IN THE FAMILY COURT OF NOVA SCOTIA
Citation: L.A.O. v. T.H.C., 2009 NSFC 7

Date: (20090127)
Docket: 08D059734
Registry: Yarmouth

Between:

L.A.O.

Applicant

v.

T.H.C.

Respondent

Judge: The Honourable Judge John D. Comeau
Chief Judge of the Family Court

Heard: September 16, 2008
October 14, 2008
October 28, 2008
November 18, 2008
December 16, 2008 in Digby, Nova Scotia

Decision: January 27, 2009

Counsel: Raymond B. Jacquard, for the Applicant
Martin J. Pink, Q.C., for the Respondent

The Application:

[1] This is an application brought by the mother of Zachery born [..], 2002, and Ava born [..] 2005. She is requesting joint custody of the two children with her being the primary caregiver and specified access to the Respondent father of the

children. The Respondent father contests the application and is asking for primary care and specified or reasonable access.

Issues:

[2] Custody, access and child support.

The Facts:

[3] The parties had been living common-law when the children were born. Their relationship was ongoing between 10 and 11 years.

[4] This was a very concentrated contested custody application where the Applicant attempted to impugn the character of the Respondent. Much of the evidence relating to the family's finances is irrelevant to the issue of custody. Both parties appear to have lost track of the children's best interests. The Applicant was bitter over an affair the Respondent was having with a woman who is presently his girlfriend.

The Applicant's View of Past and Present Parenting:

[5] The basis of the argument is that the Respondent was not involved in parenting his children to an extent that it would be in their best interests that he be

given primary care. Specifics have been given about his lack of involvement with the children and his insufficient and improper supervision when he had them. The Respondent answers these allegations indicating he would be the best to be given primary care and would be the better party to facilitate access.

[6] There has been much evidence presented to the Court concerning the Respondent father's parenting from the birth of their first child, Zachery, to his involvement with their second child, Ava. The Application mother works in seafood sales and the Respondent father is a land developer and also involved in the sale of lumber (wood).

[7] On the birth of Zachery the Applicant mother took maternity leave to care for the child. She says the Respondent changed a diaper or so but did very little else. When Ava was born she was unable to take a long maternity leave but the Respondent was not happy with this life change that affected him and he was not around much. After Ava was a year old the Applicant went back to work full time and prior to this has been going in to work sporadically. When she went back to work the children put in daycare with one B.H. This was done five days a week.

[8] The Respondent had an office in a space attached to their home. This was also in the form of separate living quarters. In addition to working long hours the

Respondent coached the high school girls basketball team and played basketball himself. These recreational activities were time-consuming.

[9] The Applicant says the Respondent never left work early to pick up the kids at daycare. At night her mother would care for the children because she says the Respondent could not be relied on. When she was hospitalized the children were cared for at daycare or by her mother because the Respondent had to go to basketball. Her mother lives next door and her stepfather, they play a significant role in the children's lives.

[10] The Applicant resides in the matrimonial home and the children have never resided anywhere else. For the past five years she says that she has really been a single parent. The Respondent has been too pre-occupied with business and recreational activities. He did not participate in regular routines with the children such as getting them up and ready for school.

[11] Following an admission that he was involved with another woman the parties got back together and attended marriage counselling. They had originally separated in January 2008. The reconciliation did not go well and he moved out in April 2008 taking 50 % of his belongings with him.

[12] The frequency of requests for access improved with the Respondent father following the commencement of court proceedings, according to the Applicant.

She says he would take the children but still pawn them off on others which she considered “very disruptive to my children.”

[13] Access arranged for the Respondent is Tuesdays and Thursdays and every other weekend, but the Applicant complains he would find others to care for the children. She says he missed Father’s Day, child’s Christmas party and a family picnic because during the latter event he took his girlfriend to Los Angeles.

[14] There has been much evidence of confrontations between the parties concerning a lot of issues. Relevant to the custody application is a confrontation over access in front of the child which included him locking their son in the vehicle and not letting him out. She says he just walked in and took Zachery to the theme park on her weekend with the children and he did this over and over again. Her concern is that the children have a proper routine.

