IN THE SUPREME COURT OF NOVA SCOTIA
Citation: K.E. v. D.E. - 2003 NSSF054

Date: 20031231
Docket: SFHD No. 026327
Registry: Halifax

Between:

K.E.
Petitioner
-and-

D.E.
Respondent

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: November 17, 18 and 19, 2003 in Halifax, Nova Scotia

Decision: November 21, 2003 (orally)

Written Decision: December 31, 2003

Counsel: Counsel for the Petitioner - Deborah Conrad
Counsel for the Respondent - Colin Campbell

[1] This is the trial of a divorce proceeding in which the main issues to be decided revolve around joint custody, access by the father, and child support.

[2] The parties were married on August 20, 1994 and separated on March 11, 2000. There are two children of the marriage - A.E., now age 7, and B.E., now age 4.

[3] Immediately prior to their separation, the family lived in Montreal. For reasons recited later in this decision, Ms. K.E. on March 11, 2000 left the matrimonial home and took the two children with her to her parents' home in Nova Scotia. They have since resided here continuously, with Mr. D.E. having remained a resident of Montreal. Ms. K.E. is now an elementary school teacher in Halifax. Mr. D.E. is unemployed and has not worked since late 2001.

[4] The evidence is clear that there has been no collusion in this divorce proceeding and there is absolutely no possibility of reconciliation. I am also satisfied that all matters of jurisdiction under the *Divorce Act* have been met and that the requirements of the *Divorce Act* have otherwise been fulfilled in all respects. I therefore grant a divorce to the parties where there has been a breakdown of the marriage and the one year separation requirement has been established as the grounds for divorce.

[5] There are no matrimonial assets or pension issues to be addressed. The Corollary Relief Judgment should therefore contain a declaration that each party has sole ownership of the property presently in their possession and each will be

responsible for any debts in their respective names. Ms. K.E. also seeks a name change back to her maiden name, K.J.T., and that will be granted as well.

[6] In turning to the corollary issues of custody and access, I will first outline the procedural history of the matrimonial proceedings between the parties. They began in April of 2000 when Mr. D.E. made an application for custody under what I take to be the Quebec equivalent of our *Family Maintenance Act*. That led to a consent order being taken out in the Superior Court of Quebec dated October 12, 2000, the essential terms of which are:

1. Ms. K.E. to have custody of the minor children, A.E. and B.E.;
2. Mr. D.E. to have the following access:

(a) telephone access three times a week (Mondays, Wednesdays and Fridays) between 17h00 and 17h30, (prepaid calling cards to be provided by Mr. D.E. on a regular basis of $25 per month);

(b) supervised access at Veith House in Halifax beginning in October, 2000 and thereafter at any other time available, (Mr. D.E. to confirm the visits directly with Veith House). The cost of the visits at Veith House to be paid by Mr. D.E., including the costs of the report of Veith House about the visits, if necessary;

3. Neither party to discuss the court proceedings with the children nor to denigrate one or the other in front of the children;
4. Both parties agree to undergo an expert psychological assessment of themselves and the children regarding access rights, to be completed by the services provided by the courts;

5. Mr. D.E. not to have to pay child support where he is to pay his traveling costs to Nova Scotia to exercise access;

6. Mr. D.E. to pay for a scholarship for the children in the amount of $60 per month.

[7] At about the same time, namely, on October 10, 2000 Ms. K.E. filed an application in the Nova Scotia Supreme Court (Family Division) under the Nova Scotia *Family Maintenance Act* for an order for custody, access and child maintenance. That application culminated in the granting of an Interim Custody Order by Justice Gass on September 14, 2001 (amended on October 2, 2001) and an Interim Child Support Order on September 28, 2001. In neither instance did Mr. D.E. appear before the court.

[8] The Interim Custody Order decreed that:
(a) Ms. K.E. have sole care, custody and control of the children of the marriage;
(b) Mr. D.E. have access in accordance with the earlier consent order dated October 12, 2000; that is to say, by telephone access three times a week as specified in the order and by supervised access at Veith House at times when Veith House can provide supervision for such visits;
(c) a psychological report be prepared in Quebec where Mr. D.E. resides, to be arranged by him, to assist the court in determining access.

[9] The Interim Child Support Order, after reciting Mr. D.E.'s failure to provide financial disclosure, imputed income to him of $60,000 per annum (the basis of which is unspecified) which translated into a child support obligation of $700 per month under the table amounts for Quebec. The order further required Mr. D.E. to disclose and file within 30 days three recent pay stubs, income tax returns and

Notices of Assessment for 1998, 1999, and 2000, and a financial statement for 2001.

[10] In the meantime, Mr. D.E. filed a Petition for Divorce in the Superior Court of Quebec on April 11, 2001 seeking, as a corollary measure, access to the children on the terms therein specified. A number of motions were filed in that proceeding but ultimately, the Quebec proceedings were transferred to the jurisdiction of the Nova Scotia Supreme Court by Justice Trahan, reasons for judgment having been rendered from the Bench on May 10, 2002.

[11] The final procedural step leading up to this trial was the filing of a Petition for Divorce in the Nova Scotia Supreme Court (Family Division) by Ms. K.E. on July 22, 2003, seeking an order for custody, access and child support as corollary relief. At a pre-trial conference held before me, the parties agreed that they would proceed with the divorce under the petition filed in Nova Scotia. Mr. D.E.'s counsel has undertaken to file a Notice of Discontinuance of the Quebec divorce action which, of course, must be done before the federal Department of Justice will issue a new Clearance Certificate. The granting of a Divorce Judgment by this court will be delayed accordingly.

[12] Before turning to the evidence presented at trial, I first make reference to the pertinent sections of the *Divorce Act* relating to custody and access.

Section 16 reads as follows:

> (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.

> (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.
>
> (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.
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> (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.

[13] Much of the trial evidence was taken up with the past conduct of Mr. D.E. which was directed at the issue of his ability to act as a parent. There was a lengthy chronology of incidents of physical and mental abuse during their tumultuous marriage related in Ms. K.E.'s testimony, most of which Mr. D.E. either denied or tried to explain away. Significant among these was an alleged sexual assault and uttering of threats by Mr. D.E. against Ms. K.E. on March 5, 2000 which resulted in criminal charges being laid. Ultimately, those charges were disposed of through a plea bargain whereby the charges were not prosecuted upon the entry by Mr. D.E. into a Recognizance to keep the peace and be of good behaviour for a period of 12 months beginning April 3, 2001. The Recognizance recited that the court was satisfied by the evidence adduced that the complainant

had reasonable grounds for her fears. It prescribed conditions of no contact with Ms. K.E. and her family except for purposes of visitation rights (or emergencies) for their children as provided in a Superior Court Judgment.

[14] It is not necessary for purposes of this decision for me to make specific findings of fact as to whether this or other specific incidents of abuse happened as described by Ms. K.E.. Suffice it to say that I generally accept her evidence as being credible and reliable to the point of being satisfied, on the whole of the evidence, that she was subjected to a pattern of abuse by Mr. D.E. during their marriage. This was predominantly emotional abuse, but at times physical as well (for example, the incident of March 5, 2000 and the infliction upon her of a sexually transmitted disease the month before).

[15] I do not equate Mr. D.E.'s past conduct with that of the husband in *Abdo v. Abdo* (1993) 126 N.S.R. (2d) 1, as urged by counsel for Ms. K.E., a case in which the Nova Scotia Court of Appeal terminated access altogether. However, having heard the evidence of both parties, on direct and cross-examination, I conclude that Mr. D.E. has demonstrated in his relationship with Ms. K.E. a pattern of controlling, argumentative, self centred and emotionally abusive conduct.

[16] As was noted by the court in *Abdo*, however, abusive husbands do not necessarily make abusive parents. There is little evidence here that Mr. D.E. has ever deliberately directed any abuse toward the children, either physically or mentally, apart from subjecting them to his abusive conduct toward their mother.

Indeed, Ms. K.E. acknowledged in her testimony that Mr. D.E. does have a good side as well, the one she knew when she married him. She testified that he can be sweet and caring, gentle and kind and that he is great playing with the children for short periods of time; but then at other times, his other personality of cruelty and heartlessness comes out, which was apparently nicknamed "goat". She acknowledged that her daughter A.E. loves her father and enjoys playing with him, yet at the same time is also fearful of him.

[17] Ms. K.E.'s own fears over unsupervised access are that Mr. D.E. would treat the children like he had treated her in terms of emotional abuse by controlling them, laying blame on them, not putting them first, and failing to take responsibility. She points to a lack of stability in his lifestyle. She also considers him to be a flight risk if he were to have unsupervised access, just for spite as a way of getting back at her for her sudden departure from the matrimonial home with the children when she fled to Nova Scotia on March 11, 2000.

[18] Mr. D.E. describes himself as a caring and loving father who has improperly been denied normal access to the children for no good reason. He finds the Veith House supervised visitation arrangement presently in place to be logistically inconvenient, an impediment to developing any kind of relationship with the children and humiliating.

[19] Before dealing further with the subject of access, I turn briefly to Mr. D.E.'s request for joint custody of the children. He does not seek day to day care, custody and control but does seek an order for joint custody so as to have a voice in decision making in the lives of the children and to have equal access to information on their health, education and welfare.

[20] It is to be noted that s.16(5) of the *Divorce Act* already confers the right to be given such information as incidental to an order for access. In my view, the situation before me does not otherwise warrant consideration of a joint custody order. This has been a bitter struggle in which the parties continue to exude hostility and acrimony towards each other. They have not shown any signs of being willing to cooperate or even being capable of cooperating with each other. A joint custody order has more potential for exacerbating the problems in the raising of these children than in providing a solution.

[21] I do not consider it to be in the best interest of the children for a joint custody order to be made. I therefore direct that Ms. K.E. will continue to have, as corollary relief to the divorce judgment, the sole care, custody and control of the children.

[22] It is that same test, of course, that must be applied to the issue of access, as embodied in s.16(8) of the *Divorce Act* and echoed throughout the case law. As Justice L'Heureux-Dube eloquently put it in *Young v. Young* (1993) 160 N.R. 1 (at para. 125), "The best interests of the child remain the prism through which all other considerations are refractable". That comment is equally applicable to both custody and access matters.

[23] Complementing that principle is the principle embodied in s.16(10) that a child should have as much contact with each spouse as is consistent with the best interests of the child.

[24] Mr. D.E. proposes to gradually maximize his contact with the children by a series of stages outlined as follows:

(1) On his next visit scheduled for January of 2004, he be allowed to have part of his Saturday visit at Veith House unsupervised under its transition program for moving from supervised to unsupervised visits; and that on Sunday, he be permitted an unsupervised visit with the children from 9:00 a.m. to 6:00 p.m. at a local hotel where he will be staying (with transportation of the children being provided by Ms. K.E.). That is put forward as a short term arrangement.

(2) The second stage proposed, on the next bi-monthly visit, is having unsupervised visits with the children at a local hotel from 9:00 a.m. to 6:00 p.m. on both Saturday and Sunday.

(3) The third stage proposed, on the next bi-monthly visit, is having an expanded weekend visit to include overnight on Saturday, again at a local hotel.

(4) The fourth stage proposed is a one week block of summer access in Montreal (the location of which was unspecified) followed by the resumption of bi-monthly weekend access visits in Halifax as last described.

(5) The fifth stage proposed is one week of block access in Montreal on alternate Christmases, beginning in December, 2004.

[25] Mr. D.E. proposes to eventually expand his block access to one month during the summer.

[26] In addition, Mr. D.E. seeks telephone access with the children every Sunday at 6:00 p.m. by calling Ms. K.E.'s telephone number.

[27] Ms. K.E., on the other hand, urges the court to maintain the status quo of supervised access at Veith House only, as set out in the Interim Custody Order.

[28] The question for the court to decide is - what access arrangement is in the best interest of the children in this difficult situation?

[29] Unfortunately, the court does not have the benefit of a comprehensive custody/access assessment. What has been entered in evidence, without objection as to its admissibility, is the court ordered assessment carried out in respect of Mr. D.E. during December, 2001 and January 2002 by Mr. Steven Schachter, a psychologist with the Psychosocial Assessment Service of Les Centres de la Jeunesse. Mr. Schachter carried out interviews and a psychological assessment of Mr. D.E. which culminated in a report dated February 12, 2002 that became part of the Quebec court file later transferred to Nova Scotia. In that report, Mr. Schachter summarized his conclusions as follows:

- It is in the best interest of all children for them to benefit from a relationship with each parent as much as possible providing the parents are relatively well-functioning and no abusive situations exist.
- It is detrimental to the development of the children if they are not allowed this contact, and any attempt to turn the children against the other parent is extremely prejudicial to their development.
- Mr. D.E.'s personal history and psychological profile do not provide evidence suggesting that Mr. D.E. is a danger in any way to his children.

- Feedback from Mr. D.E.'s supervised visits with his children did not indicate any difficulties in their relationship.

- Except where otherwise stated through an agreement of Ms. K.J.T. and the children, Mr. D.E. does not appear to be a danger to any of them.

- The present restraining order makes telephone contact between Mr. D.E. and the children very difficult.

Mr. Schachter went on to recommend that:

- Ms. K.J.T. and the 2 children undergo a psychological evaluation.

- Mr. D.E. be allowed frequent unsupervised access with his children in Nova Scotia and capacity of Ms. K.J.T. to share the cost of airfare should be examined and taken into consideration. As the visits increase in duration the children can vacation with their father in Montreal.

[30] While this report is helpful to the court, it must be observed that Mr. Schachter's conclusions were essentially based on a self report of information by Mr. D.E. without any collateral checks of that information being carried out. The strength of Mr. Schachter's conclusions must therefore be tempered in that light.

[31] The court also has before it , by agreement of counsel, a report from Veith House in the form of a letter written by Jocelyn Yerxa, one of its community workers, dated July 14, 2003. This report recites the resumption of Veith House access visits by Mr. D.E. between January and June of this year, after a 21 month gap, and records the following observations:

- Mr. D.E. and his children are comfortable in their interactions. B.E. was a little uneasy with his father for the first five minutes of the visit on January 25, 2003; however, given that he had not seen his father for almost two years, this was a completely understandable reaction.

- Mr. D.E. is both physically and verbally affectionate with his children and acknowledges their feelings.

- Mr. D.E. sets appropriate limits and boundaries, and when misbehaviours occur he uses verbal and physical redirection to correct the behaviour.

- Mr. D.E. has appropriate expectation and speaks appropriately in front of his children.

- A.E. and B.E. are excited to see their father and enjoy exploring all the possible activities in the room with him.

> To date we have no issues or concerns relative to the interactions between Mr. D.E. and his children during their visits that have taken place at Veith House. Mr. D.E. is attentive and engages with his children very positively. Mr. D.E. is also respectful of the limits of the access and works within those boundaries.

[32] To be weighed against this evidence is the testimony of Frances Ready-Chisholm, a witness called by Ms. K.E.. Ms. Ready-Chisholm is a registered social worker who provides individual and family counselling under an internal employee assistance program under the auspices of the Nova Scotia Teachers Union. She is the supervisor of that service and has been doing this work for 15 years.

[33] Ms. Ready-Chisholm was not called as an expert witness but rather to describe her observations from having provided individual counselling to Ms. K.E. and to A.E. dating back to June of this year. Ms. Ready-Chisholm first met on two occasions only with Ms. K.E. who expressed concern over the protection of the children and having to cope with the upcoming court proceedings. On a third occasion, November 3, 2003, Ms. K.E. brought A.E. along as well because of the fears her daughter was expressing,

manifested by nightmares, at the prospect of going to Montreal with her father for access visits. Ms. Ready-Chisholm asked A.E. for her understanding of why she was there. She said that A.E. was very clear about her worries and appeared quite mature for a 7 year old. Her father had told her that he would soon be able to take her to Montreal for a visit and she was afraid to go. She feared her dad might be mean to her without another adult present, whether it be in Montreal or even a five minute walk outside. She made it clear to Ms. Ready-Chisholm that she was fine with the supervised visits at Veith House. When Ms. Ready-Chisholm tried to build on that by using various techniques to look for ways to increase A.E.'s time with her father and still feel comfortable, she said she made no headway.

