IN THE SUPREME COURT OF NOVA SCOTIA (FAMILY DIVISION)
Citation: G.M.M. v. S.F.M., 2005 NSSC 242

Date: 20050831
Docket: 29432
Registry: Sydney

Between:

G. M. M.

Applicant/Petitioner

v.

S. F. M. and C. F. M.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Restriction on publication: 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 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 Donald M. Hall.

Heard: Dec. 2, Dec 3, 2004, Jan 10, June 20, 2005, in Sydney, Nova Scotia

Counsel: David Raniseth, counsel for G. M.

Alan Stanwick, counsel for S. M.

Clara Gray, counsel for C. F. M.

By the Court:

[1] This proceeding involves two competing applications to vary the original order respecting the custody and primary care of the child, J. H. M..

[2] The issue to be determined is whether it is in the best interests of the child to vary the custody and/or primary care of the child and, if so, to whom should custody and/or primary care be granted.

[3] The child J. was born to the respondent, S. M., and the applicant, C. M., April [...], 1997, in Sydney, Nova Scotia. At the time Mr. M. and Ms. M. were living in a common law relationship although Mr. M. was in the Canadian Army stationed at [...], and Ms. M. was living at the home of her parents in [...], Cape Breton. Subsequently she moved to [...] with the child to reside with Mr. M.. She was there only a short period of time when they separated, ending the common law relationship. With the consent of Mr. M., Ms. M. returned to Cape Breton with the child.

[4] Subsequently under date of April 20, 1998, a consent order was granted by the Nova Scotia Family Court awarding sole custody of the child to Ms. M. with access to Mr. M.. Mr. M. was also ordered to pay child support which he has paid as required. This order was varied by order of this Court under date of November 4, 2003. The order confirms sole custody to Ms. M. and

access to Mr. M., but increased the amount of the maintenance payment to $346.00 per month. It also was a consent order. It is this order that is the subject of this variation proceeding.

[5] After returning to Cape Breton, Ms. M. appears to have had a difficult time in part or primarily because she suffered from Crohn's disease, a chronic and debilitating condition of the bowel. She moved several times during the intervening period including a number of periods of residence with her parents. Her final period of residence at her parents' home was between May, 2003 and September, 2003. Ms. M. had an "off and on" common law relationship with a man named W. L. and had a child with him, A., who at the time of trial was five years old. After Ms. M.'s and Mr. L.'s final separation in June of 2004, A. remained in the custody and care of Ms. M.. During her final period of residence at her parents' home, Ms. M. had both of her children, J. and A., with her. When she left her parents' home to again take up residence with Mr. L. she took A. with her but left J. in the care of her mother, the applicant, G. M.. The child has remained in the care of his grandmother since that time.

[6] Under date of August 12, 2004, an interim order was granted in this Court awarding temporary custody of the child to Mrs. M. with access to Mr. M. and access to Ms. M., subject to conditions.

[7] Since his birth J. has been in the care of his mother and grandmother with occasional access visits with his father and his maternal grandparents. The longest period with his father was a month in the summer of 2004 spent with his father's family at their home in [...], Ontario.

[8] Since early childhood J. has demonstrated some behavioural problems. He has experienced encopresis or fecal incontinence and in 2003 he was summarily diagnosed as ADHD. His progress in school has been slow or considerably below average, although in recent months since being put on Ritalin, later changed to Dextrotin, his behaviour has improved considerably as has his progress in school. In fact one of his teachers and the Principal of his school testified that there have been no significant behavioural incidents, that there has been a marked improvement in his school work and that it is expected that he will soon be functioning at a level appropriate for his age. The Court was informed at the final hearing that J. had successfully completed Grade II and had advanced to Grade III and that his teachers were pleased with his progress.

[9] Since October of 2003 J. has been under the care of Dr. Asim Salim, a paediatrician and specialist in paediatric gastroenterology practising in Sydney. J. was first seen by Dr. Salim with respect to encopresis. He was seen again by Dr. Salim with respect to behavioural problems. He apparently was acting aggressively toward his grandmother and hitting her. She was not able to control him and was having difficulty coping. Dr. Salim made a determination that J. was ADHD without the usual detailed assessment that he required and prescribed Ritalin in order to moderate J.'s behaviour, particularly toward his grandmother. The Ritalin, which was later changed to Dexodrene, appeared to have had the desired effect as J.'s behaviour at home improved as did his performance in school.

[10] The applicant, G. M. is 53 years of age and resides in the family home in [...], Cape Breton, with J. and her 54 year old husband, G.. Mr. M. is disabled as he suffers from a manic-depressive condition or bi-polar disease and as a result receives a pension through his former employment at the Sydney steel mill. Mrs. M. has been the primary care giver for J. for much of the time since his birth. As noted above, she has had full responsibility for his care since September, 2003, except for access visits. She is a member of the Roman Catholic church and takes J. to church with her every

Sunday except when he is away on an access visit. She is anxious that J. be brought up as a Roman Catholic. It is her proposal that J. should continue to reside with her and her husband and that she have sole custody of J., subject to access by the parents and paternal grandparents.