The Respondent’s View of Past and Present Parenting:

[15] The Respondent father describes himself as a good father attending all maternity classes and being in the room when Zachery was born. At home he would take turns getting up with the child in the middle of the night. The mother wasn’t nursing so he would prepare formula for the child’s bottles, feed him and bath him. He kept track of medical appointments for the children and attended with

Zachery his first appointment with the dentist. In an attempt to confirm this involvement the Respondent's Counsel attempted to have e-mails sent to the Applicant and her mother entered in evidence. Counsel for the Applicant objected that this amounted to oath-helping.

[16] Oath-helping was discussed in The Law of Evidence in Canada, John Sopinka et al, 2nd Edition, Butterworth's at 518.

> The practice of "oath-helping" appears to have originated in medieval times when the accused in a criminal case could prove his or her innocence by calling witnesses to swear the truth of his or her oath. "Oath-helping" evidence is inadmissible in modern times because questions of credibility are the province of the triers of fact who are in as good a position to determine credibility of witnesses appearing before the court as the "oath-helpers". Where the sole purpose of evidence is to bolster the complainant's credibility, the evidence will be excluded on the basis it contravenes the rule against oath-helping. However the Supreme Court of Canada point out in **R. v. Burns** [1994] 1 S.C.R. 656 such evidence may be admitted where it relates to matters in issue other than credibility.

[17] Much of this type of evidence, when admitted, goes to the weight the Court places on it reserving to the trier of fact the issue of credibility.

[18] The Respondent father has presented evidence to show that he took an active role parenting, attending to any medical problems involving the children, cooked healthy meals at home for the family and took the children and picked them up at daycare at least fifty percent of the time.

[19] He also played a role in the children's education by talking to Zachery's teacher and going to orientation for the child's first year in school. While the

Applicant put the child on the bus for his first day of school the Respondent actually attended the school.

[20] The recreational activities of the Respondent father mainly consisted of coaching basketball and playing that same sport. He says this did not consume most of his time as alleged by the Applicant mother. There was time spent doing activities with the children, as well, which included soccer, skating, walking at the park and beach, camping and swimming at the lake. He says he always informed the Applicant mother when he was taking the children for activities with him.

[21] The Respondent provides the Court with a number of picture albums showing him participating in activities with the children. Video evidence shows his involvement at Christmas to counter accusations that one Christmas he left the family alone to work. The Respondent father has left no stone unturned to show his parenting of the children.

Access Arrangements Since March 2008:

[22] The children have resided with their mother in the matrimonial home since the parties separated. The Respondent father has had access on Tuesdays and Thursdays and every other weekend. In addition to this there has been extra access times agreed to by the parties. He says he had children in his care at least 60% of

the time and he bought Zachery a froggie phone so he could keep in touch, but somehow it has disappeared.

Witnesses:

[23] The Applicant called a number of witnesses to show that the Respondent father was not as diligent in his parenting as he claims. Her stepfather who with her mother lives "a few feet away from her home" was involved with the Respondent father in his business. As far as the children were concerned he saw the Applicant mother as the primary caregiver because the Respondent father either was gone away on business or secluded in his office. This included weekends as well when he did have the child Zachery with him. He would take him to some of his construction sites, but not keep close attention to him. This is something the stepfather had to do as a surrogate babysitter.

[24] One other example of inattention was when the Respondent was working at the computer and Zachery got up on the island in the kitchen with the potential of falling of and being hurt. Also leaving the basement door open with possible access by the child is one of many incidences. Another occurrence was the child being in possession of a grass trimmer.

[25] The children's babysitter (out of her home) had both children because the parents worked five days a week. The Applicant mother would drop off the

children and pick them up. She had very little contact with the Respondent father. They only time he picked up the children was last summer to take them early to the exhibition. There were times he would drop off the children but this was sporadic.