[34] When cross-examined about the timing of this counselling in such close proximity to the trial dates, Ms. Ready-Chisholm was dismissive of any suggestion that it was contrived or for posturing purposes by Ms. K.E.. She said it was a situation where the fear factor was increasing, with the court soon to decide the issue.

[35] I found Ms. Ready-Chisholm's evidence of her observations during the counselling sessions to be credible and reliable. Children are apprehensive of change in the best of circumstances and would understandably be all the more so in the strained circumstances we have here.

[36] Mr. D.E. has certainly done little to improve the circumstances by the lack of responsibility and sensitivity he has shown since the separation.

Although Mr. D.E. wrote a conciliatory letter in December of 2000 agreeing to Ms. K.E. having custody and also agreeing to pay full child support and extras as best he could, nothing was ever paid, even though Mr. D.E. remained employed through most of 2001. Nor did he even appear before the Nova Scotia Supreme Court (Family Division) in August or September of 2001 when interim custody and child support applications were heard. Still nothing was paid to help support the children, despite the orders granted.

[37] Of greater concern, however, is the lengthy gap between access visits at Veith House between March, 2001 and January, 2003, compounded by the irregular provision of calling cards to Ms. K.E. for telephone access. Mr. D.E. has tried to explain that away by attributing his absence to his inability to afford his travel costs with the temporary demise of Can Jet as a discount carrier and the logistical difficulties of travelling to Halifax for a Saturday visit. I do not find that to be a satisfactory explanation for such a lengthy gap between visits. Where there is a will, there is a way.

[38] What is even more perplexing is that upon learning that this trial would likely be shortened from four days to three, Mr. D.E. did not plan to stay over the extra night or two so as to be able to visit the children on Thursday evening which was the only time slot this week that Veith House could accommodate him. He acknowledged he had no reason to get back to Montreal, other than to avoid an extended hotel bill here in Halifax. This is hardly indicative of a father putting his children first.

[39] It must be remembered, however, that the focus of the court is not directed at penalizing Mr. D.E. for his past conduct or erratic behaviour. The task of the court is to determine what access arrangement would be in the best interests of the children in the hopes of developing a better relationship between them and their father.

[40] Judges have no divine insight in deciding such cases and essentially have only a snapshot of the family situation to work with, through evidence limited both by the rules of admissibility and, as here, the financial resources of the parties.

[41] For all of Mr. D.E.'s shortcomings, I am satisfied that he truly loves his children and all indications are that they enjoy being with him, albeit in a supervised setting. If the supervised setting at Veith House is maintained indefinitely, there is little prospect that Mr. D.E. will ever be able to develop much of a relationship with the children, or they with him, in such a sterilized and constrained environment. I do not perceive that he poses any danger to the safety of the children or that he poses a flight risk, notwithstanding the fears of Ms. K.E.. There is no evidence to suggest that such a risk exists and as Mr. D.E. should well know, that would spell the end of any access to the children once he was caught up with, not to mention the force of the criminal law.

[42] Having made these findings, I conclude that it would be in the best interests of the children to try to provide a framework of access that would at least give the development of their relationship with their father a chance. It must be implemented, however, on a very gradual basis, given the anxiety

expressed by A.E., and undoubtedly absorbed by B.E., over the prospect of unsupervised visits. I am prepared to order that for the January, 2004, Saturday visit, Mr. D.E. be permitted to have part of his visitation time at Veith House unsupervised in accordance with its transition program policies earlier referred to.

[43] Assuming that small step proves to be a positive experience (and this order can be revisited by a variation application if it is not), I am prepared to order that for the next bi-monthly visit, the same arrangement be followed at Veith House for the Saturday visit but further that Mr. D.E. be permitted unsupervised access with the children, based at the local hotel at which he is staying, on the Sunday of that weekend from 9:00 a.m. until 5:00 p.m., with Ms. K.E. (either herself or through a designated person) providing transportation for the children to and from the hotel.

[44] Hopefully, that expanded step will allow the children to become more confident in their relationship with their father and will be a positive experience. Assuming that it proves to be a positive experience (and again, this order can be revisited by a variation application if it is not), I am prepared to order that for the third bi-monthly visit hence, Mr. D.E. be permitted unsupervised access with the children, based at the local hotel at which he is staying, on both Saturday and Sunday from 9:00 a.m. until 5:00 p.m., with Ms. K.E. providing transportation for the children as aforesaid. By using the term “based” at the hotel, I do not mean to restrict Mr. D.E. from taking the children to outside activities and outings, within Halifax Regional Municipality.

[45] Aside from further permitting telephone access to the children every Sunday at 6:00 p.m. (Atlantic time) at Mr. D.E.'s expense (the placement of which calls can surely be worked out by the parties through their counsel), I am not prepared at the present time to expand the access arrangement beyond that. That is to say, the bi-monthly weekend access visits from 9:00 a.m. to 5:00 p.m. on Saturdays and Sundays as above described will continue indefinitely, until varied by agreement of the parties or by further order of the court. It can only be hoped that with time, and a responsible effort by both parties, that the children will be able to develop a more normal and better relationship with their father to the point where there is a sufficient comfort level with overnight access and perhaps eventually, block access of some sort in Montreal as the children get older. As matters presently stand, however, I am of the view that a satisfactory track record needs to be established over the next several months before overnight access can be considered as being in the best interests of the children.

[46] I would go on to say that in the present circumstances, the proposed block access in Montreal is out of the question. The current level of anxiety of the children over unsupervised visits may not dissipate as hoped in the gradual expansion of the access arrangements if block access in Montreal is known to be in the offing, a fear foremost in the mind of A.E. expressed in her counselling session. Moreover, there is far too much instability in Mr. D.E.'s lifestyle in Montreal at the present time. He has only within the past two months moved in with his girlfriend (with whom he admittedly had an extra-marital affair in 1999) and her three children at her residence on the Kahnawake reserve. He has been unemployed since late 2001 and has been drawing social assistance benefits since 2002. This is said to be based on

stress leave, and an inability to concentrate on work because of his anxiety over his children and their whereabouts. There is not even a plan presented as to how such block access would work. Perhaps some day this might be considered as the children get older and more mature, but it cannot be considered at the present time. It is simply not in the best interests of the children to do so.

[47] I have tried to set out a framework for expanded access over time with the goal of creating an opportunity for the development of a better relationship between the children and their father. This will only have a chance of being successful if both Mr. D.E. and Ms. K.E. rise above the acrimony between themselves and put the children's interests first. I admonish them to do so.

[48] The only remaining issue to be dealt with is that of child support; an issue that was not strenuously argued on behalf of Ms. K.E. simply because she has no faith that Mr. D.E. will comply with a child support order even if income is imputed to him.

[49] Although the financial disclosure filed late by Mr. D.E. in March of 2003 was still incomplete, he has recently provided a Notice of Ruling from Quebec on his social assistance benefits dated October 24, 2003. That ruling confirms a monthly benefit amount of $536.33 as of November 1, 2003. That level of income is below the entry level of the table amounts for resident payors in Quebec. Mr. D.E. says he uses these funds largely to finance his travel and accommodation costs associated with his access visits in Halifax.

[50] Although Mr. D.E. has not provided the court with any of the supporting documents or reports in connection with his application for employment assistance benefits, said to have been accepted on a stress leave basis, there is insufficient evidence otherwise to warrant the conclusion that income should be imputed to him under the divorce legislation. I therefore decline to make a child support order at the present time.

[51] Given the result, and the financial positions of the parties, I direct that they each bear their own costs of this proceeding.

J.