SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: ***D.W. v. S.S.,*** 2020 NSSC 306

Date: 2020-10-23
Docket: SFH-MCA - 104314
Registry: Halifax

Between:

D.W.

Applicant

v.

S.S.

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Elizabeth Jollimore

Heard: October 15, 2020

Summary: Both parents applied to vary shared parenting. Material change found, relating to mother's plan to reconcile with fiancé. Shared parenting to resume and review ordered if mother resumes cohabiting with fiancé. Child support adjourned until parents provide evidence of additional costs of shared parenting and circumstances in each parent's home.

Key words: Family, variation, shared parenting, material change, best interests

Legislation: *Parenting and Support Act*, R.S.N.S. 1989, c. 160, s. 18(6), s. 37
Child Maintenance Guidelines, NS Reg 53.98, s. 9, s. 14(b)

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Counsel:	Kristy J. Hall for D.W. Andrew I. Kirk for S.S.

By the Court:

Introduction

[1] Mr. W and Ms. S have each applied to vary the terms of a January 2018 order relating to custody, parenting arrangements and child support for their 4 ½ -year old son, M. Their applications are under the *Parenting and Support Act*, R.S.N.S. 1989, c. 160, section 37.

[2] While each parent claimed a change to custody in their pleadings, they agreed that they want shared decision-making to continue so I make no change to the decision-making terms of the current order: paragraphs 8, 14 and 15 of the January 2018 order will continue.

Has there been a material change?

[3] I accept that there has been a material change in circumstances since the January 2018 order was granted. In December 2019, the police entered Ms. S's home under a search warrant. Based on media reports, Mr. W understands the police seized cocaine, MDMA, brass knuckles and ammunition, and that Ms. S's fiancé was charged with 2 counts of drug trafficking, possession of a dangerous weapon, and unsafe storage of ammunition.

[4] Mr. W says Ms. S lacks insight into M's safety. Ms. S says Mr. W has used the search as an excuse to deny her parenting time with M.

[5] A material change is one which affects the child's needs or the parents' ability to meet those needs. It is not a temporary change. A material change is a substantial continuing change: *Guadalaxara v. Viau*, 2014 ONSC 545.

[6] Ms. S's lack of care for M's safety is a change in circumstances which gives me the authority to vary parenting time.

Why Mr. W's denial of parenting time isn't a material change

[7] The existing order has detailed provisions about maintaining M's relationship with each of his parents, their cooperation and communication. These terms support their shared parenting arrangement.

[8] The existing order requires that if one parent isn't available to care for M for more than 3 hours, he or she must give the other parent the first opportunity to care for M. Mr. W gave evidence of approximately 6 times, since January 2018, when Ms. S provided him with additional parenting time. Ms. S has parented cooperatively with Mr. W, offering him additional time with M, where her work, health or childcare concerns compromised her ability to care for M. Ms. S adopted a co-operative approach to the shared parenting arrangement in the existing order.

[9] There's no evidence that Mr. W took a similarly cooperative approach. The record of referrals to the Department of Community Services and his actions over the past 10 months suggest that his approach was far less cooperative.

[10] Between January 2018 and December 2019, Mr. W made 7 referrals about Ms. S to the Department of Community Services. Mr. W complained when M had bruises, cuts, or scratches, and when M used the wrong sort of car seat: 4 of his referrals were not investigated and the 3 that were investigated were unsubstantiated.

[11] Mr. W hasn't allowed M to have unsupervised parenting time with Ms. S since December 2019. According to records from the Department of Community Services, Ms. S had no parenting time with M from December 2019 until at least the end of January 2020. Ms. S says she saw M for a few hours on Boxing Day 2019.

[12] Initially, Mr. W insisted that access occur at his home or when he was present. He then offered Ms. S could see M at his mother's home.

[13] The parties disagree about how many visits M has had with Ms. S since December 2019. Mr. W says that Ms. S wasn't asking for visits. Ms. S says that she shouldn't have had to ask for visits because there's a court order that dictates their parenting time.

