IN THE SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: M. v. F., 2004 NSSF 106

Date: 20041104
Docket: SFSNF 12437
Registry: Sydney

Between:

M.

Applicant

v.

F.

Respondent

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on June 6, 2008.

D E C I S I O N

Judge:	The Honourable Justice Walter R. E. Goodfellow
Heard:	November 3 and 4, 2004, in Sydney, Nova Scotia
Written Decision:	November 26, 2004
Counsel:	Janine Kerr, for the Applicant Douglas P. MacKinlay, for the Respondent

By the Court: (Orally)

BACKGROUND

[1]"M", now 46, and "F", now 49, met in British Columbia in 1995. The parties were blessed with a son, "X", born [...], 1996, now 8 years old. When they met "M" was a member of a police force and she became a pensioner upon her retirement, apparently initially for medical reasons and she has a 21 year combined police/military pension.

[2]In 2001, they moved to Cape Breton and separated, I was not sure if it was April or July but the brief says July 2001. On July 25, 2001, "M" was admitted to the Cape Breton Regional Hospital for observation. "A", a psychiatrist, diagnosed her condition as an adjustment disorder with symptoms of anxiety. "A" reported no psychotic symptoms or indications of any major psychiatric disorder. "M" maintained primary care of "X" following her discharge from hospital and "F" exercised access with "X" until Christmas 2001.

[3]"F" brought an ex-parte application which resulted in an Order being granted on January 2, 2002, granting sole custody to "F" with supervised access to "M". On July 4th, 5th, 2002, September 3rd and 26th, 2002, the matter was heard by Justice MacLellan. Her Ladyship issued an oral decision on October 4th, 2002 that granted sole custody to "F" and access to "M". As a consequence of this decision, "M" went for a swim in the harbour and was hospitalized. "A", her psychiatrist, in his report filed March 5th, 2004 said on this admission, she did not manifest any symptoms consistent with a major psychiatric disorder. "A" in his evidence before me said, "there was not a grain of evidence of any psychiatric disorder". He described her condition and said she had made amazing progress showing tremendous tenacity and was relentless in pursuit of her career. Under cross-examination, "A" acknowledged his report used essentially the same comments given by him in his report before Justice MacLellan. He does not specifically address any changes in her emotional behaviour, particular as it relates to the child.

[4]On the outset, I want to acknowledge the tremendous linguistic ability of "M" and certainly the child, "X", who initially, according to the father, by direction of the mother, only spoke the French language, now speaks only English, would

benefit from exposure to the French language and culture. If "X" has any facility in languages over time, if the mother can handle him, "X" could become versed in several languages. There is no doubt "M" has progressed in her employment securing a senior position in the field of security and in mid 2004 moved on to a position of even greater responsibility.

[5]"M" in this application filed the August 18, 2004 recites the serious inability of the parties to communicate as directed by Justice MacLellan in the Order under review. "M" had "A" write a letter on March 3, 2003 to Justice MacLellan advising that the direction in the Order with respect of communication was counter-productive then repeating "M's" view that communication should be through a third party. "M" refused to deal with communication by way of e-mails, even though there is a specific direction in the decision of Justice MacLellan.

[6]The issues are set out in the extensive and thorough brief filed by "M's" counsel. First of all I want to recite the provision in the *Act*, s. 37(1) of the *Maintenance and Custody Act*, R.S.N.S. 1989 Chapter 160 provides:

> **37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.**

[7]You should note that it is permissive. It is not mandatory because obviously some changes don't warrant...and there is always changes, people get older and change in many other ways.

[8]In the brief I think the first issue raised was the question of whether or not "F" was virtually in contempt of the existing Order and I will comment very briefly on that. First of all, I think the direction given by Justice MacLellan was certainly not specific. Justice Maclellan did not direct that by a given event, a date or happening, that access would change. It was related really to "M's" emotional well-being and of course there have been some changes. I understand from the evidence that the summer access itself was by agreement between the parties expanded and so I take the view that "F" was not in breach of the Order of Justice MacLellan.

