

IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA

Citation: C.C. v. J.C. 2011 NSFC 15

Date: 20110531
Docket: FNGCFSA - 35242
Registry: Pictou

BETWEEN:

C. C. and A. C.

Applicants

- and -

J. C. and C. F.

Respondents

DECISION

Editorial Notice

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

Judge: The Honourable Associate Chief Judge James C. Wilson

Heard: April 20th, 2011, Pictou, Nova Scotia

Final Submissions: May 18, 2011

Decision Date: May 31, 2011

Counsel: Eugene Tan for D. F. and C. F.
Roseanne Skoke for J. C.

Unrepresented C. C. and A. C.

[1] The parties to this proceeding had been involved in a lengthy child protection matter. The protection application was initiated because of a substantiated allegation of assault by J. C. against her son A.. Following very extensive services and a second protection application, the matter terminated in August of 2010. At that time J. C. and A. C. F. agreed that their son A., D.O.B. November *, 2003, should be placed in the care of the maternal grandparents, C. and A. C., with specific terms of access to the other parties as set out in the order. The parties agreed that the order was interim and was subject to review by the court in January of 2011 to determine how matters were proceeding. Unfortunately, the order setting out the terms of the August agreement was not prepared by counsel until after the parties returned for review in January 2011.

[2] Within a few months of the child protection proceeding completing, J. C. and her mother started discussing the transition of A. to the home of J. C. and her partner. A. was expressing to them the wish to be home with the rest of his family and the maternal grandmother, C. C., felt J. had made sufficient progress to take on the parenting role. At the same time C. C. was experiencing some health problems which would not allow her to remain in a primary care role.

[3] When the child protection proceeding was terminated and A. was placed in the care of his maternal grandparents, the understanding between the parties was that the child protection agency would receive notice of any change in his custody. C. C. testified she notified the Agency's counsel that she and J. had decided to transfer the care of A. to J.. The F.s were not made aware of this change until the matter came before the court for a scheduled review in January. The Agency acknowledges being aware of the change by the time the matter returned to court in January, but there is no evidence of when they were advised.

[4] When the matter came before the court for review in January, the parties were not in agreement and the matter was set for hearing. Another interim order was granted which had A. in the joint custody of his parents with J. C. having primary care and control. The matter was set for hearing.

[5] A. C. has presented challenging behaviors to his caregivers. This has been a major issue which service providers have attempted to address

throughout all of these proceedings. The evidence is that around Christmas and through the January-February period A.'s behavior was escalating and presenting a greater challenge at home and school. In February A. returned from a visit with his father and according to the evidence was quite out of sorts. He made a disclosure that suggested he had witnessed his father being physically abusive towards his then partner. As a result of this J. C. filed an application to suspend of Mr. F.'s access. She also arranged for A. to be seen for assessment and counseling at Mental Health.

[6] Subsequent to the March appearance seeking a variation of access, the paternal grandmother D. F. filed an application to be granted status so that she could apply for custody of A.. Mrs. F. has been a participant in these proceedings including attendances at the child protection appearances and has been instrumental in facilitating access. She is well aware of the circumstances, and the evidence before the court is that she and A. have a good relationship. Her involvement is supported by J. C.. In the circumstances she was granted leave to have standing to bring a custody application.

ISSUES

1. What is the best care plan for A.

LAW

[7] In this case the applicable statutory law is found in section 18(5) of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 as amended:

(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.

The burden of proof in this case as in all civil cases is a balance of probabilities.

[8] On the particular facts of this case, a change of primary care would necessitate a relocation of the child. The court must be aware of the law on mobility as stated in *Gordon v. Goertz* [1996] 2 S.C.R. 27. The law is summarized at paragraphs 49 and 50 as follows:

49 The law can be summarized as follows:

- 1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
- 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
- 3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

- 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
- 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
- 6. The focus is on the best interests of the child, not the interests and rights of the parents.
- 7. More particularly the judge should consider, inter alia:
 - (a) the existing custody arrangement and relationship between the child and the custodial parent;
 - (b) the existing access arrangement and the relationship between the child and the access parent;
 - (c) the desirability of maximizing contact between the child and both parents;
 - (d) the views of the child;
 - (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
 - (f) disruption to the child of a change in custody;
 - (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

50 In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

DISCUSSION

[9] A. C. is a grade 2 student at a local elementary school. He has been attending there since he started school and is well known to the staff. The vice-

principal of the school testified. A.'s behavior brought him to the vice-principal's attention since he entered the school. She continues to have frequent contact with him. She described the services that had been put in place including the services of an educational assistant and the school psychologist. When A. first attended the school their greatest concern was the physical aggression he was displaying towards other students. More recently his behaviors are classified as defiant and refusing to work. Academically he functions one to two grade levels below his placement. The school has arranged for a psycho-educational assessment to be conducted later this year to determine if he requires an individual educational plan. At this point it is not clear whether his academic problems are related to cognitive disability or are more behaviorally based. Vice-principal * testified that because of his behaviors, A. struggles socially and loses friends easily. He can become angry and frustrated and is defiant to any authority. Managing his behavior requires his teachers to keep a journal. Ms. * concluded by stating that A. is at greatest risk for aggressive behavior during unstructured time, but that they have noted some improvement both on the playground and on the bus. She confirmed his attendance is satisfactory and his mother keeps in close contact with the school.

[10] The maternal grandmother is employed as a * at A.'s school and this offers further help in his management.