[26] On August 14, 2008, the witness described an incident where she went to the Respondent's home to collect two weeks pay owed her. He became confrontational in front of the children and she pulled on his shirt. She is now charged with assaulting him and no longer babysits the children who she misses very much.

[27] As mentioned the maternal grandmother and her husband (the stepfather) live next door to the Applicant mother. Her brother and father live in the vicinity as well. The babysitter referred to earlier lives across the road. She is self-employed so has a lot of flexibility in helping out her daughter . She spends time there with the children at least three or more times a week. She says, "They are going to be my only two grandchildren."

[28] It is her view from observations that the Applicant mother is devoted solely to her children while she describes the Respondent father's parenting as not dependable, leaving the children with her when he could or being attentive only to the computer or cell phone. That he would undermine discipline measures taken by the Applicant mother. Although the Respondent may make a big show in public

with the children it was always her daughter who did most of the parenting behind the scenes.

[29] The most compelling and least self-serving witness was the Respondent father's aunt who was employed by him (executive assistant position) until he found out she was coming to court to testify for the Applicant. Her evidence confirms his lack of attention when he had the children as well as using her as a babysitter. In addition to describing some unscrupulous business affairs she was very negative concerning his parenting of the children when he had them such as letting them run loose and get into things that were dangerous to them. She had to look out for them, not him.

[30] Two other witnesses which include Zachery's teacher and a person who works for Community Services gave a positive observation of the Respondent's parenting and interaction with his children.

Application by Respondent's Counsel for Recall of Witness:

[31] There have been a number of continuances in this case and following the completion of the evidence on behalf of the Respondent the case was adjourned for rebuttal and summations by Counsel. When the hearing commenced on the date set as referred to above, Counsel for the Respondent father applied to the Court to

present new evidence of an occurrence or occurrences that took place between the adjourned dates. This evidence was in the form of audiotapes.

[32] Counsel for the Respondent father submitted case law concerning the admissibility of taped conversations in child custody cases. In **The Children's Aid Society of Cape Breton - Victoria v. H.A. and G. A., SR.**, 2005 NSSF 18, Justice Walter Goodfellow agreed that evidence of taped conversations, although not admissible in a criminal proceeding, may be admitted in a civil proceeding if relevant, reliable, probative and in the child's best interests.

[33] In the case before the Court, that was not the issue. This is a protracted custody proceeding between the parties where they have dragged up everything they can to attack the character and parenting skills of the other. This is particularly so, on the part of the Applicant mother. Family dynamics are always in a state of flux and issues continue to fester between the parties. If the Court were to allow a party who has closed their case to present further evidence obtained during an adjournment, disputes and the court case could conceivably continue on with no end in sight. This would be contrary to the children's best interests. The process of parents taping evidence of conversations with each other should be discouraged. [See **A.(M.F.) v. A.(R.D.)**, 2001 Carswell, B.C. 1962, 2001 BCSC 1131 (S.C.) or **N.(T.A.) v. N.(R.G.)**, 2003 Carswell, ALTA 1384.] This is particularly so during

the course of an adjournment in the middle of a custody dispute where both parties have closed their case.

[34] The parents should be aware that both will forever be the father and mother of the children and they should always treat the other with respect. This will in the future be recognized by the children and their respect for their parents will be enhanced. In most of these disputed cases this is a sacrifice for parents that is well worthwhile.

[35] The Court has exercised its discretion in not allowing the Respondent to reopen his case to place taped conversations with the other party before the Court. This discretion is a wide one and in family situations it must be exercised keeping in mind the best interests of the children.

[36] In **The Law of Evidence in Canada**, Butterworths 2nd Edition, Sopinka, Lederman, Bryant, the Court's discretion to reopen in civil cases is discussed.