[9]Next I am going to combine the two issues that were raised by the "M" in her brief and that is really a question of whether there is a change in the circumstances and I say at the outset that there is no change in the circumstances that warrant the relief sought of shared custody. The success "M" has had in the employment field places her in full time employment. Her success is very commendable but I am not at all convinced that shared custody on the evidence before me would be beneficial to "X". In fact, I find to the contrary. It would exacerbate the inability of the parents, particularly "M", to communicate and accept any parental cultural direction other than that of her choosing. The parties are totally unable to communicate and yet "M" says in shared custody she would accept and follow "F's" approach to discipline. There is already a specific paragraph in the Order dealing with that aspect and there has been difficulties since. Separate from the lack of communication ability, "M" is a strong willed, intelligent person who would have extreme difficulty accepting any other position on parenting other than her own. It is a concern that an eight year old has, in the mother's care, used foul language and threatening gesture towards his mother and this conduct seems to be uncontrolled despite "M's" approach to discipline. I do not know where this conduct originates, but both parents fail "X" if they do not address something as fundamental as an eight year old being taught and indeed being required to respect his parents.

[10]The child presently has a measure of stability and that was commented on by Justice MacLellan in her decision. In fact I want to incorporate some of the paragraphs in her decision and I will come back to the point where I am at now. I meant to do that earlier and that is paras. 73-79 of her decision. So that anyone reading it or dealing with it would have a flavor of what the background is.

> **[73]** I accept that Ms. N.M.M. has made in appropriate comments to A in therapy and on the phone when she knew these comments were unwise. She knew he was a disturbed child when she raised painful topics in front of his therapist. Her comments made to A about the court just last month illustrates she has no ability to reflect on her errors. I believe she has little chance to correct them. At no time did the Court indicate that she was a bad woman or a bad mother. This is a very painful thing to tell a five year old child.
>
> **[74]** The reports to professionals do no address her unacceptable rages and the effect such behavior has on A. It is well known that children gravitate to tranquillity and stability. She can provide neither at the present time. If she was

not emotionally unstable, as related by the evidence, and if I did accept that she is now perfectly emotionally healthy, then she fails to explain the inappropriate behaviors regarding her roughness with A, the trigger points, such as the volume of a radio, her in-appropriate comments to Dr. Betsy Marcin, to A regarding the Court and To Cst. Sophocleous, to name a few. These behaviors were left unexplained so either she is emotionally unstable giving rise to these behaviors, or she's emotionally stable and behaved in a most inappropriate manner without explanation.

[75] Ms. N.M.M. seems not to be aware that she should have attempted to explain these behaviors or at least to provide some reassurance they will not be repeated. All she has done in her evidence is to blame others for all and any hardship she has experienced, including her own acting out. Admittably, if her past records are true, she's had an abysmal upbringing and no support from her family, but there is evidence, direct evidence of her conduct before this Court which is inexplicable for her as a mother, as grown up, and educated woman and a former peace officer. There is no doubt she would frustrate contact with the father. I accept the father will not frustrate access to her. He has been willing to accept advice on access.

[11]I would interject here that I think frustration has got to "F" and to say he is not terribly keen on access is to speak euphemistically and he has an obligation to make sure that "X" has a relationship with "M" and it is the child's right to access and not the access right of a parent.

[12]Further in Justice MacLellan's decision:

[76] As indicated there is evidence that Mr. B.L.R. was a poor husband and a poor friend to Ms. N.M.M. However he is a better than adequate father and he is receptive to child rearing advice.

[77] Based on Ms. N.M.M.'s evidence, her emotional state is weak. Her emotional state will effect A adversely.

[78] Ms. N.M.M. believes she puts A's needs first, but she does not, and it appears difficult for her to do so. I accept A was afraid to return to her house at Christmas. Why, was never explained. As well I accept that A lashed out at her in therapy and indicated that his father had not abused him.

[79] As stated already, A has thrived in his father's care for the past ten months. His behavior and sleep have improved. For all these reasons I find it is

> in A's best interest to order sole custody of A to Mr. B.L.R. with access to Ms. N.M.M.

[13]I recited parts of the decision of Justice MacLellan where she found a period of stability and indeed I think that period of stability has extended and what you have, it is been enhanced. That period of stability has been enhanced by the introduction of Ms. M. and a close friend and quasi-brother, A.. While they may or may not be living together, it is a relationship of some standing and duration and it has enhanced the stability that was there which has been extended in any event.

[14]There was some suggestion by "M" that the child was calling Ms. M. "mother". I do not accept that but, if it is happening, there is an obligation on "F" to recognize and make sure that "X" recognizes that his mother is "M" and it would be totally inappropriate and a disservice if you start using terminology addressing someone else as his mother.