[14] Ms. S frequently complained to staff at the Department of Community Services that Mr. W would try to limit her parenting time. This was his habit.

[15] Mr. W hasn't demonstrated a willingness to support M's relationship with Ms. S. Mr. W claims he has acted out of concern for M's safety, but his concern isn't currently warranted. His level of support for M's relationship with Ms. S hasn't changed since the January 2018 order was granted, so this is not a material change.

Ms. S's circumstances

[16] In December 2019 Ms. S lived with her 2 children (who shared a bedroom), her fiancé, and another adult. There were also at least 2 pit bull terriers in the home. M had lived in this household for approximately 6 weeks.

[17] Ms. S said that her fiancé uses 5 grams or less of cannabis daily. She also knew that he used cocaine. Though she knew her fiancé used drugs, Ms. S said she didn't know there were drugs in the house.

[18] After the police search in December 2019 and until August 2020, Department of Community Services staff visited Ms. S at home. They had no concerns about the home. The only concern ever noted about the home related to clutter and hazards in and around the baby's crib which were immediately remedied.

[19] There was a smoke grenade, a gift to Ms. S's fiancé from a friend, stored in the bottom drawer of a dresser in the children's shared bedroom. This drawer also contained a Thomas the Train toy. The children's bedroom is upstairs, and Ms. S said that M only went in the room with her: he never went upstairs until bedtime and she stayed with him until he fell asleep. She said she was always awake before him in the morning. She said that M "knows better than to dig into things".

[20] Ms. S said she didn't know about the drugs and weapons in her home. They were not hers. The drugs and weapons were in the basement. Ms. S said that M knew not to go into the basement.

[21] Ms. S's fiancé told staff at the Department of Community Services that Ms. S was unaware of the drugs and that she didn't know he intended to sell them. There is no record of any comment he made about her awareness of the weapons.

[22] In December 2019 the home would be a busy one, with a baby, a 3-year old and at least 2 dogs. Ms. S's fiancé would not be an appropriate caregiver when using cannabis or cocaine. There was no evidence that anyone other than Ms. S cared for the children.

[23] There was no evidence of any safety devices in the home: a lock on the basement door, or on cupboards containing drugs or weapons, baby-gates on the stairway, or child locks on the drawer containing the smoke grenade. These devices would limit the risk that M might wander into the basement and find the drugs or weapons, or open a drawer and find the smoke grenade. That a 3-year old "knows better than to dig into things" is not sufficient protection for that child in a house containing drugs and weapons. Ms. S could easily be distracted from watching M by the needs of the baby or the demands of the dogs.

[24] Even if I accept that Ms. S didn't know about the drugs and weapons, her ignorance didn't fulfil her obligation to make sure M is safe. She knew her fiancé used drugs but gave no evidence of the steps she took or questions she asked to satisfy herself that M couldn't access them.

[25] Since the police search, Ms. S hasn't lived with her fiancé. The Department of Community Services requires that Ms. S's fiancé's time with his daughter must be supervised and Ms. S isn't allowed to be the supervisor. Ms. S and her fiancé still plan to marry once his criminal trial has ended. Ms. S believes the trial will be next year.

[26] Ms. S didn't ensure M's safety and she gave no evidence she'd change what she'd done in the past when she and her fiancé resume cohabiting. Her failure to plan for that future shows the risk to M continues.

[27] The Department of Community Services doesn't require that Ms. S's parenting time with M be supervised. Department staff have noted no safety concerns with her home since December 2019.

[28] The immediate risk to M's safety was significant and short-lived. It's been completely eradicated because Ms. S can't live with her fiancé.

[29] The longer-term risk to M continues because Ms. S plans on building a life together with her fiancé and she's offered no plan for M's safety once that life begins. In the past Ms. S may have been able to say she was unaware of her fiancé's plan to sell drugs and his weapons, but she cannot say this now. She has always been aware of his drug use.

[30] My variation order must reflect M's best interests in the context of the changed circumstances. I must consider all relevant circumstances in determining M's best interests, including those listed in subsection 18(6) of the *Parenting and Support Act*. This case is all about M's safety. Recognizing the future risk from her plan to cohabit with her fiancé, I turn to the variation order I must make.

