SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *A.W.V. v B.V.B.*, 2014 NSSC 202

Date: 2014-06-11
Docket: SFHMCA-088744
Registry: Halifax

Between:

A.W.M.

Applicant

v.

B.V.B.

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Heard: June 2 and 3, 2014, in Halifax, Nova Scotia

Counsel: Sharon L. Cochrane for A.W.M.
Joyce M. Ruck De Peza for B.V.B.

By the Court:

Introduction

[1] Mr. M filed a motion for interim custody of his daughter, F, when she was three weeks old. He and the baby's mother had separated just two days earlier.

[2] Pursuant to section 18 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, Mr. M seeks full custody of F and an order for Ms. B to have access every weekend (during which time Ms. B would let Mr. M know where the baby will be). Ms. B opposes this motion and seeks custody, asking that Mr. M's access be supervised. She also wants child maintenance. While Ms. B did not file a motion for interim maintenance, Mr. M does not object to my determining child maintenance, if my decision with regard to parenting makes such an order appropriate. He has not claimed child maintenance.

[3] In January 2014, the parents consented to an order that Mr. M would have "interim interim" access to F, which would be supervised by Ms. B's mother. Because her mother works during the week, Ms. B suggested that access occur from 5:30 p.m. to 8:30 p.m. on Saturdays. Mr. M, who was representing himself at that time, agreed.

[4] This is an interim motion. A final hearing has not been scheduled. Over the course of two days, I heard evidence from Mr. M, his cousin, Ms. B, her mother, and Craig St. Peters (Ms. B's and F's family doctor).

Family history

[5] The parties initially dated in 2008. At the time, Ms. B was seventeen and the mother of an infant daughter, who lived with Ms. B's mother. Mr. M was twenty-six. He had no children and was employed by the Department of National Defence.

[6] The parties' accounts of how long and when they were together differ. They agree that their relationship was "off and on". It was far more "off" than "on", including years when they were not dating each other. They spent more time apart than together. Their relationship was turbulent.

[7] In the spring of 2013, Ms. B became pregnant. From June 12, 2013 until September 12, 2013, Mr. M was in British Columbia, completing the training required to move from the Army to the Navy within the Armed Forces.

[8] While he was in British Columbia, Mr. M provided money to Ms. B's mother to assist with expenses. He had no say in how the money was spent.

[9] F was born approximately six weeks after Mr. M returned from his training in British Columbia. F remained in the hospital for three days after her birth and was then discharged to her parents' home. Virtually since birth, F has been fed formula, which Ms. B was using to supplement her nursing.

[10] Until November 11, 2013, Mr. M and Ms. B lived together. Both cared for F, and Ms. B agreed that Mr. M was unsupervised at times. Their separation followed days of turmoil during which Ms. B says that Mr. M raped her and urinated on her while they were in the shower together. She has not reported this to the police. Mr. M denies sexually assaulting her. He says that he did urinate in the shower while they were in the shower together, but that when he told her that he had urinated on her he was only joking. Mr. M says that Ms. B assaulted him, and she has been criminally charged. She has pleaded not guilty and is prohibited from having any contact with Mr. M.

The mother, Ms. B

[11] Mr. M has identified no significant complaints with Ms. B's care of F. He has complained, for example, that F was dressed in a snowsuit with a hood that was too large. I do not accept this as a serious complaint. He says that Ms. B smokes. Ms. B denies smoking around F, saying she steps out onto her back deck and closes the glass door behind her when she smokes. She says that F is left in her saucer on the inside of the glass door.

[12] Mr. M says that Ms. B used drugs and has mental health problems.

[13] Ms. B admitted to using marijuana and experimenting with various other drugs. She says she tried acid, crack, and mushrooms once. She said she tried ecstasy more than once. She denies that she is currently using drugs and there is no evidence to contradict this.

[14] Ms. B's mental health has been troubled. As a teen-ager, she was raped more than once, and she was abducted. She spent time at the Nova Scotia Youth Facility in Waterville.

[15] Since 2001, Craig St. Peters has been Ms. B's physician. He provided a brief letter to the court. Counsel agreed to admit this as a treating physician's narrative pursuant to Civil Procedure Rule 55.14.

[16] In June 2008, Ms. B told Dr. St. Peters that she heard voices which told her to harm people. He referred her to the Community Mental Health Outpatient Clinic at Bayers Road. She followed up on the referral and has, since then, maintained a relationship with a psychiatric nurse there.

[17] Ms. B has consulted with Dr. St. Peters about depression at various times from 2009 to date. Over this period, he has prescribed her three separate anti-depressant/anti-anxiety drugs. She has consulted with him (or his partner, when he wasn't available) twice to adjust the dosages. He says that her mood and outlook are "good" and "positive" and that she has no depressive symptomatology right now. Following F's birth in October 2013, Dr. St. Peters referred Ms. B to the Reproductive Mental Health Clinic at the IWK Health Centre. Instead, Ms. B returned for treatment to the psychiatric nurse she'd worked with in the past at the Bayers Road Outpatient Clinic.

[18] In 2010, Dr. St. Peters provided information to the Canada Revenue Agency in support of a retroactive claim by Ms. B's mother for a disability tax credit relating to Ms. B (and Ms. B's brother). This required Dr. St. Peters to complete a form explaining Ms. B's difficulty in mental functioning in the context of her daily life. In it, he explained that Ms. B would need assistance with complex tasks or making appropriate judgments when her symptoms were exacerbated or she was in stressful circumstances. He indicated that this level of mental function was not likely to improve.

[19] In May 2012, Dr. St. Peters provided information to the Department of Community Services about Ms. B in support of her claim for social assistance disability benefits. In doing this, he claimed her disability was a psychiatric disorder (depression with a secondary diagnosis of possible bi-polar disorder).

[20] Dr. St. Peters explained that Ms. B had been diagnosed with Attention Deficit Disorder, Oppositional Defiant Disorder and Conflict Disorder when she was younger. She was seen by another doctor for those and, as Dr. St. Peters

explained, the ODD and Conflict Disorder diagnoses don't usually continue into adulthood. Ms. B's ADD "doesn't bother her", according to Dr. St. Peters. He explained that ADD is something one is born with – it doesn't go away. This is something Ms. B was addressing when she was a teenager with another doctor.

[21] Additionally, at some point, Ms. B was diagnosed with Cannabis Dependency Disorder. Ms. B requested urinalysis drug testing in December 2013. She warned Dr. St. Peters that she might test positive because she had been exposed to second-hand marijuana smoke when visiting friends who lived in a one-bedroom apartment. The test was negative.

[22] Dr. St. Peters said that Ms. B had regular pre-natal care. He said he'd seen F between four and six times since F was born and he saw good interaction between F and Ms. B during the visits. He said he had no concerns regarding F. She has had all routine scheduled visits and vaccines. When Ms. B was concerned whether F was getting enough to eat and decided to supplement F's diet with pablum, Ms. B consulted with Dr. St. Peters.

[23] Dr. St. Peters was asked directly whether he was concerned about the Cannabis Dependency Disorder diagnosis, Ms. B's "psychotic breaks", her hearing voices and her suicide attempts. He was clear that he is not currently concerned about these things. He said that Ms. B has not been diagnosed with a psychotic disorder and that the so-called "psychotic breaks" (when she reacted violently to someone, and hurt the person) and auditory hallucinations were precipitated by external stressors and "anyone could react" as she did. He had no concern about her attempts at suicide in 2009. Dr. St. Peters said that the prevailing circumstances at the time included Ms. B's brother's death, her drug use and other external stressors which do not exist at the present. He said she is not now at risk of self-harm.

[24] Dr. St. Peters said that Ms. B was "not one hundred percent compliant with treatment": she may not come to all scheduled appointments. He said that she would attend nine out of ten appointments. He also mentioned that she missed one of F's appointments: an appointment was scheduled for an ultrasound of the baby's hip. The orthopedics department reported that Ms. B missed this appointment and the department hasn't been able to reach Ms. B.

[25] Ms. B is aware that her mental health is compromised. She has appropriately sought treatment. These health problems, while reviewed in detail in the evidence, have not been shown to undermine her ability to care for F.

[26] When the couple separated, Ms. B moved in with her mother and stepfather. Her older daughter had lived there since she was a few months old. Ms. B and her daughters were able to move into their own home four months ago, in February.

[27] Mr. M has made no significant complaints about F's care. It only emerged in Dr. St. Peters' testimony that F had missed her ultrasound appointment.

The father, Mr. M

[28] Ms. B says that Mr. M was controlling and tried to isolate her from her friends and family, however, it was her evidence that while they lived together in 2013, she moved back and forth between his home and her mother's, at will.

[29] Like Ms. B, Mr. M smokes.