[15][*"X's" school marks to which some credit must be given to the "M" because she has helped him with his homework seemed to have improved, they seem to be quite decent marks. I am impressed by the evidence both of Ms. M. and of the "L". I do not know what to make of the suggestion that the child might have Tourette's disease (syndrome). I repeat what I said in argument that this should be double checked. Certainly it is an indication of how emotionally strong "M" feels towards this little boy. The difficulty is that Justice MacLellan referred to her emotional instability and what we have of "A" is really her stability with respect to employment and although one can draw some inference and that there has been some improvement in her emotional stability, it is clear from the way she conducts herself in the court that she really is a very emotional, almost obsessed person in some respects and she has to learn to take greater control. Certainly I would not put the child at risk with respect to the increased stability that he has. Here, however, I do not think even the limited prospect of communication that existed in *Markus v. Markus* (2004), N.S.J. 31 exists and not even a defined joint custody declaration as in *Loughran v. Loughran* (2001), N.S.R. 82 2(d) 143 is appropriate. There remains tension between the parents as evidenced by these allegations of threats and his saying there have been 17 complaints to the police and the Children's Aid Society and I think he even used the word 'stalking'. They are all separate and apart from the criminal charge that is apparently under investigation. Terrible turmoil still exists even this long after their separation.

[16]The importance of a young boy developing a relationship with his mother that includes an opportunity to be exposed to the French language and cultural background of the mother must be recognized and warrants encouragement and I think there is room for adjustment and I find that there is no change significant enough to even consider either shared custody or joint custody, but it seems to me that it is clear that there should be a review of the existing access and some alterations and adjustments.

[17]I now turn to the Order itself and the first paragraph with respect to the weekends. I want that to be redrafted. It says; "If it is a long weekend, the Respondent will have visitation on that day". We should make it clear because some long weekends start on Friday and if it starts on Friday, the child should be with his mother on Thursday and then have Thursday, Friday, Saturday, return the child Sunday and if it is on Monday, the child stays over Sunday and I am not sure if it was that clear. Now the weekend access is for ten months of the year. It does not apply in July and August and I will come to that.

[18]With respect to the Wednesdays. I am not a strong personal proponent of it but I see no reason to change the Wednesday, although it is a concern that there is consistent thread of evidence that the boy, initially at least, was having some difficulty in adjusting when he returned home and with respect Ms. Kerr, I do not accept that it is anything to do with him wanting to stay with his mother. I think it is the turmoil that takes place. In any event, the Wednesday, I have no objection to the homework and supper being left in there and I accept her evidence that she helped "X" with his homework. Now the Wednesday access will only be for the ten months of the year and not in July and August.

[19]With respect to...one of the considerations of fostering the opportunity for his exposure to the French language and culture, I think longer block periods are necessary and I think in the month of July and August she should have the child for 15 days in July and again for 15 days in August. Now she should designate those in writing on or before June 1st and there should be an interval between them. You do not want 15 days at the last of August. During that 15 day period there will be telephone communication and he is almost old enough, perhaps even by computer, but telephone communication, the boy should be able to call his father at

reasonable times and that should be encouraged by the mother. "F" will not have any Wednesday nights or any time with "X". It will be 15 days where the mother will have "X" with her, it is a block access opportunity and again she will have 15 days in August and again he will not have any Wednesday nights. Similarly, for the balance of July and August, there will be no Wednesday nights or weekends so that each of them will have this really good period of block access. The one thing I want to...and I maybe wrong and no one has a magic wand, but I do sense her obsession with the French culture and that, I mean this child can benefit but be careful how heavy you come on. There is some problem that "X" has with language to start with and I am not so sure her enthusiasm, devotion and obsession with it is not being a little too heavy because there has been very very little progress in almost two years. "M" is intelligent enough whether, but it is a disservice if she comes on too strong and I do not mean to lecture and you do not need anything in the Order in that regard. So I hope you are clear about the mid-week access.

[20][On Christmas there should be a greater block period because Christmas generally and I am a little out of touch but it usually runs from the 19th to the 31st and it seems to me that you should probably cut out Christmas Eve but that she "M" should pick "X" up at 4:00 p.m. on Christmas Day and have him until one full day prior to going back to school and that gives "M" a block period of time, even enough time if she wants to take "X" to Quebec or somewhere and "F" would have "X" for an uninterrupted period from the 1st day of the Christmas holidays so there would be no Wednesday. So it is the balancing of it. If counsel can agree, you can do some shifting of that in alternating years but if you cannot agree, then "M" is to have "X" from 4:00 on Christmas Day until noon the day before he returns to school. Now you may want to alternate that depending on how the calendar works out, but it gives "M" an opportunity for a block period of access at Christmas. Regular access would start up again after "X" returns to school. The child should be returned to his father no later than noon the day before school recommences. Mid-week Wednesday access and week-end access would be suspended for the period of the entire Christmas holiday break and would then recommence.