M

[31] I have little information about M: the evidence focused on his parents.

[32] M's parents separated when he was 6 months old. His parents consented to a joint and shared parenting arrangement in November 2017, which was formalized in the January 2018 order. Until December 2019, M had extensive parenting time with each of his parents.

[33] M doesn't attend pre-primary, though he is old enough to. He has a half-sister who is less than 1 ½ years old. She is the child of Ms. S and her fiancé.

What is in M's best interest?

[34] M's safety takes priority over his relationship with his mother where the 2 conflict. Here, there is no current conflict because, by virtue of the involvement of the Department of Community Services, Ms. S doesn't live with her fiancé.

[35] Mr. W recognizes the absence of current risk: he no longer requires supervision of Ms. S's parenting time.

[36] Mr. W suggests that M spend time with Ms. S on alternate weekends (extended if the adjacent Friday or Monday are holidays) and that the parents equally divide the summer, holidays, and special occasions. This is far less time than M has had in the past and there's no evidence why this reduction is in M's best interest or why, in the absence of the risk posed by Ms. S's fiancé, M's parenting time with Ms. S should be altered.

[37] In the absence of a current risk to M, I order the parties resume their shared parenting arrangement. Ms. S's fiancé cannot be present during the time Ms. S spends with M.

[38] If and when Ms. S resumes cohabitation with her fiancé, I order a review of M's parenting arrangements. Until the review can be heard, M's parenting time with Ms. S will occur on alternate weekends (extended if the adjacent Friday or Monday are holidays) and the parents will equally divide the summer, holidays, and special occasions. Here, too, Ms. S's fiancé cannot be present during the time Ms. S spends with M.

[39] The focus of the review hearing will be how Ms. S deals with risks posed by her fiancé's possession, use and intention to sell drugs, and the dangerous items he owns: what she has or hasn't done to address the risks her fiancé poses to M's safety. To be blunt, there is a very direct connection between Ms. S's parenting time with M and her relationship with her fiancé.

[40] Ms. S must notify Mr. W immediately when she resumes cohabitation with her fiancé.

[41] I want to address the issue of procedural fairness, raised by *Slawter v. Bellefontaine*, 2012 NSCA 48, where the Court of Appeal held that parties were denied procedural fairness where the judge made a type of parenting order that neither party had sought - which meant that neither had offered evidence or submissions about it. This, in my view, isn't such a circumstance. In a variation application, if the judge finds there's been no material change in circumstances, the existing order won't be varied or the judge may find there has been a material change but that the current order continues to meet the child's best interest in the new circumstances - as has happened here. The parties' failure to envision this isn't a denial of procedural fairness.

Child support

[42] Ms. S isn't working and has no income. In 2018, her annual income was $20,000.

[43] Mr. W's income has increased significantly since the 2018 order: he then earned $38,582 and now earns $70,909 after his union dues are deducted.

[44] The changes to the parents' incomes are changes under subsection 14(b) of the *Child Maintenance Guidelines*, NS Reg 53/98, so a variation of child support is appropriate.

[45] Since M is in a shared parenting arrangement, I must calculate his support under section 9 of the *Guidelines*. The set-off amount of child support under

subsection 9(a) is $607: Mr. W's payment of $607 less Ms. S's payment of no child support.

[46] Because each parent was looking for primary care, neither offered evidence relevant to subsections 9(b) or 9(c) of the *Guidelines*.

[47] Where information is deficient, I adjourn the application so the parties can provide evidence relevant to subsections 9(b) and 9(c): *Contino v. Leonelli-Contino*, 2005 SCC 63 at paragraph 57.

[48] While I am adjourning determination of child support until the parties can offer proper evidence, that doesn't mean the parties can't resolve that issue by their own agreement.

[49] Within 14 days of finding a job, Ms. S must notify Mr. W of her job, her employer, and her annual earnings, so child support can be assessed.

Directions

[50] Ms. Hall will prepare the order for Mr. Kirk's review.

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Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia