IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Y. v. F., 2004 NSSF 022

Date: 20040116
Docket: SFHF-005228
Registry: Halifax

Between:

L.Y.

Applicant

v.

B.J.F. and N.Y.

Respondent

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on September 26, 2008.

Publishers of this case please take note that s. 94(1) of the ***Children and Family Services Act*** applies and may require editing of this judgment or its heading before publication.

Section 94(1) provides:

> "No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or relative of the child."

Judge:	The Honourable Justice Leslie J. Dellapinna
Heard:	January 13, 14, 15 & 16, 2004, in Halifax, Nova Scotia
Written Decision:	March 11, 2004
Counsel:	L.Y., Applicant, personally Colin Campbell, counsel for the Respondent, B.J.F.

By the Court: (Orally)

[1]This is an application by L.Y. pursuant to the *Maintenance and Custody Act* for an order granting to her custody of her grandson, D.Y., born [in 1999] and, alternatively, an order for access. Leave was granted to L.Y. in August of 2003. B.J.F. has attorned to the jurisdiction.

[2]D.Y. is the son of N.Y. and B.J.F.. N.Y. is the daughter of L.Y.. D.Y. resides with B.J.F. in [...], Nunavut.

[3]Much of the evidence presented to the Court related to child protection proceedings in relation to D.Y. initiated in March of 2000 when D.Y. was only 13-months old. On or about March 17, 2000, the Minister of Community Services initiated an application pursuant to the *Children and Family Services Act* naming N.Y. and B.J.F. as the respondents. The Minister sought a finding that D.Y. was in need of protective services. Prior to that application N.Y. and B.J.F. had ended their relationship. N.Y. and L.Y. also had a falling out. Then, as well as now, N.Y. accused her mother of being physically and verbally abusive. There was considerable conflict among the parties. L.Y. had on January 2000 applied for custody of D.Y. pursuant to the *Family Maintenance Act*, the predecessor legislation to the *Maintenance and Custody Act*.

[4]As is often the case in child protection cases, assessments of the parties were conducted. They were done to determine, among other things, the suitability of the parties as placements for D.Y.. The assessment report with respect to B.J.F. is dated July 13, 2000. He was then 22 years of age. He had been working in a bar and sharing accommodation with a number of male friends. The report acknowledged his bond with his son and that he cared for him. It also stated that his lifestyle at the time was not well suited for the care of a young child. He had a history too of using marijuana and there was some evidence of violence in his past relationships. He was not, as of the date of the report, considered an appropriate long term placement. Miss MacEachern, one of the co-authors of that report, testified that the report was time-centered. The assessment report regarding L.Y. was dated March 25, 2000. It contained a psychological assessment. As a result of that assessment, it was recommended that L.Y. not be considered as an appropriate long term placement for D.Y.. N.Y. had previously made it known that she was

not seeking the return of her son. As the child protection proceedings ran their course, D.Y. was found to be a child in need of protection and was placed in the temporary care and custody of the Agency. It is important to note that before the *Children and Family Services Act* proceedings, N.Y. and D.Y. resided for a period of time with L.Y. and, for a period of approximately two-and-a-half months between November of 2000 and February 2001, D.Y. was in the care of his grandmother alone.

[5]Between July 2000 and March 2001, B.J.F. made certain lifestyle choices. He testified that he decided that if he wanted the care of his son he knew the only way that was going to happen was for him to put stability in his life, put any drug use behind him and present a viable plan of care. This he apparently did and by March 2001 D.Y. was placed in his care under the supervision of the Minister of Community Services.

[6]I heard from a number of witnesses called primarily by L.Y.. Among them was Joe Williams, a family support worker who worked with B.J.F.. He guided B.J.F. through a program for parents of two to six-year olds called "Parenting the Strong Willed Child." Although B.J.F. missed a number of appointments, a circumstance which Mr. Williams said is not uncommon for persons taking the course, he left Mr. Williams with an overall positive impression. Mr. Williams indicated in his report and his testimony that B.J.F. was easy to engage, he was motivated and interested in learning effective behavioural management strategies.

