FAMILY COURT OF NOVA SCOTIA

Citation: D.C. v. K.C., 2009 NSFC 21

Date: 20090827
Docket: FLPMCA-064900
Registry: Bridgewater

Between:

D. C.

Applicant

v.

K. C.

Respondent

Revised Decision: The text of the decision has been revised to protect the identity of certain parties. This revised version is released on November 2, 2009.

Judge: The Honourable Judge William J. Dyer

Heard: August 21, 2009 at Bridgewater, Nova Scotia

Counsel: A. Franceen Romney, for the Applicant
Shawn D'Arcy, for the Defendant

By the Court:

Background

[1] D.C. (the husband) and K.C. (the wife) are the married parents of six year old K. The parties had been in a relationship for about nine years before they married in mid- June, 2002; they separated in May, 2009.

[2] The husband has a fifteen year old son, A., from another relationship. The wife has a nineteen year old daughter, B., from another relationship. B. lives independently. As will appear, these two children figure prominently in the escalating tension and hostility between the spouses and the competing short and long term plans for K.

[3] What might have be seen as typical march to a courtroom showdown has been slowed and complicated by the intersection of incomplete child protection and criminal investigations. And, while this is not a text-book example of intersection problems, it is a reminder to parents to proceed carefully, thoroughly and cautiously at interim hearings.

The Issue

[4] In this instance, proceedings under the **Maintenance and Custody** (**MCA**) were fast-tracked to an interim hearing because the parents were unable to resolve the question of K.'s schooling before it resumes in a few days. To expedite the hearing counsel agreed they would rely on affidavits, save and except for the possibility of limited oral testimony from witnesses who might be unable or unwilling to file timely affidavits - notably an investigating child protection worker and a police officer. Ultimately, there was very brief testimony by the officer; and none from the social worker.

The Evidence

[5] I cautioned counsel that their agreements on process were not received by me as a license to disregard the **Family Court Rules** or basic rules of evidence.

[6] The purpose of the **Rules** is to secure "the just, speedy, and inexpensive determination of every proceeding". The court, in its discretion, may also refer to

the **Civil Procedure Rules** where there is no specific provision under the **Family Court Rules**. (Unlike their cousins, the **Family Court Rules** have not been the subject any recent review or revision.)

[7] **Family Court Rule 13** addresses affidavit content. Unless the court otherwise orders, an affidavit used at a hearing must contain only facts that the deponent is able to prove from his or her own knowledge. Any content which is scandalous, irrelevant or otherwise oppressive may be struck out.

[8] Affidavit use (and abuse) has been the subject of much judicial commentary, especially by family law judges who consume a steady diet of affidavits which often prove very hard to digest because deponents, as often as not, choose to load up the menu with all manner of distasteful, inflammatory and inadmissible content. [See: **C.K. v. C.S.** (1996), 157 N.S.R. (2d) 387 (Fam. Ct.); and **Huery v. Huery**, 2004 SKQB 108.]

[9] In the present case, the husband filed three affidavits. The wife's two affidavits were supplemented with one from her daughter, B. Without labouring the point, I quickly determined that the affidavits from both sides were contaminated with inadmissible hearsay evidence and generous quantities of personal opinion, speculation, argument and otherwise inappropriate material. I directed myself to ignore the offending content.

Interim Fact Findings

[10] Making the best of the incomplete and conflicting evidence, I make the following findings.

[11] Before their separation, the parties lived in a small rural community in Queens County. The husband has an unspecified physical disability which has limited his employment opportunities for several years. However, he is currently working full-time. The wife has a long uninterrupted work history at an industrial plant in Bridgewater, about a half hour east of the husband's residence. She works weekdays, from early in the morning until mid-afternoon. The husband characterized himself as seasonally employed and as a stay-at-home father, for much of the time. The wife has customarily co-parented when not at work.

[12] The wife left the matrimonial home on May 3, 2009. By then, she had started a relationship with another man, S.L., with whom she and K. now reside. They live in a town which I judicially notice is almost a half hour south of Bridgewater where the wife works, and about an hour away from the husband's present residence (depending on weather, traffic, etcetera).

[13] The husband claimed his spouse's departure was a complete surprise and that he had no idea that their relationship was in trouble. By contrast, the wife mapped out a long history of alleged inappropriate and abusive conduct which was no secret and which she cited to explain, if not justify, her decisions.