[21]With respect to March break, I prefer the suggestion that it be alternated. It seems to have become fairly standard practice and counsel advise that "M" had "X"

for one-half of the March break. “M” to have “X” in the odd years, commencing in 2005 and “F” to have “X” for March break in even years, commencing 2006.

[22] Reasonable telephone access should continue. The child must have access to a telephone to talk to his other parent in the absence of the parent in the residence from which he is telephoning. The child is entitled to privacy and to be taught the respect for one’s privacy. Eventually, the existing provision will prevail and during the summer block periods of access, the only communication with the other parent shall be by telephone or computer. The existing provision with respect to avoiding inappropriate comments shall remain.

[23]There should probably be a provision with respect to access being available to the mother for Mother’s Day and the child to be with the father Father’s Day and where possible, the child to be with the mother on Saint-Jean Baptiste Day, which I understand is June 24.

[24]Now going back to paragraph three remove access to be expanded as her health improves and child’s health and remove paragraph eight. Now that is not a finding, that her emotional state with respect to “F” and the child has improved very much, it certainly has vis-a-vis employment, but I do not think it has vis-a-vis her handling of the child.

[25]The existing provision with respect to retaking the Parent Information Course shall be removed. However, the paragraph with respect to the style of discipline shall remain because the father is the primary care-giver with sole custody.

[26]The e-mail, I am going to leave that paragraph in. I know that she said no e-mails and introduced “A” and there is this business of mail being late going to Mr. M. They have to get a start somehow and surely they can sit at their own computer and talk politely to each other. That is not confrontational, it should not be and he should make sure not to try to direct her how to make her e-mails. Obviously, they should retain copies of the e-mails and if there is a problem, I would make myself available to review them and see whether or not there is any breach of the clear direction in this regard.

[27]With respect to the records, change that to put the obligation on the custodial parent to provide her in a timely fashion with all school reports and medical reports and keep her fully advised in that regard.

[28]The paragraph with respect to non-removal from the jurisdiction stays with the exception that "M" and "F" during their block access periods which would include Christmas period, the March Break and the summer period, if either of them want to take the child out of the jurisdiction and I suspect she does to take the child to Quebec and he may want to as well. Who knows where he may want to go, that they only have to advise the other person in writing and of a contact so that the child could be contacted by telephone or e-mail by the other parent.

[29]When people develop some trust and capacity to communicate as parents they can introduce flexibility. I don't see any possibility of flexibility for at least a year and I'm making that comment because I've followed it up by saying that if she can not exercise a Wednesday night access, I can not see them getting into a reasonable discussion as to an alternate even though that is the normal course. So it is rigid until such time as they can really communicate. I think the best thing for them to do is abide by the Order virtually by the letter and if they are able to do that, that will prove to him that she has the capacity and prove to her that he's not doing anything to deter the access. So for the foreseeable future strict adherence to the Order. If the two lawyers can change it at sometime by agreement, that's fine but I think that's far preferable. I accept his evidence that they have been examined by experts and assessors to death. I think there is a limit to how much mediation, conciliation, attending at doctors and everything else, it just keeps their minds focused constantly on something rather than addressing it and I think the only thing here is to adhere to the Order, live up to the Order and by gosh maybe with a bit of luck a year from now or more they maybe able to communicate.

[30]The Order will provide that they exchange Income Tax Returns on or before the 15th of June in each year and it is not only Income Tax Returns, the standard phrase, Income Tax Returns or Notices of Assessments and they exchange them. When I say exchange, it doesn't mean that she has to wait for his or he has to wait, the obligation is to provide the other side, okay and when you have that, they should be able to adjust the child support and the present child support is based on $72,200.00.

[31]Seventy-two thousand, two hundred fixing child support payable by “M” in accordance with the Child Support Guidelines at $581.00 per month, payable the 1st day of each month commencing November 1, 2004. Payment to be made to the Maintenance Enforcement as requested.

COSTS

[32]There is a tentative Order of costs against “M” in the amount of $850.00 and after hearing representations, I am satisfied that the additional expense “M” went to in order to engage a bilingual solicitor and have a translator available running her costs of this day and a half hearing in excess of $10,000.00, should be sufficient deterrent to any further pre-mature application and “F” is represented by Legal Aid. The fact he is represented by Legal Aid does not preclude costs being awarded; *Carruthers v. Carruthers* (1992), 113 N.S.R. (2d) 438, but in all the circumstances, I think the appropriate determination is each party bear their own costs of this application.

J.