[30] Mr. M initiated the parenting application: he believed he was F's father. At the initial court appearance in January 2014, Mr. M said that Ms. B's friends told him that there were others who might be F's father. I encouraged Mr. M to resolve any doubt he had about paternity as soon as possible, in light of the consequences of an admission. Mr. M's paternity was confirmed through testing. Ms. B takes some exception to the need for testing. In the circumstances, it was reasonable.

[31] After the couple separated, Mr. M had two unsupervised visits with F. Ms. B was prohibited from having contact with Mr. M, so her mother was involved in transporting F for access visits. Following a disagreement over who would transport the baby, Mr. M's access was terminated in early December 2013. It didn't resume until almost two months later, following a court appearance on January 27, 2014.

[32] Since Mr. M's visits resumed, they've been supervised by F's maternal grandmother, Ms. C. Ms. C works during the week. At Ms. B's request, visits were scheduled from 5:30 p.m. until 8:30 p.m. on Saturday. As it turns out, F is typically asleep at 7 o'clock so Mr. M didn't have three hours to care for or interact with F. F would be asleep for the second half of his visit. Mr. M was offered the chance to reschedule his access but he chose not to do so. Instead he's said that he hasn't been able to spend "anywhere near enough time" with F, and that he's been denied access despite contacting Ms. C, child protection authorities and the RCMP. Mr. M has been on parental leave since F was born, so he should have been able to re-schedule his visits to spend more time with F.

[33] Mr. M plead guilty to a criminal charge in 2001 (two others were withdrawn at the time) and he was placed on probation for one year. In 2010, he plead guilty to a charge of impaired driving. He was fined and lost his license for one year. He says he no longer drinks.

[34] Ms. B has not observed Mr. M's time with F, so she's unable to comment on his care. Her mother, Ms. C, has supervised all the visits which have occurred this year. Minor concerns have been expressed: he used baby powder when he shouldn't have; and he purchased the wrong type of diapers. I call these "minor concerns" because they cause no enduring harm to F.

[35] F lived with her mother, half-sister, grandmother and step-grandfather until February 2014 and, since then, she's lived with her mother and half-sister. She spent limited time with the father. Absent direction from someone involved in F's daily care, Mr. M wouldn't know of any product sensitivities that F would have. It would be for Ms. B or Ms. C to inform him. Similarly, concern that Mr. M doesn't know F has a "sookie blanket" is misplaced. Where Mr. M had only a few hours with F each week, he can't be expected to know this information without being told.

[36] Mr. M has a dog, a three year old mixed breed, Shar Pei / pitbull. Ms. B is concerned about this dog harming F. While each of these breeds has a reputation for fighting, the only evidence I heard was that the dog has never bitten anyone and plays with children. Ms. B did not give evidence of any special precautions she took to protect her older daughter or F from this dog.

[37] Ms. C says that in November 2013, Mr. M picked up F by her head. At the time, F was less than a month old and, according to Mr. M, she weighed seven or eight pounds. Mr. M denies this and demonstrated how he would lift her, supporting her head.

[38] Ms. C says that in April, when F was laying on the couch, Mr. M picked F up by her arms and had F hanging in the air. Despite the fact that F was less than six months old when this happened, Ms. C said nothing to him at the time. Mr. M says that he has not held F up by her arms; he says he lifts her by her core. He said he would hold her hands while she was trying to stand.

[39] According to Ms. C, she didn't speak to Mr. M about lifting F by her head (nor was it mentioned in material filed for the court appearance in January). Ms. C says she only spoke to Mr. M about lifting F by her arms after he did it a second

time. The purpose of having Ms. C supervise access was to ensure that F was safe and Mr. M cared for her properly. Ms. B had clearly expressed her concerns that Mr. M didn't know how to care for F. If I accept Ms. C's evidence, her inaction in directing Mr. M in how to properly handle F suggests that she was less concerned about F's well-being than being able to report negatively on his parenting.

[40] Ms. C admits that F is more comfortable with her father than she was in the past. She says that he feeds, changes, bathes and interacts with F.

[41] Mr. M has been on parental leave since F was born. While he seeks primary care, he's made no arrangements for childcare and appears to assume the childcare will be readily available for a nine-month-old when he returns to work next month.

[42] Mr. M lives alone in three bedroom duplex on a dead end street. There are children in the neighbourhood and his yard is fenced. With the assistance of his cousin, he's prepared a nursery with a nursery set, toys and a video monitor system. He has a car seat for F.