[11] The applicant C. M. is a member of the Canadian Armed Forces based in [...], Ontario. He earns something over $40,000.00 per year. He resides in [...] , Ontario, with is wife, F. M., and their three children. Ms. M. is not employed outside the home. Two of the children, K., nine years of age and A., four years of age are Ms. M.'s children from a previous relationship. K. is ADD and apparently learning disabled. The school system provides him with an education assistant. The youngest child was born to Mr. M. and Ms. M. prior to their marriage and is now two years old. Although Mr. M. is Roman Catholic, the family regularly attends a Baptist church in [...].

[12] Mr. M. proposes that he have sole custody and primary care of J. subject to access by Ms. M. and Mrs. M.. Arrangements have been made with the local school authorities for a complete psycho-educational assessment of J.. An education assistant would be provided for him if required.

[13] The respondent, S. M., is currently residing in a rented apartment in Sydney with her daughter, A.. She is employed part time as a cashier at [...] in

Sydney. She is registered to take [...] course at the [...] campus of the Nova Scotia Community College. Although she continues to have Crohn's disease, since she had surgery in 2003 when a portion of her bowel was resected, she has been virtually symptom free. She proposes that she have sole custody of J. with access to Mr. M. and the grandparents. She would obtain a larger apartment in Sydney to accommodate her and her two children with each child having his and her own bedroom. The two children would go to the same school.

[14] The relevant legislative provisions are found in the **Maintenance and Custody Act** as follows:

> 18 (2) The court may, on the application of a parent or guardian or other person with leave of the court, make an order
>
> > (a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or
> >
> > (b) respecting access and visiting privilages of a parent or guardian or authorized person.
>
> (4) Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise

(a) provided by the **Guardianship Act**; or

(b) ordered by a court of competent jurisdiction.

(5) 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 principle that the welfare of the child is the paramount consideration.

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.

[15] Counsel referred the court to the following decisions: **King v. Mr. & Mrs. B (King v. Levy)** (1985), 16 D.L.R.(4th) 576; **C.A.C. v. F.D.R. & S.J.R.** (1977), 21N.S.R.(2d) 631; **George v. MacCabe** (1993), 127 N.S.R.(2d) 221; **Foley v. Foley** (1993), 124 N.S.R.(2d) 198 and **Dykes v. Dykes** (1977), 24 N.S.R.(2d) 527.

[16] Before the court may embark upon a consideration of whether there should be a variation of the custody order, it must be satisfied that there has been a material change in circumstances since the order or last variation was granted. Counsel did not argue the point so I take it that they accept that there has been such a change. In any event, I am satisfied that there has been a material change in circumstances. When the last variation order was granted J. was residing with and in the care of his mother and no question

had been raised as to her ability to care for him. At the present time J. is in the care of his grandmother, having been left in her care in December, 2003, when Ms. M. moved in with Mr. L. and did not take J. with her because she felt she was not able to care for two children. As well, since the last order concerns have been raised respecting J.'s social and intellectual development causing concern for his father who is now established in a new family relationship and in a position to provide care for J..

[17] That being the case the court must determine whether it is in the child's best interests to vary the existing order. The burden of proof is on the applicants to show that it would be in the child's best interests to vary the order.

[18] As indicated in the reports and *viva voce* evidence of Dr. Asim Salim and Dr. Reginald Landry, a psychologist, as well as the evidence in general, J. appears to be happy and reasonably well adjusted in his present home environment with his maternal grandparents. Although J. has been diagnosed as borderline ADHD it appears that his condition has been brought under control by the medication prescribed by Dr. Salim. It also appears that the encopresis problem has moderated greatly to the point where it may now be non-existent. Furthermore, it seems that J. is making progress in school as indicated in the evidence of his teacher, C.L., and his

school Principal, A. M.. That this progress is continuing is confirmed by the fact that he successfully completed Grade II this past school year and advanced to Grade III and that the school authorities are pleased with his progress, as the court was informed at the most recent court appearance. The evidence also indicated that he attends church regularly with his grandmother and mother which he apparently enjoys.

[19] That being the case, the court must consider whether the *status quo* should be disturbed. It must be kept in mind, however, that the order that is under consideration here is the order granting custody to Ms. M. and not the interim order granting interim custody to Mrs. M. and Mr. M.. In referring to the *status quo* here I mean the current or present *de facto* care arrangement.

