assumed the care of Sarah and April

and rehired a staff member who previously resigned from Mr. Luke's employ. Then followed a number of court proceedings in Zimbabwe with respect to the custody of the children. While Ms. Luke was in Zimbabwe this Court granted Mr. Luke's ex parte application. Ms. Luke received a copy of that order on or about May 30. Eventually, the High Court in Zimbabwe also ordered that Mr. Luke would have interim custody of the children pending the outcome of this application in Nova Scotia.

Notwithstanding the ex parte order of this Court and the order of the High Court of Zimbabwe, Ms. Luke removed the children from Zimbabwe and returned with them to Nova Scotia in early July just in time for what was to be the commencement of the hearing of this application.

Upon first appearing before this Court on this application, Ms. Luke requested an adjournment. She was without counsel (having dismissed her previous lawyer) and having only just returned to the Province was ill prepared for a custody trial. On the condition that she honour the ex parte order of this Court by returning the children to their father, an adjournment was granted. Within a few days Ms. Luke then secured an emergency hearing date. She sought an injunction in order to keep the children in her care pending the final results of her interim custody application. After a relatively brief hearing on the day that

the children were to be returned to Mr. Luke, her application for injunctive relief was dismissed. This hearing then recommenced on the previously assigned adjourned date, September 2.

As part of this application, the Court has received evidence from a number of witnesses. In addition to the parties themselves who provided numerous affidavits, the Court received affidavits from their son, William, the Headmaster of Armbrae Academy who is familiar with all three of the children, a nanny who cared for the children under the employ of Mr. Luke in Zimbabwe for a period of time, a driver employed by Ms. Luke for a short period of time during her stay in Zimbabwe in May of this year, friends of the parties who know them and their children, Mr. Martin Whitzman, a therapist who interviewed both children over the phone during the course of these proceedings and others. The hearing spanned several days and afforded the Court a much better opportunity than previously was the case during the ex parte application of Mr. Luke and the application by Ms. Luke for injunctive relief to receive evidence, to appreciate the parties' respective positions concerning the care of the children and to assess the needs of the children.

Conduct of the Parties

Both parties have at times, since the deterioration of their marriage, acted

inappropriately towards each other and more importantly in their interaction with the children.

Mr. Luke was dishonest with his wife and his children. In December, 2001 when he and Ms. Luke discussed the care arrangements for the girls while Ms. Luke completed her M.B.A. program, he failed to disclose to Ms. Luke his relationship with A.D. and her likely involvement with Sarah and April. While I accept that the parties may have discussed other problems in their marriage and may even have discussed divorce proceedings, Mr. Luke would have known that Ms. Luke's position regarding the care of the children would have been different had she known of his extra-marital relationship.

He was equally dishonest with his daughters. Given their ages and the close bond that they have with their mother, he owed it to them to be more forthright. He misrepresented to the girls the conditions that they would be living under in Zimbabwe.

Mr. Luke was insensitive to the concerns of his daughters when introducing A.D. and her children to them. It was, or should have been, apparent to him that they were resisting A.D. and yet instead of adopting a slow and gentle approach to the introduction of his new companion, he all but thrust her and her daughters upon them. His affidavits show that he was aware that his daughters

were emotional and at times even hostile as a result of A.D.'s presence. William had expressed his feelings quite openly with his father and had passed on to his father the views of his sisters.

Mr. Luke made negative references about Ms. Luke to the children and put pressure on them to accept his new partner and her family. William stated in one of his affidavits:

12. Since February I have had a difficult relationship with my father in terms of trust. After we knew and he admitted his affair with Ms. [D.] I have noticed so much animosity in him. He constantly devalues Mom to us. Recently his sister, Auntie Isa and my paternal grandmother, are saying mean things to me about my mother.

33. Since his relationship with Ms. [D.] Dad relates to us with intimidation, threats and punishment. For example, Dad has told my sisters and me that if we do not accept Ms. [D.] he will not have anything to do with us but will accept Ms. [D.]'s two daughters as his own instead.