The law

[43] Section 18 of the *Maintenance and Custody Act* governs this motion. According to subsection 18(5), my paramount consideration in determining F's parenting arrangement is her best interest. In determining this, I am required to consider the factors listed in subsection 18(6). This means considering F's physical, emotional, social and educational needs, including her need for stability and safety, her age and stage of development. I am also to consider each parent's willingness to support the development and maintenance of her relationship with the other parent, and the history of her care. I am to consider the plans each parent offers and F's cultural, linguistic, religious and spiritual upbringing and heritage. I am to consider the nature, strength and stability of the relationship between F and each of her parents, grandparents and other significant individuals in her life. I am to consider each parent's ability to communicate and cooperate on issues affecting F and the impact of family violence, abuse or intimidation.

[44] Here, F is 7 months old. She is just learning to speak. She has experienced a number of changes in her surroundings and the people with whom she lives without incident. There were no complaints with the care that Mr. M provided to F prior to the separation. Over the past five months, Mr. M has provided adequate care to F and her bond with him has grown. While Mr. M has expressed concerns about Ms. B, he has no evidence of any problems with her care for F.

[45] F has formed relationships with her maternal grandmother and her half-sister. She has not yet met her paternal family. Members of her maternal family have tried to adjust access to accommodate F's sleep schedule and visits with her father: Mr. M has not been willing to co-operate with this. The parents are prohibited from communicating with each other by virtue of the criminal charge facing Ms. B.

[46] Throughout most of F's young life her mother has been her primary care-giver. Ms. B is attentive to her own mental health needs and to the needs of F's physical health. She is a more experienced parent than Mr. M.

[47] The parents' relationship was poor. Ms. B is young and no more mature than one would expect someone of her age and education to be. She is twenty-three and has two children. She has not completed high school. Her personal relationships have been turbulent, and she has only recently adopted a stable lifestyle, taking her older daughter into her home.

[48] Mr. M, while nine years older than Ms. B, doesn't demonstrate the maturity one would expect of someone his age, but he has shown greater stability: he's been able to maintain employment, pursue training, and reside on his own. Mr. M hasn't yet developed an understanding that the responsibilities of parenting are not a favour he does for Ms. B, but an obligation he owes to F. He has taken an antagonistic tone in dealing with Ms. C.

[49] F has many needs which she cannot meet herself. Her parents must do virtually everything for her: feed her, clothe her, change her, bathe her, soothe her, supervise her, carry her from place to place, and meet her health needs. Mr. M has shown that he's capable of attending to F's needs and he has received some assistance in learning how to do these things. He finds exercising his access in the home of Ms. B's mother and step-father uncomfortable, to say the least.

[50] Mr. M has had almost five months' worth of visits supervised by Ms. C. This is sufficient. When Ms. B first requested supervised access, she asked that it continue until F was six months old. F is now more than seven months old. Ms. C says that F is more comfortable with her father. I am persuaded that F has become sufficiently comfortable with her father to move to next stage of access with him.

[51] Mr. M has requested various parenting arrangements for F. When he filed this motion, he wanted F's primary care. He now speaks of shared parenting.

[52] On an interim basis, I am to focus on F's needs in the short-term. The longer term will be considered when the application is heard and there is more opportunity to consider the circumstances in greater detail. Because mine is an interim decision based on incomplete information, I am unprepared to make a dramatic change to the status quo. As well, my decision is not intended to govern the family for the long term.

[53] At this point it is not in F's best interests to be taken from her mother's primary care. Ms. B is better able to care for F and, at this point, can do so without the need for third party care-givers, while this is not the case in either of the circumstances that Mr. M seeks.

[54] This is not to say that F should not have greater access to Mr. M. She should have more access with him and her access should be unsupervised so that he has the opportunity to care for her fully.

[55] Commencing during the week of June 16, 2014, F shall visit with her father twice each week for three hours at a time. This shall occur during weekdays. Mr. M can select the days and times and the same day and times shall be consistently used. This will continue until Mr. M returns to work.

[56] Mr. M resumes work on July 21, when his weekday time will be taken up with work and F's available hours will be limited by sleep. Commencing that week, he will have two visits each week from 5 p.m. until 7 p.m. on Tuesday and Thursday.

[57] This coming weekend includes Father's Day. Mr. M shall have access with F from 9 a.m. until 6 p.m. on June 15, 2014. Commencing the weekend of June 21-22, 2014 and on alternating weeks thereafter, F will be with her father from 9 a.m. until 6 p.m. on Saturday. Commencing on the weekend of June 28-29, 2014, F will be with her father from Saturday at noon until Sunday at noon.

[58] Ms. B must provide Mr. M with a list of the foods that F eats and, if she is eating commercial products, the names and brands of those products. Similarly, she must provide him with list of the personal care products F uses (soaps, shampoos, diapers, creams, ointments) and the particular brands. This information will allow Mr. M to ensure he accommodates any sensitivities that F has. If F has no sensitivities, Mr. M may use items he chooses. To ensure F's transition is comfortable for her, Mr. M should use products that F knows.

[59] Both Ms. B and her mother have told me that F's sookie blanket is a comfort item for her. She's developing an attachment to a stuffed unicorn. These items must be with her at all times: no parent is to withhold them from her. They must travel with her, moving between each parent's home with F.

[60] I am prepared to impose terms with regard to the use of alcohol, non-prescribed drugs and prescribed drugs. First, each parent may use prescribed medication in the manner in which it was prescribed while caring for F.

[61] Mr. M may not be under the influence of alcohol or non-prescription drugs for a minimum of eight hours prior to any time when he is having access with Faith and while he has access with her.

[62] For Ms. B, the requirement is that she not be under the influence of alcohol or non-prescription drugs for a minimum of eight hours prior to any time when she is in a primary care position or while she is in the position of primary caregiver.

[63] A discrete order should be issued providing that Ms. B and Mr. M may each communicate directly with those, such a F's doctor, to obtain information about F.

[64] F must be taken to all scheduled medical appointments.

Child maintenance

[65] Mr. M says that he loves F. Regardless, he has made no financial contribution to her support since he and Ms. B separated. It is a fundamental principle that a child is entitled to maintenance. This has been repeatedly stated by the Supreme Court of Canada: in *Richardson*, 1987 CanLII 58 (SCC) at paragraph 16; in *Willick*, 1994 CanLII 28 (SCC) at paragraph 15; and in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37 at paragraph 38. The entitlement to support exists from the outset. The entitlement does not come into being only after a motion or application has been filed. The entitlement is not suspended until a judge determines the child's residential arrangement.

[66] Mr. M believes his income is in the range of $55,000.00 annually. In 2013, he received parental leave benefits for approximately one and one-half months, following F's birth (there's a two week waiting period). These benefits are paid at the rate of fifty-five percent of the claimant's average weekly earnings in the year before the claim was made, up to a weekly maximum of $518.00. Mr. M's annual income means he would receive the maximum amount.

[67] To reduce the issues between the parties, I am addressing Ms. B's claim for child maintenance from the date when the parties separated. In 2013, Mr. M's income was comprised of his earnings for ten months ($55,000.00/12 =$4,483.33 x 10 = $45,833.33) and parental leave benefits for six weeks ($518.00 x 6 = $3,108.00). His total income was $48,941.33. Using the simplified child maintenance tables, I calculate that he owes child maintenance of $615.00 for 2013 ($410.00 per month for one and one-half months).

[68] Mr. M will return to work on July 21. He's receiving weekly parental benefits of $518.00 for twenty-eight weeks ($518.00 x 28 = $14,504.00). When he returns to work, his regular annual salary of $55,000.00 will resume and he'll earn $25,384.62 during the remainder of the year. I estimate his total 2014 income will be $39,888.62. Accordingly, he owes monthly child maintenance of $335.00 this year.

[69] Mr. M has asked that his child maintenance be payable bi-weekly. Where he must pay $4,020.00 this year, he must pay $154.62 every two weeks.

[70] The parties haven't scheduled a final hearing or a settlement conference. As a result I anticipate that matters may remain unresolved for some time (unless they are able to resolve matters with the assistance of their counsel, which has not happened to date). To ensure the payment of the appropriate amount of child maintenance, I order that starting on January 1, 2015, Mr. M's child maintenance payments will be payable at the rate of $463.00 per month ($213.69 bi-weekly). This is consistent with an annual salary of $55,000.00. Mr. M shall provide Ms. B with a copy of his 2014 year end paystub by January 16, 2015.

[71] Annually, Mr. M must provide Ms. B with a copy of his income tax return (including all schedules and attachments, whether he files the return or not) before May 15 and a copy of his Notice of Assessment or Re-assessment within fourteen days of receipt. If his income changes (other than as I've noted for his return to work), he must notify Ms. B of the change within fourteen days of learning of the change. In this way, if Mr. M receives sea pay for a posting (for example), Ms. B will become aware of it.

[72] Ms. Cochrane shall prepare the order for review and consent by Ms. Ruck De Peza.

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

Halifax, Nova Scotia