IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: P.A.D. v. W.E.K., 2005 NSSC 92

Date: 20050425
Docket: SFHMCA-36380
Registry: Halifax

Between:

P. A. D.

Applicant

v.

W. E. K.

Respondent

Editorial Notice

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

Judge: The Honourable Justice R. James Williams

Heard: April 5, 2005, in Halifax, Nova Scotia

Decision Rendered: April 25, 2005

Counsel: Mary Jane McGinty, for the Applicant
B. Lynn Reierson, for the Respondent

By the Court:

[1] This is an interim application. At issue are the interim care and child support arrangements for J. K., born October [...], 1999, and B. K., born January [...], 2002. They are the children of P. A. D., age 41, and W. E. K., age 63.

[2] The application is brought pursuant to the *Maintenance and Custody Act*. The portions of the Act relevant to the determination of the care of the children include:

> s. 18(2) The court may, on the application of a parent or guardian or other person with leave of the court, make an order
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> (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 privileges of a parent or guardian or authorized person.
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> s. 18(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
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> (a) provided by the *Guardianship Act*; or
>
> (b) ordered by a court of competent jurisdiction.
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> s. 18(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. R.S., C. 160, s. 18; 1990, c. 5, s. 107.

[3] In *Marshall v. Marshall,* [1998] N.S.J. No. 172 (N.S.C.A.) Roscoe, J.A. noted that "the test to be applied on an application for an interim custody order is: what temporary living arrangements are the least disruptive, most supportive and most protective for the child". This case and *Foley v. Foley*, [1992] N.S.J. No. 347 (which dealt with a final order) refer to a number of factors for courts to consider in applying the best interests test. I have considered the legislation and the direction given by these cases.

[4] P. D. is the mother of these children. Her February 18, 2005 affidavit notes that her relationship with E. K. commenced in February 1986. They moved in together and commenced a common law relationship in 1991. The children were born in 1999 and 2002. Ms. D. and Mr. K. disagree on their separation date - she saying it was mid-2003, he saying mid-2004.

[5] Both parties are lawyers. Ms. D., 41, has worked for [...] since 1999. Since the completion of her maternity leave for B. she has apparently worked full-time, Monday to Friday. Mr. K., 63, is [...]. He has also practised law but appears to have wound his law practice down significantly. In terms of time, he has very limited employment commitments:

(a) he indicated he will teach summer school for six weeks in May and June, a "morning commitment";
(b) he will be, for all intents, "off" in July and August;
(c) he is due to retire from [...] in a year and has a sabbatical for half of an academic year owed him; he is potentially "off" until the completion of the fall 2005 university term;
(d) his teaching commitments are (if not on sabbatical): Tuesdays 9:00 - 10:30, 12:00 - 1:00 and 6:00 - 9:00 p.m. and Thursdays 9:00 - 10:30 and 12:00 - 1:00.

He has then, a significant amount of flexibility Mondays, Wednesdays, Thursdays after 2:00 and Fridays.

[6] Ms. D. asserts that she has been the primary parent in the past, particularly during her maternity leaves and times of separation. Mr. K. has actively cared for the children at times too. On the whole Ms. D. has had more of their care. Both parents have been involved with the health care of the children.

[7] Mr. K. acknowledges that he had difficulty (in the summer of 2004) adjusting to the termination of the relationship with Ms. D. and with the commencement of her relationship with B.P., a lawyer with whom Ms. D. works. In May 2004 Ms. D. and Mr. K. were together, after a period of separation. Ms. D. and the children moved out at the end of May, start of June. By early July she was dating B. P.. She and Mr. P. holidayed with the children and were living together by mid-August. Mr. K. indicates he sought the advice of counsellors and professionals. He withdrew somewhat, having limited contact with the children through the summer of 2004. The limited contact was for a variety of reasons - Ms. D. took the children on holiday, Mr. K. had an operation, Mr. K. was emotionally fragile.

[8] His contact with the children increased through the fall of 2004 to at least two nights per week. Ms. D. is concerned that Mr. K.'s anxiety and stress from the breakup has, even now, a negative effect on the children. There is very little evidence to support this view.

[9] At the same time, Ms. D.'s affidavit of February 18, 2005 indicates that through October, November and December of 2004 and January 2005 Mr. K. saw the children frequently - nine overnights in October, ten overnights in November, nine in December and nine in January - resulting in the children being in his care for parts of 16 days in October, 17 days in November, 14 days in December and 16 days in January.

[10] Through the fall and into this year Ms. D. has felt that three overnights in a row with Mr. K. were "too hard on the kids". At one point the children were with him three nights and returned to daycare the Monday morning. She picked them up after daycare that day - and finding them overtired concluded with considerable certainty that this was because of the extra overnight with their father. I do not share her certainty.

[11] Ms. D. states at paragraph 18 of her affidavit of April 4th:

> The Respondent's rigid insistence on having the children from Friday to Monday and the obvious coincident detrimental effect on the children left me with no choice, but to retain a lawyer and seek assistance to resolve the dispute. With the assistance of my counsel, I made every attempt to give the Respondent significant access, but he refused to accept that. Further, I have always encouraged weekend visits. I simply ask that they be from Friday to Sunday afternoon so that I could put the kids to bed on Sunday night in their own home and send them to daycare from there in the morning. Even at that, I was concerned that it was too much access, but I did not have the strength to continue the conflict with the Respondent to reduce it further. By insisting that the weekend access continue over a three night period, and refusing to return them on Sunday, the Respondent left me little choice, but to advise the Respondent that I would be seeking the assistance of the Court and advised him that I would be stopping the weekend access.

[12] At one point in the fall of 2004 Mr. K. briefly agreed not to push this, feeling that if he did he would be blamed for any distress that Ms. D. felt the children would have. In recent months he has sought to have the children in his care for more extended periods.

[13] The parties have communicated by e-mail. They have not been able to resolve how they would share the care of their children.

[14] Stability for the children is an important issue for Ms. D..

[15] She states in her affidavit of April 4, 2005 at paragraph 4:

> I am sensitive to the childrens' needs and their signals and I apply a positive parenting style. It is this background that tells me that the problems with J. arise from the conflict between his parents and that what is needed is clear access, and clear decision making roles to reduce the conflict. I believe that J.'s problems are a result of the conflict between his parents and therefore, the lack of a consistent schedule and routine and instability has affected his security and not any one factor in his life. I can state with certainty that the children are not exposed to this conflict in my home. We lead a happy and peaceful life and we do not discuss the problems arising from the separation.

[16] And at paragraph 6:

> The serious relationship issues that we had together as a couple are well described in the Respondent's affidavit. It is my view that those issues remain unresolved for the Respondent, and that the children, without the benefit of a structure and routine, are suffering from the conflict between us. While I do not agree with the way the Respondent has described many things or has characterized our problems, I think it is very clear that there were numerous and significant problems between us.

[17] And at paragraphs 15, 16 and 17:

> We have sought the counsel of Dr. Karen Pure but she has been unable, up to this point, to identify J.'s problems as she has had to spend J.'s scheduled session with me to review the Respondent's concerns over confidentiality. Dr. Pure does not see J. until April 6, 2004. While we are trying to identify the nature of J.'s problems and address them effectively, I simply ask that he have some structure and predictability in his life and as little disruption as possible. I believe that the proposal I have put before the court is the best way of doing so.
>
> Regular attendance at daycare is one of the most consistent elements of the children's lives to date. The suggestion that they be taken out of daycare to reduce the Respondent's contribution to their daycare costs is very misguided. I believe the stability of the daycare should be maintained.
>
> I am not close minded to eventually increasing the children's contact with their father, but I simply find that it is too much, too soon and I believe that it is not in the best interest of the children right now. I have communicated to the Respondent that I am not opposed to a shared custody arrangement when and as the children are able to cope with it.

[18] I would conclude that stability is an issue for these children. Apart from the disruption and uncertainty created by their parents' inability to resolve issues concerning their care over the last six to eight months, their background includes a number of moves, relocations and changes including:

(a) From June 2002 to mid-October 2002 Ms. D. and the children moved to [...] to be with her family. Mr. K. visited, sometimes for a week at a time. Prior to this Ms. D. felt "totally exhausted and despondent". She felt she received little support from Mr. K.. Their relationship, she felt, was deteriorating. Ms. D. was on medication as a result of a diagnosis of depression.

(b) They were together with the children from mid-October 2002 to June of 2003 in their family home in Halifax.

(c) Ms. D. and the children left the family home and took an apartment in June 2003. They stayed there until April 2004. Ms. D. and Mr. K. differ in their evidence concerning the amount of contact they had during this time.

(d) Ms. D. and the children moved back into the family in April 2004. She and the children left again at the end of May 2004.

(e) At some point in the summer of 2004 Ms. D. formed a relationship with Mr. P.. They began cohabiting in August, 2004.

[19] J. is described by Ms. D. as having problems. He has soiled himself a couple, perhaps more, times since August 2004. He slept with his mother for months, perhaps years, before she began cohabiting with Mr. P.. He has more recently slept in the same bed as his father - Ms. D. feels this is now inappropriate - and inconsistent with her having "broken the habit". Ms. D.'s view is not unreasonable. I would expect Mr. K. to take steps, make efforts to prevent this from being a consistent pattern of behaviour in his home. I do not view it as a reason, at this time to restrict Mr. K.'s contact with his son.

[20] These children are young. Their last three years have not been stable. Their parents' relationship has been unstable over this period. There have been a number of physical moves. Both parents have had some personal emotional difficulties during this period. Their parents have separated. Their mother has entered a new relationship. I have difficulty attributing any distress or anxiety either child now might have to one cause, independent of this background, a background both parents are responsible for. Ms. D. attributes J.'s problems (which are not very specifically identified) as being, in large part, the result of Mr. K.'s inability to deal with the separation. The evidence does not support this.

[21] Taken separately, both these parents appear to be capable, intelligent, and committed to their children. They have, at times, both blamed the other for difficulties and J.'s behaviour, or their perception of J.'s behaviour.

[22] I conclude from the evidence before me that both are attached to the children, and the children to them. I conclude that both are able to care for the children.

[23] Mr. K. has a significant amount of time available to these children now, and in the future.

[24] Ms. D.'s proposal for the care of the children is set out at paragraph 36 of her affidavit of February 18, 2005:

> That I respectfully request the Court Order on an interim basis that:
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> a. The children's primary residence remain with me.
> b. The Respondent will have frequent access to the children which will be Monday after daycare delivering the children to daycare for Tuesday morning; Thursday after daycare delivering the children to daycare for Friday morning;
> c. The Respondent will have the children on every second Saturday from 9:30am to 4pm. The Applicant will drop the children off at 9:30am and the Respondent will deliver the children to the Applicant at 4pm - this access will be suspended if either J. or B. experience difficulties with the arrangements or if the Respondent is not polite during the drop-offs and delivery of the children;
> d. The Applicant will make a reasonable effort to consider the suggestions and views of the Respondent in parenting, but this requirement is suspended for a period of 3 months to allow for a cooling off period, and for the Respondent to accept the new family situation;
> e. The Applicant and the Respondent will ensure the children have daily telephone contact with the absent parent.
> f. The Applicant will have the final determination in all aspects of parenting, including consideration of school, discipline, health extracurricular activities.
> g. Neither the Applicant or the Respondent will make negative comments about the other or their current relationships in the presence of the children and
>
> . . .