> In civil cases the discretion to reopen is wider and should be exercised in light of the broad principles which are the bases for the restriction on reply evidence. These principles are designed to ensure that the Defendant knows the case to be met and the Plaintiff (or Respondent) are not permitted to split his or her case. The rationale for the latter principle is that trials should not be unduly prolonged by creating a need for surrebuttal. Within these broad parameters, the trial judge has a discretion to permit reply evidence whit it is the reasonable and proper course to follow. (See **Erco Industries Ltd. v. Allendale Mutual Insurance Co.** (1987) 25 O.A.C. 130, 29 C.C.L.I. 4 (C.A.) and **Mersey Paper Co. v. Queens County** (1959), 18 D.L.R. (2d) 19, 42 M.P.R. 397(N.S.C.A.)

The Law:

[37] **Powers of Court**

18(1) In this Section and Section 19, "parent" includes the father of a child of unmarried parents unless the child has been adopted.
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 privileges of a parent or guardian or authorized person.

18(3) This section does not apply

(a) where there is an adoption agreement respecting the child pursuant to the **Children and Family Services Act**, that has not expired or been terminated except with leave of the court upon application of a parent who is not a part to the adoption agreement;

(b) where the child has been placed for adoption and adoption proceedings under the **Children and Family Services Act** have not been dismissed, discontinued or unduly delayed; or

(c) where there is an order respecting custody of or access to the child made pursuant to the **Divorce Act** (Canada) or by the Supreme Court or the county court or a judge thereof.

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

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

(b) ordered by a court of competent jurisdiction.

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.
[See **K.(K.) v. L.(G)** (1985), 44 R.F.L. (2d) 113 (S.C.C.), **Dixon v. Hinsley** (2001), 22 R.F.L. (5th) 55 (ONT. C.J.) and Foley v. Foley (1993), 124 N.S.R. (2d) 198 (N.S.S.C.)]

[38] Counsel for both parties have referred to **Foley v. Foley**, supra, which contains seventeen factors the Court should look at when considering a custody application.

> In determining the best interest and welfare of a child, the court must consider all the relevant factors. The diversity that flows from human nature is such that any attempt to compile an exhaustive list of factors that could be relevant is virtually impossible.

16. Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:

1. Statutory direction Divorce Act 16(8) and 16(9), 17(5) and 17(6);
2. Physical environment;
3. Discipline;
4. Role model;
5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication of, or expression by the child of a preference;
6. Religious and spiritual guidance;
7. Assistance of experts, such as social workers, psychologists, psychiatrists, et cetera;
8. Time availability of a parent for a child;
9. The cultural development of a child;
10. The physical and character development of the child by such things as participation in sports;
11. The emotional support to assist in a child developing self esteem and confidence;
12. The financial contribution to the welfare of a child;
13. The support of an extended family, uncles, aunts, grandparents, et cetera;
14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. The **Divorce Act** s. 16(10) and s. 17(9);
15. The interim and long range plan for the welfare of the children;
16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and
17. Any other relevant factors.

17. The duty of the Court in any custody application is to consider all of the relevant factors so as to answer the question.

18. With whom would be the best interest and welfare of the child be most likely achieved?

19. The weight to be attached to any particular factor would vary from case to case as each factor must be considered in relation to all the other factors that are relevant in a particular case.

Conclusion/Decision:

[39] This is a contested custody matter in that, although the parties do not require a change as set out in S. 18(4) of the **Maintenance and Custody Act**, (joint custody) they each request the Court to add a condition to that form of custody so that one as opposed to the other will be the primary caregiver. (See **Blois v. Blois** (1988), 83 N.S.R. (2d) 328 (N.S.S.C. APP. Div., Jones, J.A.)

[40] In order to support their respective positions, the parties have seen fit to put into question the conduct and character of each other. This was most prevalent on the part of the Applicant mother who is bitter over the relationship the Respondent father had while they were together and continues to have with another woman. While the conduct of the parents are a factor in a custody dispute, it is just one of the many things the Court must consider to determine with whom and where the children should reside so as to foster their welfare and best interests.

[41] The essence of the argument of the Applicant mother is the father was not diligent in his parenting role and she says she was the one who was the primary caregiver. He was preoccupied with his work and even when he had the children with him he used his personal assistant to babysit them. Coaching and playing basketball took up his spare time and weekends while she cared for the children.

[42] Photographic evidence of the Respondent father participating with the children and their activities has been presented to the Court. His girlfriend has children of her own who get along well with his. They do not reside together but spend a lot of time together.

[43] Both parties decided to pursue one aspect of custody dispute, namely, conduct of the other parent. This method of conducting their case is a further indication that they both have lost sight of the paramount consideration; what is in the best interests of their children. The decision in **Foley**, supra, does not refer to conduct of the parent(s) but sets out one of the factors to be considered as "role model". This means the Court should look at which parent would provide that kind of positive reinforcement to the children so that they would feel they have stability and are comfortable. The Respondent father has compromised his ability to be a positive role model by his actions that led to the breakdown of the family unit. If both parents continue to question the conduct of the other they will pay the price in the future in the eyes of the children. This type of conduct does not contribute to children developing self-esteem and confidence.

[44] This case is not determined by the parenting styles, so-called, of the parents. There are more important facts which are outlined in **Foley**, supra. One factor concerns the physical environment. The children must have a primary place of

residence that is familiar to them. They continue to live in the home they have always lived in with their mother.

[45] There is no concern about both parents ability to discipline their children in a proper manner. The concern which is disclosed in the evidence is the Respondent father's inattention to children that are young enough that they need dedicated supervision.

[46] Both parents work and this requires a third party to babysit and it appears the Respondent father anticipates using his girlfriend for this purpose. His work is more than a nine to five job, so-called, while the Applicant mother's occupation and work gives her more time to exercise the parenting role.

[47] Participation of extended family is very important and the Applicant mother's parents have always been involved with the children. Her mother and stepfather live next door and they are a great source of help for the mother and provide continuity and stability for the children. It is understood from the evidence the Applicant mother's father lives nearby and he is involved in the children's lives.

[48] The Respondent father's mother lives in Bridgewater and she presents a positive person who gives a lot to the children in emotional support when she sees them. A sister of the Respondent's mother was a witness who once worked for the Respondent but her evidence is about inattentive parenting. They appear to be

estranged. There is no other evidence of extended family of the Respondent father who have contact with the children.

[49] Given the history of parenting in the past there is some question about the Respondent father's motive requesting primary care. This would mean removing the children from the home they have always known away from the extended family that has very actively participated in their lives since birth. He wants to care for them on a day-to-day basis with the help of his girlfriend. It is difficult to perceive that this would be in their best interests. Some parents think that primary care gives them control over every aspect of the children's lives and as such a parent with this frame of mind is not a good access facilitator.

[50] The Respondent father has presented evidence of his involvement with Zachery's school and this is what parents should do. Primary care is not required to be fully involved in children's lives. He has not presented any long term plan of care of the children nor has he provided any valid reason why the Court should disrupt the status quo referred to earlier.

[51] This is one of those cases where the parties should have developed a parenting plan within the framework of joint custody, but they were unable to overcome personal animosity towards each other to achieve this.

[52] The present living arrangements of the children are in their best interests (See **Mendoya-Gonsalez v. Columbe**, 2005 Carswell N.S., 280, 234 N.S.R. (2d) 104, 2005 N.S.S.C., 156 (S.C.)

[53] The question is with whom would the best interests of the children most likely be achieved. There is no evidence that removing the children from the home they have always known in their mother's primary care to the father's would be a better alternative. There is no purpose to it.

[54] The Court finds it is in the best interests of the children to order joint custody with primary care to the Applicant mother. Access should continue on the present schedule referred to above. Both parties will advise the other of anything that affects the welfare of the children. Counsel for the Applicant shall prepare the Order.

[55] At the trial Counsel advised they would consult on the issue of child support and consequently this matter is adjourned without date and if it is not resolved one or both of the parties may request a hearing date through the Court Administration.

Ordered Accordingly,

John D. Comeau
Chief Judge of the Family Court
of Nova Scotia