[14] During the last academic year, K. was in grade primary at a rural school in Queens County and travelled by bus. The husband said he was actively involved with K.'s school and attended parent/teacher meetings and other school functions. The wife's level of involvement is unstated.

[15] Upon the wife's departure, K. stayed briefly with her father but had contact with her mother. Initially, the husband objected to K. being at the S.L. residence, even for access purposes. Reportedly, he and S.L. soon came into conflict and there is vague evidence of police involvement.

[16] The husband's relationship with his former partner, D.J., and their son, A., was described in glowing terms. D.J. has primary care but A. has stayed regularly with his father and new family. The husband described the sibling relationships as normal, before the separation. As well, the wife seemed to enjoy a good relationship with A.

[17] The husband provided his version of events which led up to temporary suspension of his contact with K., about two months after the separation. A. was at his father's residence on the weekend of July 11th. K. had been visiting the wife. After a telephone conversation with K., the husband concluded that "something was amiss". The wife refused to let K. return, although this had been previously agreed. A. went back to his mother's home.

[18] The husband embarked on efforts to secure K.'s return. He commenced legal action. A court appearance was set. He soon learned that there was an allegation of improper sexualized contact between his son, A., and his daughter, K.

[19] Child protection authorities had prior involvement with the family which was not initially disclosed to the court. Upon learning of the present allegations, a local agency made a referral to the police. Although everything was in a state of turmoil, the father persisted in his attempts to reestablish contact, if not actual care, of his daughter. He staunchly defended his son and questioned the veracity of the disclosures and the motives of the referral sources.

[20] By July 15th, the husband had confirmed that the wife was under directions or instructions from the police and from child protection workers that she was not to permit him to speak to K. He also learned that the protection and police referrals had been triggered by a disclosure attributed to K. by her older sister, B.

[21] The husband gave assurances he was prepared to cooperate with the child protection agency and ensure that his son would have had no contact with K., until the outstanding matters are resolved.

[22] Police and agency investigations are ongoing. It is unclear how long they will continue. For certain, they will not be finished before school starts. No charges have been laid against the son. An assertion by the husband that a referral source would likely be charged criminally is unfounded at this stage.

[23] There has been no *voir dire* regarding the admissibility of out-of-court statements attributed to the six year child. Nor is there any agreement on the issue. Accordingly, I have directed myself to disregard those statements, except for the limited purpose of having some background to explain agency and police interventions, and the wife's stance on parenting issues. None of the evidence considered goes to establishing the truth of the outstanding allegations.

[24] The husband's agency-arranged and supervised contact with his daughter in the intervening time has not gone well from his perspective. Given the intensity of the investigations, the turmoil in the child's living circumstances and her young age, the experience should not come as a surprise and, at this juncture, I find there is no credible evidence to link the child's expressed preferences and concerns to any actions or conduct by the wife.

[25] In my opinion, management of access arrangements for K. and potential supportive services for all family members is best left in the hands of the agency.

(In so saying, I am mindful that child protection proceedings have not been initiated; and that only voluntary services may be offered and accepted.)

[26] The husband flatly disputes the allegations of physical abuse made by the wife, although he acknowledged arguments and mutual verbal abuse. He wrote that the main issue within the home was B.'s out-of-control behaviours which sparked friction all around.

[27] Without providing specifics as to date, time and place, the husband turned the table and delivered his own allegations of past physical abuse as between his wife and B. He also challenged allegations advanced by the wife that he has physically and emotionally abused his son, and engaged in self-harming behaviours. He denied assertions regarding drugs at his place of residence. He ultimately admitted to having a criminal record, but countered that the wife does too. He admitted that a charge that he assaulted B. at some point in the past did result in a conviction. But, the bulk of the wife's and B.'s allegations about him were denied, refuted, or minimized.

[28] Oddly, the husband claimed that he could not recall any past court determination that B. was in need of protective services, but took pains to point out that if there was it would have been at a time when he and the wife were cohabiting and co-parenting B.

[29] By contrast, there emerges from the wife's affidavits a picture of a chronically troubled marriage which she finally left due to violence and intimidation by him. Without providing specifics of dates, times or places, she alleged the husband abused her constantly; and she gave some examples. One of the most serious allegations was that she had attempted to leave last summer but he locked both of them in a bedroom with a loaded gun and threatened to shoot himself; and she claimed that she begged him to let her go and not to hurt the children. She went on to catalogue other complaints of domestic violence and emotional abuse. However, she provided no evidence of formal police or agency intervention, except as already noted.

[30] The wife adopted B.'s version of past conflict between that daughter and the husband, including agency involvement, but she did not elaborate on the proceedings which presumably involved both parents. She reiterated and amplified her daughter's assertions of chronic emotional and physical abuse.

[31] The wife rationalized leaving the matrimonial residence without K. by saying she might be harmed if she did so. She added that she had no place to go. The latter is doubtful because (on her own evidence) her parents lived in the same area and were described as ready, willing and able to help. And, it did not take very long for her to settle at the S.L. residence. That said, the crucial disclosures attributed to K. did not surface until after the separation.

[32] Also, as noted elsewhere, on an unspecified occasion in early July the wife said that when she picked K. up at the husband's residence she came upon a "stash of drugs" in his bedroom.

[33] The wife corroborated the disclosure of alleged misconduct by the husband's son, her complaint to the police, and directions given to her regarding family contacts while investigations are in progress.

[34] As mentioned at the beginning, B. is the wife's 19 year old daughter. She submitted an affidavit which was laden with scathing allegations against the husband but which was devoid of crucial specifics. For example, she characterized him as extremely hateful toward her and everyone in the household, that he routinely went into fits of anger and became violent, and that she was she was extremely scared of him. Some of these assertions clearly go back about six years when she was 13 years old and when she, her mother and the husband were living under the same roof. K. was not born. She alleges at least one physical assault by him on her and threats to do other harm, much of which occurred when her mother was at work. This was disclosed to school officials who, in turn made a referral to child protection authorities. Following police and agency investigations, she said a child protection application was started and a court found her to be a child in need of protective services.

[35] Assuming some relevance of past parenting conduct and past agency intervention, B.'s story came to an abrupt halt. No court documents were introduced. There are no affidavits from agency workers. As a result, the family's circumstances at that time, the agency's allegations and identified concerns, the supports and services provided, the family's response, the final outcome, etcetera are all unknown. Flowing from the same incident, B. alleged that the husband was charged criminally with assaulting her with a weapon (ie., a belt), convicted, and sentenced to a period of probation. (This is not disputed by him.)

[36] After agency intervention, B. conceded that the husband was less aggressive towards her and her mother, but soon thereafter his behaviours deteriorated, again. Unfortunately, her last allegations are flawed with imprecision and inadmissible content. Therefore, her generalized assertions that the husband was abusive to both A. and K., that he would often resort to cursing and swearing at both children if they misbehaved, that as a parent he demonstrated no self-control, that he lashed out viciously towards whoever was making him unhappy at the time, etcetera, have little value in deciding the immediate issue before the court.

[37] Nonetheless, B. is central to the current case because on July 10, 2009 she was visiting with her mother when her younger sister disclosed repeated, sexualized touching by her teen stepbrother, A. B. informed their mother the next day. B. was later interviewed by child protection agency workers and by the police, as was the wife.

Decision

[38] In the courtroom, I made it clear that my ruling should not be taken as indicative of the outcome should the matter proceed to a full and final hearing. To state the obvious, neither parent has had much opportunity to fully prepare and present her/his case; and I have not had a chance to hear oral testimony. Therefore, I can make no final assessment about the credibility of any deponent.

[39] The following passage from the 2008 **Annual Review of Family Law** (McLeod and Mamo), at page 89, is illustrative of the challenges faced at contested interim hearings. The present case is no exception:

> Deciding on interim custody/access arrangements is a daunting task for any judge. The material is often self-serving, unreliable, incomplete and untested by cross-examination or objective evidence. Contradictions in the evidence make it impossible to determine the ability of the parents to meet the children's needs or, sometimes, to even figure out what the status quo really is. The challenge is further complicated by the fact that even though an interim custody/access order is, in theory, intended to be a short-term measure to deal with the immediate problem of where a child should live and what role each of the parents should play on a short-term basis, the realities of busy, underresourced courts is such that an interim order is likely to be in

> existence for months on end, creating a "status quo" likely to continue until trial and often beyond. Nevertheless, children require certainty and stability, especially at the time immediately after the separation of their parents and judges are forced to decide interim custody and access provisions by a summary hearing on incomplete and conflicting affidavit evidence.

[40] Under section 18 of the **MCA**, the mother and father of a child are joint guardians and equally entitled to the care and custody of the child unless otherwise ordered. Under the same section, the court must apply the principle that the welfare of the child is the paramount consideration.

[41] Pending the outcome of the ongoing investigations, the husband has conceded primary care to the wife and does not object to the ongoing involvement of the child protection agency to facilitate access. As a result, with the consent of the parties on July 27th, 2009, I approved an interim order which provided that the wife shall have the care and control of K. and that the husband shall have supervised parenting times with her at the direction of the investigating child protection agency. Not without difficulty and some complaints, but to their credit, the parties have complied with the order.

[42] Notwithstanding earlier assertions by the wife that she and K. would be staying at her parent's home in Queens County, there is no question that she is now cohabiting with S.L. in Lunenburg County. This is reinforced by statements in her last affidavit to the effect that she has enrolled K. at a local school, that she has informed the child protection agency of her whereabouts, and that the agency has no concerns about her accommodations in Lunenburg County or her new partner.

[43] For interim purposes, the case boils down to one central issue: whether the wife should be compelled to enroll K. at her former school in Queens County and, as a corollary, arrange for K.'s safe and secure transport, each day, to and from school there, pending conclusion of the case.

[44] The concession by the husband, fortified by court approval, that the wife shall have primary "care and control" of K., at least for now, necessarily includes the wife's right to make the major day-to-day decisions affecting K.'s upbringing and well-being. Otherwise, it would be hollow and meaningless.

[45] While the terminology (which counsel crafted) does not preclude consultation between the parents, it does not require it. School enrolment choices are commonly tethered to residency. And enrolment decisions are normally made by the parent with whom the child principally lives (assuming joint custody and shared parenting regimes are not in place) so long as the choice is not unreasonable. [For example, see **Charles v. Charles**, 2004 BCSC 415.]

[46] Legal language aside, the child's best interests are paramount. When one strips away the scathing personal attacks, allegations, and counter-allegations from the affidavits there is little remaining which sheds light on K. or her circumstances. There is no evidence from school officials in either locale. There is some evidence that K. is a good, albeit very young, student. She has had the benefit of a speech therapist, but no other special needs have been identified. Even the extent of that need has not been established. There is little evidence about the comparative offerings or benefits of the respective schools, or school districts for that matter. There is no evidence of any disadvantage to the child should she attend one school, as opposed to the other. There is speculation and personal opinion from both parents, but no hard evidence that K. will be unable to adjust or make a transition at this time, or that her educational needs cannot or will not be met should the court endorse the wife's plan. Although there is no evidence that the child protection agency which is monitoring this family has formally approved the wife's proposals, neither is there any evidence that the agency opposes them at this time.

[47] Looking at the circumstances as a whole, I also conclude that it would be unfair and unreasonable to impose on the wife a long commute which (from her current residence) would necessarily mean K. would have to be transported by car approximately one hour at the beginning, and about another hour at the end, of each school day. With contact restrictions now constraining the husband, there is really nothing he can offer to ease the concern. That the wife works approximately midway between the husband's proposed school and K.'s current residence does not lessen the toll such an artificial scheme would likely take on this youngster. Given the evidence that the child can be schooled very close to home, by comparison to the husband's plan the wife's plan is viable and makes the most common sense. Finally, given the turmoil this young child has experienced in recent weeks, I conclude that it is her best interests that both her residential and schooling situations be given an opportunity to stabilize.

[48] I stressed in court and reiterate that the prevailing parenting arrangements, including access, are temporary pending a final hearing or final settlement between the parties. I have carefully considered and respect the preferences of both parents who are understandably very focused on K.'s education. While schooling has taken on heightened importance in recent days, both parents should keep in mind that it is only one of many factors to be weighed when the final outcome is decided.

[49] On behalf of the wife, Mr. D'Arcy has suggested that a report or assessment under section 18 of the **MCA** might prove beneficial. This avenue is something the parties can explore before the next court appearance. When counsel are in a position to further advance the case, they are invited to contact the Family Court Officer and seek another docket appearance.

[50] Because time is of the essence, an order will accompany release of this decision.

Dyer, J.F.C.