

IN THE FAMILY COURT OF NOVA SCOTIA

Citation: K.A.M. v. C.M., 2007 NSFC 30

Date: 20070802

Docket: FLBMCA-053616

Registry: Bridgewater

Between:

K.A.M.

Applicant

v.

C.M.

Respondent

Editorial Notice

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

Judge: The Honourable Judge William J. Dyer

Heard: August 2, 2007, in Lunenburg, Nova Scotia

**Written Release of
Oral Decision:** August 10, 2007

Counsel: Alex Embree, for the applicant
Barry F. Whynot, for the respondent

By the Court:

[1] B. R.A.M. ("B."), born October *, 2002, is the son of K.A.M. and C.M. K.A.M. seeks interim and (at least in his original application) permanent care and control of B., under a joint custody arrangement, subject to supervised access by C.M.. C.M. has defended the proceedings but not filed a formal cross-application. This is an originating application. There are no prior orders or written agreements.

[2] On my direction, the matter was set down for an interim hearing on the understanding the court would utilize affidavits filed on behalf of the respective parties; and that there would be no testimony.

The Case for C.M.

[3] I will map out her case first because her affidavit material is somewhat more elaborate than Mr. K.A.M.'s.

[4] Thirty seven year old C.M. lives at *, Lunenburg County. She writes that she and K.A.M. lived together from 1999 until 2005, with episodic reconciliation attempts throughout the years.

[5] When B. was born the couple was renting accommodations at *. She was a so-called stay-at-home mother. K.A.M. was working locally, full-time. He helped with B.'s

care on evenings and weekends. During the first year, C.M. says K.A.M.'s mother, P.M., babysat if the couple went out socially.

[6] C.M. says she returned to part-time employment as a personal care worker at a local home for special care. The paternal grandmother provided child care when the parents were both at work. C.M.'s work included irregular shifts. A friend, M.W., also assisted with child care, as need be. There is no affidavit from Ms. W..

[7] B. started daycare in 2006 - for three days each week. By then, C.M. was enrolled in a program at the * campus of the Nova Scotia Community College. Her two-year course started in January of that year. She still attends.

[8] According to C.M., when the parties separated in 2005, she relocated to a rented house at * along with B. and her son, J.M. ("J."), born May *, 1996, by another relationship. J.'s father has access and pays child support.

[9] K.A.M. then moved in with his parents, also at *.

[10] C.M. says they verbally agreed to a "shared custody arrangement". In her words, "B. spent every other weekend with me and the Applicant on a rotational basis; through the week, if I was working, then B. would stay with the Applicant's mother, P. and when I wasn't working B. stayed with me."

[11] C.M. elaborates on her educational and employment history at paragraphs 18 to 24 of her affidavit. She is working this summer, but returns to schooling full-time in September. She will work occasional weekend shifts during the school term.

[12] Under the heading "My Drug Addiction", C.M. writes, and this is directly from the affidavit material:

25. That I went to the detox unit in * for one day in March, 2007 to deal with an addiction to alcohol and drugs.
26. That I went back to the detox unit at the * in * between April 2nd, and 5th, 2007.
27. That after leaving the detox unit at the * on April 5th, 2007 I then went to the Adult Education Program offered through the out patients department at the * from May 28th to May 31st, 2007.
28. That I have been seeing an addictions counselor, N.R., at the * approximately once per week since that time although since my last session with Ms. R. in July, 2007 we have agreed to reduce our meetings to once every two weeks.
29. That I have not used any drugs since March, 2007 and I have only had a couple of drinks of alcohol since March, 2007.
30. That I did not miss any time from school or work because of my usage of drugs or alcohol; my usage of alcohol and drugs was recreational and was never around my children; in fact my children knew nothing about my usage of drugs and/or alcohol.
31. That I attend narcotics anonymous meetings and I plan to attend once every two weeks.
32. That I have no criminal record.

[13] According to C.M., when K.A.M. and his mother learned of the addiction problems, and that she was seeking therapy or treatment, they assumed B.'s care and would only allow contact for a couple of hours each day. Overnight visits, when they did occur, were under the supervision of C.M.'s mother who undertook return travel from *, in Kings County for this purpose.

[14] C.M. now rents the upper flat of a house at *. Her father occupies the lower flat.

[15] From Spring until June, C.M. was able to have some weekday access when she was not at school or at work. Her father facilitated the arrangements. C.M. says she hoped consensual supervised contact with her son would only be temporary pending resolution of the admitted addiction concerns.

[16] C.M. alleges increasing communication problems with K.A.M. such that his mother directed most of the arrangements and assumed a large measure of control.

[17] C.M.'s father picked up B. at the M. residence on June 27th but C.M. admittedly resisted his timely return. Her stated rationale is found at paragraph 40 of her affidavit.

