

**FAMILY COURT OF NOVA SCOTIA**  
**Citation: C.N.K. v. A.E.A., 2011 NSFC 9**

**Date:** 20110420  
**Docket:** 04Y035494  
**Registry:** Yarmouth

**Between:**

C.N.K.

-Applicant

v.

A.E.A.

- Respondent

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**DECISION**

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**Editorial Notice**

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

**Judge:** The Honourable Judge John D. Comeau, Judge of the Family Court for the Province of Nova Scotia

**Heard:** Digby, Nova Scotia, March 29, 2011

**Decision Date:** April 20, 2011

**Counsel:** Applicant - unrepresented  
Respondent - Oliver Janson, Esq.

**The Application:**

[1] This is an application to vary an order of this court dated January 10, 2008. The Applicant is the father of P., born September \*, 1997 and C., born December \*, 2000. He is requesting a reduction in child support and primary care of both children.

[2] The mother is responding to this by asking that she retain primary care.

[3] There was provision in this order for joint custody with the mother as the primary caregiver. Access (parenting times) were specified. Child support was set at \$300.00 with special expenses in the amount of \$250.00 for child care. On July 22, 2009 an order was made deleting the special expense payment and increasing child support to \$400.00 a month.

**ISSUES:**

[4] Change in circumstances/custody/access/child support.

**THE FACTS:**

[5] The relevant facts concern a change in circumstances with respect to what has occurred since the making of the order on January 10, 2008. At the present time the parties' daughter lives with her father, having moved in with him in the fall of 2010, following an argument with her mother. She is attending a different school than she was when in her mother's care. The argument occurred over P. taking her computer to school. Her mother did not want her to do this because it was not required for her school work. It would interfere with it.

[6] The argument escalated to the point where P. wanted to call her father. P. then took off behind the house with her cell phone. The mother then contacted, J.M., her common law husband, and he found P. and took her to her father's. There was some mix-up as to whether the father was home but he left her there and she has been there ever since. Her mother agreed she could stay because she would not listen to her. The mother has compensated the father with respect to child support and the child tax credit during this period.

[7] The mother now complains that although she agreed P. could stay with her father, there were certain conditions. She was not to associate with certain

individuals but, her father has let her visit, contrary to the mother's direction. She believes that her school grades have gone down, receiving a C, which is something which has never happened before. That the child is allowed to be on wireless internet until all hours of the night and there are pictures of her on facebook that she believes should not be there. This is why the mother refuses to get wireless internet. She also believes that the father has degraded her in front of the child. Calls to her answering machine left by the father (in evidence) indicate an aggressive, belligerent tone.

[8] The father did not testify but his common law wife did. She describes him as a great dad, always willing to listen to the children. She noted that they have disciplinary measures in the home. Wireless internet of 1 ½ hours is earned. She has an eight year old daughter.

[9] This relationship and the father's environment was described by Dr. Donaldson as page seven of his report: (see also Professional Report conclusions infra.) The father elected not to testify and this evidence is relevant and important to the children's best interest.

[10] C.N.K. has been in a relationship with A.S, since April 2009. A. has a seven year old daughter, J. S. J.'s father, C.J., has no contact with either J. or A.S. A.S. does not work outside the home and A.E.A. stated that "the kids like her." Both children expressed their fondness for her.

[11] **A.E.A. expressed concern that C.N.K. and A.S. temporarily "broke up" on May 14 and the incident was published on "Face Book." Included were pictures of holes being punched in the walls and of tipping the fridge over in a fit of rage. A.E.A. was concerned that P. worries if A.S. leaves him, he would commit suicide." A.E.A. explained that ... "he asks the kids for money" and this issue was compounded by his drug habit. "P. is aware of her father's drug habit." "They worry about their dad."**

[12] **C.N.K. has been a \* fisher man for the past sixteen years. He fishes from the Yarmouth Bar. He stated that he moved to \* because it was half way between**

**his work and the children's home in \* (approximately a thirty minute drive both ways). "I put myself half way between my kids and my job."**