[7]By August 2001, the time lines imposed by the *Children and Family Services Act* were coming to an end. There were discussions about possibly terminating the proceedings under the *Children and Family Services Act* and taking out a *Maintenance and Custody Act* order and it was contemplated that custody would be granted to B.J.F. with N.Y.'s consent. Regrettably, the parties did not tidy things up as well as one would have hoped. The Agency, content that no child protection issues remained, simply allowed the deadlines set by the Act to pass, effectively bringing the protection proceedings to an end. B.J.F., rather than waiting for an order, left the province with D.Y.. What had started as a vacation, resulted in B.J.F.'s ultimate decision to leave Nova Scotia and relocate with his son. This decision did not help mend the already strained relationship between L.Y. and B.J.F.. However, as Mr. Campbell pointed out during his submission,

while there was no order permitting him to leave with D.Y., there was also no order preventing him from doing so. The Agency apparently was not concerned at the time. They expected B.J.F. to assume care of D.Y. in any event. There was, in their view, no lingering protection issues. If L.Y. or N.Y. or B.J.F. had any unresolved issues it was left to them to address those issues in the context of the *Family Maintenance Act* or the *Maintenance and Custody Act*.

[8]N.Y. was apparently unconcerned. She had come to the conclusion that B.J.F. had changed his lifestyle to accommodate D.Y. and DY.. should be with his father. She was very much opposed, however, to her mother ever having custody of D.Y. and still is.

[9]The Agency, in or about November 2001, presented a termination order to the Court which was issued.

[10]Another of the witnesses called by L.Y. was Miss Kandi Swinehammer, a child protection social worker with the Department of Community Services. She testified that D.Y. was placed with his father in 2001 after he had formulated a plan, something he had not been able to do in 2000, and had made the necessary changes in his life to accommodate his son.

[11]After leaving Nova Scotia, B.J.F. eventually came to reside in [...]. After working first in a bar and then a short time for a company owned by his father, he secured a position with C.... and he has been employed there since December 2001. D.Y. goes to daycare and will begin primary in September. B.J.F. has formed a relationship with a Miss K. and they are expecting the birth of a child in February. D.Y. is apparently settled into his new home of two and a half years. He has friends in the area. B.J.F. presented in Court as a mature young man. He testified that he loves his son.

[12]N.Y. is in favour of D.Y. staying where he is. She and B.J.F. have a workable relationship. She gets to speak with D.Y.. She is satisfied that he is being cared for appropriately by his father. N.Y. remains adamantly opposed to her mother having custody or access to D.Y.. She accuses her mother of being physically, verbally and emotionally abusive to her during her youth. She claims her mother continued to be abusive and callous to her when she and D.Y. lived with her in

1999. She fears that her mother would be just as abusive to D.Y. once he showed he has a mind of his own.

[13]Sub-section 18(5) of the *Maintenance and Custody Act* provides that 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 principal that the welfare of the child is the paramount consideration.

[14]I heard from a number of character witnesses for L.Y.. They spoke highly of her. They confirmed she does not drink, smoke or abuse drugs. They describe her as a good and supportive friend. None of them however know D.Y. to any extent. None, because of the circumstances of the parties, could compare L.Y.'s circumstances to that of B.J.F.. Indeed, L.Y. knows nothing of B.J.F.'s or D.Y.'s circumstances, other than perhaps what she has heard in Court.

[15]L.Y.'s application is driven by a desire to have a relationship with D.Y., not by any real knowledge that he is not being adequately cared for. She claims too that she wants him to know his extended family and his heritage. It is worth noting that L.Y. has Aboriginal status.

[16]In this proceeding the onus is on L.Y. to satisfy the Court that it would be in D.Y.'s best interest to be taken from his father and placed in the custody of L.Y.. In my view she has not met that onus. I am satisfied that B.J.F. has adopted a lifestyle which is intended to provide and does provide adequately for his son. I accept his testimony. He has a stable life. He has a home. He has a position which he describes as a career. He has formed a relationship with Miss K. He is planning for the future. He has made provision for childcare for his son while he is at work. He has satisfied me that he is a caring and nurturing parent and I have been given no reason to believe that D.Y.'s current circumstances are not serving him well. To the contrary, I believe that they are. There is no reason to take him from his father or his home. I should add that in coming to this conclusion, I have given absolutely no weight to the assessment report with respect to L.Y. dated May 25, 2000.