Mr. Luke denied saying this to William. However, I accept that even if William misquoted his father he nevertheless felt intimidated and threatened. Soon after William made his feelings clear to his father, his father withheld financial support from him. When April expressed her displeasure with her father's relationship with A.D., she was struck.

Ms. Luke too, in her conversations and emails to the children, was critical of Mr.

Luke and A.D..

Ms. Luke took the children from Zimbabwe knowing full well that her actions were contrary to the terms of this Court's ex parte order as well as the order of the High Court of Zimbabwe. She also presented evidence that was at the very least misleading if not untrue.

Because of their ages the children were entitled to know of their parent's pending divorce. However, both parties went beyond that and tried to convince the children that it was the opposing parties' fault that they were divorcing and in the process aspersed the other.

Martin Whitzman's Report

Martin Whitzman is a registered marriage and family therapist. He has given expert evidence before this and other courts on many occasions. He was asked to speak with April and Sarah to try to determine their wishes regarding their future placement. In addition to the usual challenges that interviews with children in such circumstances present, he was faced with the added difficulty of interviewing the children over the phone. He and the children never met face to face. A concern identified by Mr. Whitzman was the extent by which the

children's expressed wishes may have been influenced by their parents or their older brother. He acknowledged during his testimony that the parties, William, other family members as well as staff members in the employ of Mr. Luke may have all intentionally or perhaps more likely unintentionally influenced the children's perceptions and therefore their wishes. He acknowledged that there was no way for him to be sure that the preferences expressed by the children are an accurate indication of what they want or a reflection of outside influences.

He had two telephone conversations with the girls. April, the older of the two, appeared to be more comfortable in expressing herself but Sarah, less so. Therefore Mr. Whitzman had a second conversation with her to see if her views changed over time.

April indicated that prior to leaving Canada she thought that her parents were happily married. She described a close relationship with both parents and, not surprisingly, a special bond with her mother given that she spent more time with her. Her father, however, spoke with her on a weekly basis and she said that she greatly enjoyed the time that she spent with him when he was in Halifax. April even suggested that her closest relationship had been with her father.

She confirmed that in November, 2002 her father discussed with her his plans to obtain a divorce and it was a few months after that that she learned of his relationship with A.D.. April told Mr. Whitzman that she felt that her father was putting pressure on her to “bond” and “accept” A.D.. She stated that she was very upset that her father had kept his relationship with A.D. secret from her.

April recounted some of her mother’s reactions. She also described the conflict that appears to exist between April and A.D..

Mr. Whitzman included in his report the following notes:

- A In May 2003, Mr. Luke was away on business. April felt that her Father had placed [A.D.] in charge of them. The tension between [A.D.] and April reached a high point. It was during her father’s absence that April’s Mother unexpectedly arrived. April was angry with her Mother because she was apparently gathering legal evidence about [A.D.]. She was not expecting her Mother and this resulted in a lot of “mixed emotions.” This was an extremely stressful situation. Her Dad arrived a week later and Mom refused to leave the home. This entire situation occurred just prior to April’s exams. There was also an additional situation where her Dad and Police arrived at the house.
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- April noted that her Mother did take some things from the house when she left Dad’s house. “She went berserk. She took some paintings.” My dad saw things were taken and he was not happy.
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- Since returning to South Africa, April stated that [A.D.] has continued to visit and she is convinced that [A.D.] will be residing in the home by this November. The fighting between herself and [A.D.] has increased, as April does not like her attitude. Mr. Luke is viewed as attempting to make peace between [A.D.] and April. April finds it very difficult when [A.D.] “bad mouths” her Mother. April did admit to possessing a “rebellious attitude” towards her father, when [A.D.] was present.
- April has tried to open up to her Father and has told him that she does not like the fact that they [he and A.D.] are sleeping together and committing adultery. The talks have not changed anything.
- April is upset when her Father “bad mouths” her Mother.
- April did report that both of her parents have used her to express their anger at each other.