[11] The court also heard from Patrick Callaghan, a clinical social worker with the local Health Authority. A. was referred to him last August and he started seeing him in December 2010. He has also met with the parties involved. Mr. Callaghan is still in the early stages of building a rapport with A.. He described A. as reluctant to see him but he believes A. is warming to the process, and although their relationship remains tentative, Mr. Callaghan remains hopeful progress can be made. He sees the need for very long term therapeutic support.

[12] Interestingly, Mr. Callaghan testified that he saw no behavioral problems while A. has been with him. D. F. reports the same.

[13] In February when A. reported observing his father being abusive towards his partner, J. C. was concerned about access visits. Mr. Callaghan recommended a suspension of weekend access until circumstances could be further investigated to ensure the access was safe. As a result, access has been restricted to telephone calls over the past couple of months.

[14] In support of her application to continue with primary care, J. C. testified that the transition of A. from her mother to herself went well. J. C. has had difficulty with relationships in the past including those with her partner and mother. She continues to take medication, as recommended during the child protection proceeding, and has completed a number of parenting classes. She believes she has benefited from counseling and has dealt with some historic issues she felt interfered with her close personal relationships. She admits the family made a number of residential moves over the last few years, but is now stable. She testified she has grown up, has benefited from the supports provided and is certainly now in a better position to parent A.. She is supportive of the important role D. F. has had in A.'s life and would not want to interfere with A.'s

relationship with his father so long as it is a positive experience for A. and does not put A.'s safety in jeopardy.

[15] D. F. owns her own home in * and resides there with her 11 year old granddaughter. She is employed full time in a * position with the Provincial Government. A. has visited her frequently and is familiar with her home where he would have his own room. She would propose that A. become a member of the nearby * which provides both preschool and afterschool care to coincide with her working hours. She has met with A.'s counselor and would like to continue to be part of that therapy process. She confirmed that her son C., A.'s father, no longer lives in her home. C. had been in a relationship where his partner was abusive. She confirmed that C. takes medication for ADHD. C. also confirmed that he has taken courses for anger management. He has a number of criminal convictions.

[16] There is every reason to be concerned about young A.. Not only did his parent's own relationship not work out, but they have individually struggled to

provide appropriate support to him since separation. The grandparents have been and remain supportive of A. over the long term. C. F. is not presenting a plan for primary care. C. C. is not in a position to continue in a primary care role. The two options presented to the court are to continue in the primary care of J. or alternatively to switch the primary care to D..

[17] I find on the evidence that J. C. and her family appear to have somewhat stabilized their circumstances since they first came before the court. Progress in the child protection proceeding was slow at times and complicated by the parties personal issues and financial struggles. If those circumstances were to continue, J. C. could not be A.'s primary caregiver. Currently however, she appears to have a good relationship with A.'s school and it appears that every reasonable effort that can be made through the school to support A. is being made. While the services offered locally are not unique to that location, it appears that the school does offer what would be hoped for in these circumstances. It is the school where A. is known and where he has shown some improvement.

[18] A. is also in the early stages of what appears to be long term therapeutic counseling. The evidence is that he has been tentative in this process but his therapist is hopeful that gains will be made. Similar services would undoubtedly be available for him in *.

[19] When testifying Mr. Callaghan emphasized the need for children like A. to have stability and predictability in their lives. Stability includes not just stability of residence or school, but also having primary caregivers who have been stable. For much of A.'s life the important people in his life have been in conflict with each other. How A. processes information about conflict is a complex issue for therapy. Suffice to say the starting point must be to keep A. isolated from any further conflict.

[20] A change of primary care may be the only option left for A. unless he is given an opportunity to stabilize and improve his behavior with the supports that are currently in place. Moving A. away from the community he knows to a

school where he is not known and would have to develop a fairly sophisticated support network to function, has the potential to be an extremely traumatic experience. In my opinion such a move should only be made when all other options have been exhausted.

[21] Based on what I perceive to be some improvement in J. C.'s circumstances, the wide range of services and supports that are currently in place and the willingness of the involved parties to engage in therapy with A., I do not feel it would be in A.'s best interests to change primary care at this time. So long as J. C. can maintain a stable and nurturing home for A., and A.'s behaviors do not deteriorate, J. C. will have sole custody. However, given the circumstances and the fragility of positive change, the order must be subject to review.

[22] It is the court's opinion that D.F. is a critically important resource to A.. Indeed, should A. continue to present challenging behaviors beyond the capacity of J. C. and the current support system, D. F. has a potentially viable plan. For whatever reasons, she has not experienced the same level of behavior as has

been exhibited in the C. home or at school. Having said that, the court is aware that her access visits are much different than day to day living. A change in residence and primary care can be a challenge for any child and particularly so for a child with A.'s issues. Establishing new school supports and counseling relationships takes time and energy for both child and his caregiver.

[23] Because I believe D. C. has been and will continue to have an important role, she will have full access to all information and professionals dealing with A. as if she were a joint custodial parent. This would include not only access to information but also the authority to authorize emergency care and to participate fully in any counseling recommended by the involved professionals. J. C. will keep D. F. advised of all appointments and meetings involving A..

[24] D. F. will be entitled to reasonable access consistent with the recommendations of A.'s therapist. Such reasonable access shall include regularly scheduled weekend and extended access during school vacations as well

as reasonable telephone access unless such access is contra indicated by the therapist.

[25] C. F.'s access will continue to be monitored by D. F. and shall not include unsupervised overnight access.

[26] This order will be subject to review upon the application of any party.