[20] Unfortunately there are a number of concerns as to J. remaining in the care of his grandmother. There is the concern that Mrs. M.'s over attention to J.'s personal and hygenic functions may, as Dr. Landry pointed out, "create a situation of learned helplessness and dependency . . .". These activities or functions include tying shoe laces, lying with him in bed until he goes to sleep, wiping him after a bowel movement and dressing him. It is also a concern that he may be spending too much time playing video games and

the like. As well, there is the question of the ability and resolve of Mrs. M. to discipline J.. There are also the questions raised by Dr. Salim as to Mrs. M.'s ability to cope with the challenges raised by J.'s health and behavioural difficulties. Another concern is the separation from his siblings and the lack of other children or playmates in the vicinity of Mrs. M.'s home in [...].

[21] That being said, however, the court must consider the alternatives.

[22] If Ms. M. were to have primary care of J. it would in fact amount to a significant change for him as all indications are he is very attached to and looks upon his grandmother as the person responsible for his care and her home as his home. Such a change would require him to attend a new school and live in an urban environment as opposed to a rural environment which he is used to.

[23] It is also a concern that S. Ms. M. would not facilitate or promote access by Mr. M.. She stated categorically that she wants nothing to do with him and refuses to talk to him. With such an attitude it would be very difficult to make reasonable and desirable access arrangements. Also, it appears that she may be inclined to use denial of access as a weapon or punishment in her relationship with Mr. M.. As Mr. L. testified, he sometimes has difficulty seeing their child, A., when Ms. M. is "mad" at him. In the final

analysis, although I recognize the desirability of siblings living in the same home, I am not satisfied that Ms. M. is capable at this time of caring for two children, one of whom has special needs. In my opinion, it is conceivable that the additional stress of caring for two children may cause a flare up of the Crohn's symptoms which would have a negative effect on J..

[24] As to Mr. M., it appears that he could offer a stable and happy home environment with his wife and children. It also appears that arrangements could be made with the school authorities to deal with J.'s special needs. I am convinced that Mr. M. and his wife would provide excellent care for J. and, but for one factor, I would be inclined to find that it would be in J.'s best interests to be placed in the care of his father.

[25] That one factor, however, in my view, overrides all other considerations and is determinative of the issue. That is, if J. were to be placed in the care of his father he would be uprooted from his current environment where he is apparently happy and feels secure. It would result in him moving to a totally foreign environment where the only familiar faces would be the immediate family. He would be virtually isolated from his familiar roots and extended family in Cape Breton.

[26] I am mindful of what Dr. Landry said in his report:

> Given the current situation, it is likely that J. would experience a significant amount of short-term distress should *he be required to move from his grandmother's* (edited) home given the enmeshed nature of their relationship. This distress could be managed and prevent the development of a more serious mental health problem but there would still be distress associated with a move out of his grandmother's home. However, J. appears to be connected to the extended family of his father, C., and has been an active member of that family. He would likely make a successful transition if it was managed successfully and he was able to maintain contact with his family in Cape Breton.

[27] In my opinion, however, in view of the recent improvement in J.'s behaviour and his progress in school, it would not be in his best interests at this time to change his primary care. My fear is, despite the somewhat contrary view expressed by Dr. Landry, that he would regress and revert to his former behavioural pattern. Such a change, in my view, would cause major disruption for J., which carries the risk of unfortunate and undesirable consequences for him and all concerned.

[28] In view of all that, I have concluded that J. should remain in the primary care of his grandmother which necessitates a variation of the current order.

[29] Having said that, however, I am satisfied that both parents have much to offer the child and should not be excluded from continuing involvement in deciding major issues with respect to his future. Accordingly, I will order that both parents and Mrs. M. have joint custody of J. with primary care

being with Mrs. M.. Ms. M. and Mr. M. are to have reasonable access at reasonable times and on reasonable notice. As well, there should be a schedule of specific access for the parents and some provision for access by the paternal grandparents. The specific access for Mr. M. should include one month during the summer months and an extended period for Ms. M. if she so desires. In view of the fact that Mrs. M. wishes to take J. to [...] for a month during the summer of 2006 to visit with another daughter, and all parties had previously agreed to the visit, a provision to this effect is to be included in the order, but this is not to limit Mr. M.'s access for that summer.

[30] It is my hope that the parties will be able to agree on the terms of specific access, but if not I will hear counsel on the issue.

[31] With respect to child support, Mr. MacDoinald is to continue paying as at present, subject to revision in accordance with changes in his income and the **Federal Child Support Guidelines**. As to Ms. M. paying child support for J., evidence of her financial position was scanty and the issue was not raised by counsel. In any event, it is questionable whether she is presently in a financial position to pay support. Accordingly, no order will be made in that regard at this time.

[32] There will be no order for costs.

[33] A final point, I would strongly recommend that Mrs. M. submit to counselling, parent education, or consult appropriate counsellors or experts with respect to the concerns I have expressed as to her care of J..

[34] I trust that Mr. Raniseth will prepare the order.

[35] If the parties are unable to agree on the terms of specific access and the form of the order I can be available Wednesday, August 31st, if counsel wish to make further submissions.

Donald M. Hall, J.