[25] Mr. K.'s position with respect to the care of the children is set out in his affidavit of April 1, 2005 at paragraphs 5, 6 and 7:

> The statutory right of the parents to joint custody of the children namely, J. K. and B. K., be confirmed, and that both parties keep the other promptly and reasonably informed on all parenting issues such as health, schooling, religion, recreational and extracurricular activities and that each parent consult, in advance, with the other on these matters to the extent that such consultation is feasible. Where agreement cannot be reached, the Respondent's view to prevail, unless otherwise ordered by a court of competent jurisdiction.
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> A shared parenting arrangement between the parties with the children residing with the Respondent on a two-week rotation:
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> a) every other weekend from Friday to Monday morning (extended by the extra day on long weekends);
> b) Wednesday morning (pick up at daycare) and return to daycare on Friday (for pick up at the end of the day by the Applicant);
> c) during the week following the Applicant's weekend with the children, the Respondent would pick the children up on Wednesday morning at daycare and return them to daycare by the end of the day Thursday for pick up by the Applicant;
>
> Vacations to be shared equally, either by splitting the time or alternating the holidays, including Christmas, March school break and summer, except where the children would otherwise be in daycare during a vacation day scheduled to be with one parent in which case a parent able to care for the children shall have the option of taking the extra vacation time.

[26] I cannot conclude <u>from the evidence before me</u> that the children "can't take" more contact with their father. This is the essence of Ms. D.'s position.

[27] I do not conclude <u>from the evidence before me</u> that Mr. K. continues to have the emotional difficulty with their separation that he did last summer. The pattern of contact he has had with the children since October of 2004 is in a word, frequent. Ms. D. opposes, essentially, the extended weekend access - saying it's "too much, too soon" (paragraph 17, April 4 affidavit) or suggesting that "the Respondent's proposal amounts to having the children just in excess of 40 percent of the time, I suspect an attempt to minimize his

financial obligation" (paragraph 33, February 18 affidavit). Ms. D.'s counsel indicated they offered to resolve the matter with an access order of less than 40% and no child support. Mr. K. did not accept this. This is not consistent with the suggestion that his position concerning care of the children is merely about money.

[28] I have reviewed all of the material before me.

[29] Ms. McGinty, counsel for Ms. D., has filed an article with the Court: Parenting After Divorce: Using Research to Inform Decision Making (1998) 15 Can. J. Fam. L. 79. The article is by Rhonda Freeman, MSW. It identifies three themes in the divorce literature:

1. That divorce is a process that takes time and involves:

(a) a decision to divorce;
(b) a period of crisis;
(c) the development of a post-separation family;
(d) possible creation of a new family.

Here it is time to move beyond the "crisis" of the final separation of last June and re-partnering of Ms. D. and focus on the best interests of these children within their post-separation family.

2. Family transition involves a variety of responses.

Both of these adults have had emotional difficulties that they attribute, at least in part, to the family breakdown - Ms. D. in 2002, Mr. K. in the summer of 2004.

The children's needs should be the focus in any adjustment to separation, any parenting plan. Their needs at this time include a meaningful relationship with significant time with both parents.

3. Outcomes for children are seen in terms of risk and protective factors - vulnerability and resiliency. Freeman states, "A consistent research finding is the importance of both parents in the child's life." (para. 12)

This is consistent with s. 18(4) of the *Maintenance and Custody Act*. Freeman also states that "The first year

> post-separation is a critical time that establishes a foundation for the co-parenting relationship and parenting plan arrangements." (para. 60) Interim orders are temporary, but important. They influence future expectations. They should be supportive and protective of children in terms of their day to day care, needs and stability. They should attempt, also, to be supportive and protective of children in terms of future parenting arrangements and possibilities (from the children's perspective).

[30] Does an order that gives Mr. K. the type of time he seeks with the children require a high level of effective communication between the parents?

[31] I do not conclude from the evidence before me that this couple is enmeshed in a high-conflict situation. Ms. D. decided some time ago to restrict their communication to e-mail. She has dictated the form of communication. Many of her e-mails have been negative or critical in tone. Ms. D. asserts that the conflict between she and Mr. K. is significant. Ms. D.'s focus in what has been put before me has been on what is wrong with what Mr. K. does or did - there has been little said of what she might do differently. While the difficulties in communication between these parents, may not be very effectual at times, I do not conclude that they are unresolvable, or so serious that they should dictate that one parent should have significantly less decision-making authority and/or contact with the children than the other. I have considered the following in reaching this conclusion:

(a) Communication about basic information - bedtimes, food types, nap times and patterns can be structured. I would recommend that the parties consider using a web based program such as Family Wizard;

(b) Most of the parties' communication difficulties have revolved around the child care schedule and disagreements about that. This decision resolves most of those.

(c) During the time they struggled unsuccessfully to agree on the issue of custody both parents made concerted efforts to protect the children from their conflict. I am satisfied that they would continue to do so should there be ongoing differences.

(d) There is no disagreement on who the children's doctor or dentist is.

(e) The one issue that must be resolved - "what school J. will go to" will be resolved by a future hearing.

[32] It is important that these children have some certainty and predictability. There is no reason, I conclude, for these children to not spend a substantial amount of time with and in the care of both their parents. I conclude that it is in their best interests to do so.

[33] The interim order will provide:

(a) The parents will share the care of the children.

(b) That the children be in the care of their mother, Ms. D., except when they are in the care of their father, Mr. K..

(c) The children will be in Mr. K.'s care over a two-week schedule as follows:

Week 1: from Wednesday after daycare or school to Friday afternoon at 4:30 p.m.;

Week 2: from Wednesday after daycare or school to Sunday at 1:00 p.m.

Mr. K. will be expressly authorized to keep the children out of daycare on the Fridays - he will presumably use the day care if he is teaching/working that day.

In addition to the factors and law referred to earlier and the best interests test enunciated by the legislation this schedule attempts to balance/recognize/consider:

(a) Mr. K.'s availability on weekdays;

(b) Ms. D.'s Monday to Friday work week, leaving a significant part of Mr. K.'s "Sunday" to her;
(c) the importance of child care stability - it provides that the daycare placement is maintained;
(d) the number of transitions (between the parents) for the children over a two-week period (I have attempted to limit these). The schedule provides that at least half of the transitions between the parents will be at the daycare;
(e) the importance of both parents to these children;
(f) the fact that this is a temporary, interim order.

(d) During the summer (July and August) the children will have one two-week block period with each parent. The access schedule will be suspended. If the parties do not otherwise agree, I will designate these weeks.
(e) Neither party will engage the children with a professional of any kind without the consent of the other party, it being understood that: Dr. Pure is seeing J. and/or the children; Mr. Whitzman will be doing a custody/access assessment; and the children's Doctor and Dentist is agreed.
(f) The parties will share information concerning the children's schedules, bedtimes, foods, etc. and attempt to achieve some consistency between homes.
(g) Each party may have once daily telephone contact with their children when they are not in their care.

[34] The child care arrangement is, by my calculation (whether by considering overnights (6/14) or other methods) more than the 40% that triggers s. 9 of the Child Support Guidelines. S. 9 provides:

> s. 9 Where a parent exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child maintenance order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the parents;

Ms. D.'s monthly income is $7,336 - or $88,032 per year. The Child Support Guideline Table amount for two children is $1,111. Mr. K.'s income is $6,275 per month; $75,300 per year. The "Table amount" for two children for his income is $974.

> (b) the increased costs of shared custody arrangements; and

I have little evidence concerning this issue at this time.

> (c) the conditions, means, needs and other circumstances of each parent and of any child for whom maintenance is sought.

The children are in daycare. Ms. D. is cohabiting. While I have no evidence of Mr. P.'s income, he is a lawyer with [...] who is senior to Ms. D.. Their household income is in all probability well over double Mr. K.'s. I can conclude that his presence reduces her expenses. He has, however, no obligation to these children. The children are with Ms. D. more than with Mr. K. under the terms of this order. This is an interim order.

[35] Considering these factors, I would conclude that no child support order is appropriate at this time, beyond an order that child care expenses be equally shared commencing April 1, 2005.

[36] I have expressly reserved to the final trial date the issue of retroactive child support (as sought by Ms. D.).

[37] A hearing on the issue of what school J. will attend, who will decide this will, if necessary, be scheduled.

J. S. C. (F. D.)

Halifax, NS