[13] **C.N.K. does have a relationship with his family. A.E.A. stated that "C.N.K. found out he was adopted at thirteen" and he began a life of violence which led him from foster homes to group homes. "He's angry ... he dreams things up ... I always tell him he should go to counseling." C.N.K. stated that "the kids have met my parents, once two years ago ... briefly." P. described the visit in detail and related that she continues to maintain contact with a cousin she met during that brief visit.**

[14] **Finally, C.N.K. stated that when the children are with him, "we do a lot of activities." He acknowledged that as yet the children do not know anyone in his neighbor hood. However, there were a number of**

**children nearby with whom he believed they could make friends. C.N.K. articulated his desire to spend more time with his children and they with him.**

[15] **The mother has been in a relationship with J.M. since 2006. He has two children who live in \* with their mother but spends much time as possible with him. The children's (P. and C.) opinion of J.M. is that he is "awesome".**

[16] As referred to earlier, A.S. is the common law partner of the father and she describes him as a "great dad", very protective, always willing to listen to the children.

[17] Discipline is imposed in the form of sanctions. These persons have had arguments but this does not happen in front of the children.

[18] A number of pictures showing damage to a previous home they lived in were shown to the witness. She was ambivalent as to whether this destruction was caused by the father when he was angry.

[19] The child P. has lived with them since the fall and she has her own computer but earns time of 1 ½ hours by good behaviour. She is aware of P.'s use of vulgar language on her facebook page. Also aware that her marks are lower at the school she now attends than the previous school when she was with her mother but they are coming up. It is agreed P. is an intelligent child and usually does well academically.

[20] The mother has always been the primary caregiver of the children and she believes her home is much more conservative respecting rules for the children to follow. She advised the father that there were certain persons in her school P. should not associate with. This was not adhered to by the father. P. was allowed by her father to visit at the home of a child who's father is a known drug dealer.

[21] Spending too much time on the internet has contributed to lower school marks. P. needs discipline that she does not get at her father's.



[22] The mother still has access to P.'s facebook account and she can see sometimes activity past midnight.

[23] It is her belief that P. is playing one parent off against the other (confirmed by Dr. Donaldson). She is also concerned about the father's temper having thrown things and tipped the fridge over. He is banned from Dr. Cottreau's office because of anger management problems.

[24] The father has brought the children to court (says it was for exchange purposes). In the waiting room in front of the children he has called the mother a bitch. Such aggressive language has also been recorded on her answering machine.

[25] Returning the child before the end of the school year with the necessity of her returning to the school she was attending last semester would not have an effect on her academically. This is the mother's proposal in requesting primary care with access to the father of three weekends a month and split holidays. She does not "care" about receiving child support which she believes may be the real reason for all the litigation.

**Professional Report (conclusions):**

[26] Dr. Michael S. Donaldson prepared a custody and access assessment which is dated June 18, 2010. This was ordered by consent of the parties and agreed that each would be able to cross-examine the assessor. He was also asked to stay and listen to the evidence in order to answer any further questions in the form of an update of his opinion.

[27] In the original report which was commissioned to determine the wishes of the children he made the following recommendations.

**“RECOMMENDATIONS**

- 1. That both P. and C. be placed in the joint custody of their parents,**
- 2. That primary care remain with their mother;**
- 3. That access with their father be specified as alternating between weekend and weekdays every second week. A suggested plan would be:**
  - Week one: Friday after school to Monday morning**
  - Week two: Tuesday after school to Thursday morning**

**4. That holidays continue to be shared under a schedule that had been adhered to previously.”**

[28] Preference is made to the parent’s abilities to deal with the children.

**“Finally, the children’s primary attachment is to their mother. They viewed her as being more “strict” than their father and not particularly willing to accommodate more time with their father. P. in particular, understood her mother’s perspective and concerns as they related to her father and was generally supportive of those reasons. By all measures, A. maintains an appropriately high standard for her children. She is understandably frustrated when she believes that C. Is undermining her efforts to parent.”**

[29] The father, who has no relationship with his parents expressed his desire to be with his children.