April also told Mr. Whitzman that she was miserable and that this was mainly due to A.D.. However she added that she missed her mother and wanted to return to Canada.

As for Sarah, she told Mr. Whitzman that she was not happy in South Africa and that her father is “yelling at my sister”. She describes A.D. as very rude. She stated she did not want to live in her father’s home in South Africa and stated: “I will miss my Dad but I would rather live with my Mother.”

Mr. Whitzman stated that at the end of his second telephone conversation with Sarah, she began to cry. She stated that she had a great deal going on but was unable to talk with her father. In conclusion Mr. Whitzman stated:

April is a very talkative, bright child who had no difficulty answering my questions. She is clearly upset by the changes in her family and expressed a desire to return to Canada and reside with her Mother. Sarah, while not as outspoken as her sister, echoed the same wishes. As stated earlier in this report, I cannot accurately assess the level of interference that has occurred or to what degree this may have impacted on their answers. It is clear that these children are stuck in the middle of a custody dispute which should be resolved in a timely fashion.

The Law

The relevant provisions of the **Divorce Act** are as follows:

16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage pending determination of the application under subsection (1).

(3) A person, other than a spouse, may not make an application under subsection (1) or (2) without leave of the court.

(4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

(5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

(6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

(7) Without limiting the generality of subsection (6), the court may include in

an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child. (Emphasis added.)

(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

In **Young v. Young**, [1993] 4 S.C.R. 3, the Supreme Court referred to Section 16 of the **Divorce Act** and the “best interests” test. At paragraph 17, the Court stated:

... the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has been left to the judge to decide what is in the “best interests of the child”, by reference to the “condition, means, needs and other circumstances” of the child. Nevertheless, the judicial task is not one of pure discretion. By embodying the “best interests” test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all legal tests, it is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge’s personal predilections and prejudices. The judge’s duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do.

The determination of what is in the best interests of a child requires a consideration of all the relevant factors that make up the “condition, means,

needs and other circumstances of the child”. As Goodfellow, J. stated in **Foley**

v. Foley, [1993] N.S.J. No. 347:

The diversity that flows from human nature is such that any attempt to compile an exhaustive list of factors that could be relevant is virtually impossible.

The wishes of the children are a relevant consideration but the purpose of obtaining those wishes is not necessarily to give effect to them but rather to assist the Court in deciding what is in the children’s best interest. See, for example, **Stanley v. Stanley** (1988), 84 N.S.R. (2d) 411 (N.S. Family Court).

Findings

The Court received volumes of material. Much of the evidence was contradictory and much was not particularly helpful in assessing what would be in the children’s best interests. Out of the evidence presented however there were certain facts that are indisputable.

April and Sarah are Canadian citizens. They were raised in Nova Scotia and although they have some familiarity with African culture, they are more used to living in Nova Scotia than anywhere else.

The children have lived the majority of their lives with their mother. They are, or at least were prior to July, 2002, happy, healthy, bright, well balanced

children who seemed to enjoy their home life, their friends and their achievements.

Prior to July, 2002 they had a good relationship with both of their parents even though their father was not in Nova Scotia most of the time. This is a testament to the attention Mr. Luke gave to the children in spite of the geographical distance between them and also to Ms. Luke who ensured that the role of their father was reinforced notwithstanding his physical absence much of the time.

The children's move to Zimbabwe was intended to be temporary while Ms. Luke completed her M.B.A. program.

I also find as fact the following:

When the move to Zimbabwe was agreed upon, Ms. Luke had no idea that Mr. Luke was in the midst of a relationship with another woman nor did she have any idea that this other woman and her children would be staying with her children a significant portion of the time.

When it was agreed the girls would live with their father in Zimbabwe, Ms. Luke did not know that Mr. Luke was going to be transferred to Pretoria, South Africa.

The restrictions on the children's freedom to move about are greater in South Africa than they are in Halifax. They did not have to live in a walled, armed compound in Halifax. While Mr. Luke has taken reasonable steps to ensure, as best he can, the children's safety, the need for such security is apparently much greater in Pretoria than in Halifax. It was Mr. Luke who referred to the armed robbery in the house next to theirs and the need for armed guards.

Because of Mr. Luke's work commitments, the children are very often left in the care of someone else. Presently he has a 25 year old part-time nanny caring for the children. During the course of these proceedings, Mr. Luke was away from home and travelling among approximately five or six different nations for much of a time frame that spanned approximately six weeks. His time away from the children was anticipated by the parties when they agreed that the children would reside in Harare. What was not anticipated, however, was the divorce of the parties, the conflict that has resulted and the emotional toll that conflict is likely having on April and Sarah..

Prior to the children living with their father, Ms. Luke demonstrated that she was a very good mother. The development of the children into the fine young people they are today is indicative of her parenting skills. In his affidavit

evidence Mr. Luke criticized Ms. Luke's organizational skills, house cleaning skills, household money management skills and her spiritual education of the children but during his cross examination he stated that he considered her to be a good mother.

Mr. Luke's frustration with the children's resistance to A.D. has caused further conflict in his household such that there is a risk that his ongoing relationship with his daughters may be jeopardized. His frustration has also been manifested in anger towards his children and on one occasion this has resulted in a physical assault on April.

Sarah and April would prefer to live in Halifax at this time. I accept that they miss their mother. I accept too that they are in conflict with A.D.. In coming to this conclusion I am fully aware of the possible influence Ms. Luke, William and others may have had on the children's expressed wishes. Given their ages (particularly April's) and the evidence as a whole, I believe that the children's wishes is a factor that weighs heavily in favour of their return to their mother.

While a further move from South Africa to Halifax may cause the children some upheaval, I am confident that the children will readjust quickly.

Both Mr. and Ms. Luke are educated, intelligent people. Prior to July, 2002 they demonstrated that they are capable of working together to provide their children with a sound upbringing. They have shown that it is possible in spite of being half a world apart for Mr. Luke and the children to maintain a close bond. If they put their children's needs first, I believe that it continues to be possible and even likely that the children will maintain a good relationship with both of their parents.

As a general rule the status quo with respect to custody should not be changed on an interim basis unless there is evidence that the existing arrangement is harmful to the children. If one assumes that the children's residence in South Africa is the status quo (which is arguable), I find that it would not be in the children's best interest for that to continue. The children are unhappy in South Africa. They miss Halifax and their mother. They do not wish to be exposed to A.D. at this time. If they continue living in South Africa, barring a complete change in the conduct of the parties, this arrangement will be harmful to the children.

Conclusion

In conclusion it is ordered that Ms. Luke be granted interim custody of

April and Sarah. Their best interests would be better served by them returning to Halifax where they have lived the majority of their lives. They require time to adjust to their new circumstances. They need time and space from A.D. if there is any hope of them accepting their father's new relationship within a reasonable time. They would be better off at this time with the care and attention of a parent. While Mr. Luke no doubt loves his daughters and wants the best for them, he is not in a position at this time to spend sufficient time with them. The company of a 25 year old nanny that they barely know is not nearly the same as the nurture of an affectionate parent.

While there is the risk that Ms. Luke will negatively influence the children against Mr. Luke and A.D. once she reassumes the primary care of the children, that risk exists regardless of where the children reside. Hopefully with this application behind them, the parties will spend more time reconstructing positive relationships with their children and less time fencing with each other.

Mr. Luke shall deliver April and Sarah to Ms. Luke in Halifax, Nova Scotia no later than November 30, 2003.

It is hoped that the parties will be able to agree on a reasonable access arrangement for Mr. Luke but failing such an agreement, the Court would be

prepared, after receiving written submissions, to make that determination. He should have, at the very least, regular telephone access. To the extent that finances permit, some attempts should also be made to arrange block access with Mr. Luke during the children's holiday periods from school either in Nova Scotia or Pretoria.

Dellapinna
, J.