[17]L.Y. has stated that what she wants for D.Y. is a safe, loving and caring environment. I believe that he has that now. I am not prepared to disrupt this child because in the past B.J.F. may have used marijuana. That does not appear to be a

factor now. Nor am I prepared to disrupt his current circumstances because his father may have been involved in unstable relationships in the past. That is apparently in the past and the evidence of that instability came from a time when B.J.F. was 22 or younger. Nor am I prepared to uproot D.Y. because of L.Y.'s generalizations or suspicions of life in [...]. I therefore grant custody to B.J.F..

[18]That brings me to the issue of access. L.Y.'s position is that if not granted custody she would like to have regular telephone access to D.Y. and by "regular" she means regular weekly telephone access, as well as one or two visits with D.Y. per year. B.J.F.'s position is that the relationship between him and L.Y. is conflictual. He is opposed to any Court ordered access. He believes that such access will ultimately lead to further conflict between the parties, a conflict in which D.Y. would then become involved and that would not be in D.Y.'s best interests. He proposes that any access by L.Y. to D.Y. be left entirely in his discretion.

[19]There is no question that there is animosity and even hostility between L.Y. and B.J.F.. It runs both ways. However, of the two, B.J.F. presented in Court at least to be more conciliatory than L.Y.. That may or may not be the case outside of Court but that certainly was my impression during the course of trial. During L.Y.'s direct evidence and also during her cross-examination of her daughter and B.J.F. and in her summation, rather than offer the proverbial "olive branch", her focus was on discrediting B.J.F.. She repeatedly called into question his honesty rather than give him the benefit of the doubt on any front. This is but a small example of the conflict that exists between the parties. This conflict is not a temporary condition likely to defuse with the conclusion of these proceedings. It has existed since 1999, shortly after D.Y.'s birth. I accept that B.J.F. must bear some responsibility for this. Certainly, leaving the province as he did did not help matters. The conflict between L.Y. and N.Y. has existed for a period much longer than that. L.Y.'s hostility towards B.J.F. is deeply rooted.

[20]In spite of the evidence or rather the lack thereof, L.Y. remains of the belief that she has a greater right to parent D.Y. than his own father. I point out, however, that this case is not about grandparents or the rights of grandparents. In appropriate circumstances grandparents have a very important role to play in the lives of their grandchildren. That role could include educating their grandchildren

with respect to their extended family or about values that sometimes seem to be less important today than yesterday or just to provide them with affection and attention and to be available when needed. This case is about one child and that child is D. and what is in his best interests.

[21]After D.Y. was born it would be fair to say that he had a very rocky beginning. He, like any child, deserves stability. I believe that he now has it. L.Y. has a lot of positive attributes. She is educated. Her friends say that she can be very supportive. She could teach D.Y. about his Aboriginal and Celtic ancestors. Apparently D.Y. is learning something of Canada's Aboriginal peoples because of where he lives, although perhaps not specifically about his and L.Y.'s ancestors. However, until L.Y. puts her personal feelings about B.J.F. and N.Y. aside I fear that the acrimony that she has for them will spill over onto D.Y..

[22]I believe that B.J.F.'s position on access is reasonable and well founded. There is too much risk that if access is court structured and court ordered, D.Y.'s exposure to the conflict will outweigh any benefit that he would otherwise obtain from access to his grandmother. If L.Y. has regular access, including regular telephone access, I believe it is inevitable that D.Y. will be exposed to stress and conflict as a result of the acrimony that exists and that would not be in his best interests. I therefore order also that N.Y. shall have reasonable access to D.Y. as agreed between N.Y. and B.J.F.. I also order that L.Y. shall have such access to D.Y. as B.J.F. in his discretion deems appropriate.

J.