**“Finally, C. stated that when the children are with him, “we do a lot of activities.” he acknowledged that as yet the children do not know anyone in his neighborhood. However, there were a number of children nearby with whom he believed they could make friends. C. articulated his desire to spend ore time with his children and they with him.”**

### **The Children’s perspective:**

**P. 13 years of age:**

**“Finally, P. presented as an articulate and engaging teenager. She is age appropriate in maturity and clearly understands the family dynamic. P.**

**presented both her perspective and relationship desires and reasons why. Her primary concerns are to see the parental conflict cease and have regular and “equal time” with her father.”**

**C. 10 years of age:**

**“Finally, C. presented as a fun loving, active boy as described by his mother. He has a strong devotion to his father and has a desire to spend more time with him.”**

**Child support issue:**

[30] Throughout these proceedings it has become apparent that the issue of child support and the father’s unhappiness with paying it has come to the surface.

**“A. was concerned that C. has involved C. in adult matters and in particular the issue of child support. C. has often told the children that he is unable to see them because he has no money because he has to pay child support. C. has asked her ‘Mom, why do you have to get child support?’”**

**The mother has described this issue:**

**“..... explained that “I [had] never asked for child support ... [and] when I asked, that started the whole thing ... he flipped.’ A. expressed concern that ‘he tells the kids I’m greedy ... that I’m a bitch’ because he has to pay child support.”**

[31] Dr. Donaldson's report was prepared and completed on June 18, 2010. Consequently he was asked to remain at the hearing some nine months later. This was agreed to between the parties which was for the purpose of listening to the updated evidence and answering the parties' questions.

[32] The child P. is now residing with her father, having moved there in the early fall, for the reasons referred to earlier in the facts.

[33] Dr. Donaldson's update considered the issue of parenting style. Children are prone to change and can easily manipulate parents. Both parents have a significant role to play in the lives of the children. At the present time he believes the children (particularly P.) are "running the show". They need a very tight rein and he believes the mother can do a better job with respect to discipline (see facts) and schooling.

**THE LAW:**

[34] The **Maintenance and Custody Act** provides in section 18 that the Court may on application by a parent make an Order that the child be in or under the care and custody of a parent or an Order respecting access and visiting privileges.

[35] Section 18(5) provides for consideration of the child's best interest:

“In any proceeding under the **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”.

[36] In **Foley v. Foley** 124 N.S.F. (2d) 198 Justice Goodfellow set out guidelines as to the main consideration of the Court. The relevant facts in the case before the Court are:

1. .... The **Maintenance Custody** section 18;
2. Physical environment;
3. Discipline;
4. Role model;
5. Assistance of experts, such as social workers, psychologist, psychiatrists, etcetera;

6. Time availability of a parent for a child;
7. The physical and character development of the child by such things as participation in sports;
8. The emotional support to assist in a child developing self esteem and confidence;
9. The financial contribution to the welfare of a child;
10. The support of an extended family, uncles, aunts, grandparents, etcetera;
11. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement of access to parents and each parent's obligation to promote and encourage access to the other parent;
12. The interim and long range plan for the welfare of the children;
13. The financial consequences of custody;
14. Any other relevant factors.

**Application to Vary (requires change in circumstances)**

[37] **37(1)** The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order

respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.

**CONCLUSIONS/DECISION:**

[38] The parties separated for the final time in 2002. They were very cooperative with each other concerning the children and access. A joint custody order was consented to in 2004 with the mother being the primary caregiver. A consent variation was made in 2005 and it provided for joint custody with equal access.

[39] According to the father things changed in 2008 resulting in another consent order for joint custody with the mother being the primary caregiver. Access was specified for weekends to the father. They agreed to share Christmas and March break.

[40] The communication became strained in January of 2008 when P. told her mother that the father had said she “was a bad mom”. Since then there has been a lot of acrimony between the parties, something that is contrary to the children’s best interest.



[41] Dr. Donaldson in his oral update indicates the “children are manipulating their parents” and what needs to happen is both parents have a significant role in parenting. His observations are that the children “are running the show”. They need a very tight rein and the mother “can do a better job”. Schooling and discipline are on top of his list. He recommends the children live with the mother during the week and with the father on weekends which he defines as Thursday after school until Monday.

[42] Dr. Donaldson has also confirmed what the Court has determined is, that both parents love their children. The Court attempted at a number of pre-trial sessions to persuade the partes that this love should be expressed by a parenting agreement between them. One or both were not willing or capable of doing this.

[43] The children are frustrated with their parent’s inability to compromise and agree to the terms of their care. Both want, as much as circumstances can allow, to spend equal time with their parents.

[44] The parent’s lack of agreement has put them in a position where the Court will make the decision. This decision is made taking into account the best interests

of the children. The disagreement scenario is a change in circumstances as contemplated by **37(1)** of the **Act**.

[45] It is apparent that P. is happy at her father's, possibly because she gets to do what she wants. Some of these things are contrary to her best interests. Further, it is understood she has regularly been an A student but her marks have dropped to a C since she has been with her father.

[46] The Court has discussed the character and relationships of the parents. The children have always been in the primary care of their mother and considering the characters and home environment of the parents, the mother is most capable of providing the two issues Dr. Donaldson referred to, schooling and discipline.

[47] Custody of both children shall be to the mother with access to the father three consecutive weekends a month, Thursday after school to Sunday at 4:00 p.m. Holidays are to be split 50/50 and the father is to have the children the first two weeks in July and the first two weeks in August.

[48] This access has been determined by taking into account that the custodial parent needs a weekend with the children and they need to be returned Sunday to get ready for School on Monday.

[49] In lieu of granting joint custody which is not realistic because of the disagreements between the parties provision shall be made for disclosure by both concerning the welfare of the children.

[50] The Court gave much consideration to returning P. to her mother immediately which would require a change in schooling.

[51] In **Mercer v. Clark** (1989) 90 N.S.R. (2d) at p. 4, Daley J.F.C. discussed when a Court would remove a child from his/her present environment:

“One of the considerations, a major consideration I might add, is the question of moving the child from its present environment, which included removal from the current care giver. Briefly, if one accepts that a child becomes attached to an environment with which the child feels comfortable and happy and with a caregiver who meets the needs of the child in a nurturing, caring way, then it necessarily follows that to remove the child from such a situation would be upsetting, at least initially and perhaps lastingly, for the child. Generally, the courts have taken the view that when everything is at least equal, the court will not risk a change in custody and leave the child where it is. Sometimes the evidence is so overwhelming that in spite of the current upset which may be caused the court may conclude that it is in the long-term interests of the child to change custody.”

[52] P. would be returning to a school she had already attended. She is an intelligent, “articulate and engaging teenager” and is capable of this change. Things are not equal at the parent’s home. At the father’s P.’s marks have dropped and she has been allowed to associate with questionable people and spend long and late hours on the internet.

[53] There is an underlying issue in this matter that the mother has referred to and that is the father’s duty and requirement to pay child support. This, she believes, has been the reason for a lot of the litigation. She says she does not care about child support.

[54] The Court’s duty is to the best interests of the children and it is rare that a payee would agree to no child support being paid. Taking into consideration the home environment and the minimal financial information before the court the mother’s request will be allowed and child support shall be terminated. The father will spend monies on the children that are required during access visits.

[55] Counsel for the mother shall prepare the Court Order which shall read as follows upon referring to a change in circumstances:

1. Custody of the children P. and C. shall be granted to the mother A.E.A, with access to the father C.N.K. three consecutive weekends a month, Thursday after school to Sunday at 4:00 p.m. (This will start the first weekend following the receipt of this decision);
2. The parents (parties) shall keep each other informed about anything that affects the welfare of the children, including but not limiting, health and education;

~~Immediately upon receipt of this decision, the children shall be returned to the father's care.~~  
The children shall be returned to the mother's care upon receipt of this decision, unless the mother in her discretion directs otherwise.

4. Child support shall be terminated as of May 15, 2011.

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JOHN D. COMEAU  
JUDGE OF THE FAMILY COURT OF NOVA SCOTIA