[18] Since July 5th, according to C.M., the parties have returned to their well-established shared parenting regime.

[19] C.M. writes at length about B.'s diagnosed autism (paragraphs 42-52). I find it unnecessary to dwell on this aspect of the case for interim purposes. I note, however, that B. is scheduled to start the pre-primary program at a local elementary school in September and he will attend daily. At paragraph 54 of her affidavit, C.M. questions K.A.M.'s understanding of B.'s autism. She credits professional resources and services, as well as the support of both families, for noticeable progress; and she singles out K.A.M.'s mother for particular credit (paragraphs 59 and 61). B.'s routine while under C.M.'s care will be found at paragraph 60.

[20] C.M.'s mother, S.S., who was involved with parenting supervision, did not submit an affidavit. However, her 56 year old father, R.M., did. Mr. M. writes about the background to the prevailing residential situation. Focusing on the time since September, 2006, he expresses no concerns about his daughter's ability to parent both of her children. However, in late March, 2007 (at least according to him it was March, 2007), he learned of her addiction problems and her efforts to address them. He confirmed K.A.M.'s assumption of B.'s primary care while he looked after J..

[21] Mr. M. supported K.A.M.'s parenting role, but asserts he did not commit to any agreement on time-frames. He did play an active role in ensuring his daughter had ongoing supervised contact; and he also helped facilitate overnight access under the supervision of Ms. S..

[22] Mr. M. writes that he has never personally observed his daughter under the influence of drugs or alcohol, and particularly notes that he has not observed her under the influence while caring for either of her children.

[23] Mr. M. claims to have a good working relationship with K.A.M.'s mother, although he says little about Mr. K.A.M.. He expresses some concern about the degree of control being exerted by K.A.M. and by his mother. He confirms, in general terms, the events which occurred between June 27th and July 5th. Since then, he writes that the former shared parenting regime has been reinstated.

[24] Mr. M. will assist his daughter in whatever ways he can. He has an unspecified partial disability which results in him being on the home-front 24/7. He professes respect for the roles of both parents and their extended families.

The Case for K.A.M.

[25] The maternal grandmother is about 65 years old. She has been married to A.M. since 1965. They have lived at * for about 23 years. They have three children. Their son K. lives with them at this time.

[26] She wrote that a friend of C.M.'s informed her of C.M.'s drug use. The friend has not submitted an affidavit. She informed her son, who in turn relayed to her the new, pending arrangements for B.'s care.

[27] Ms. M. purports to be the “principal person” to take care of B. insofar as his autism is concerned. She appears to take credit for much of B.’s progress since February. She supports her son’s efforts to achieve primary care of the child on the understanding that residency would be under her roof. (A.M.did not submit an affidavit.)

[28] K.A.M.’s affidavit covers much of the same background territory discussed previously. It need not be repeated. He works locally from about 8 a.m. until 5 p.m., weekdays, although according to C.M., he occasionally works considerably later. He says the parties separated in the Spring of 2004 when he moved in with his parents. He said he visited B. often and that he paid child support. He mentions reconciliation efforts in 2005 and the increased role his mother played when he and C.M. were at their respective workplaces.

[29] K.A.M.’s first knowledge of C.M.’s drug problems came via other individuals. [See paragraph 12 of his affidavit.]. He assumed *de facto* care of B. while C.M. engaged in therapy. As noted elsewhere, there is some dispute on what was agreed, or not agreed, upon with R.M. at this time, ostensibly on behalf of C.M..

[30] K.A.M. canvasses B.’s progress since February, 2007 with much of the attention focused on the child’s autism. Allowing there have been a host of professionals involved with the family, K.A.M. clearly takes credit for much of the progress. He, like C.M., also credits his mother for her efforts.

[31] B.'s routine at the M. household is summarized at paragraph 16; and supervision of C.M.'s care is captured briefly at paragraph 17. His nutshell summary of the June 27 to July 5 time frame and the events will be found at paragraphs 18 and 19. His request for primary care subject to supervised access by C.M. is qualified by the words "until she has entered and successfully completed a program to help her address her addictions problems".

Discussion/Decision

[32] This is an interim hearing to address what are often referred to as "parenting issues" under the **Maintenance and Custody Act** - the words employed are custody, access, and visiting privileges. Under the **Act**, the child's welfare is the paramount consideration at the interim as well as the final hearing stages. Under section 4 of the **Act**, the father and the mother of a child are joint guardians and are equally entitled to the child's care and custody unless otherwise ordered.

[33] There are a number of practicalities in this case, including but not limited to the absence of testimony which has been tested by cross-examination. Not surprisingly, the written evidence at this early stage is incomplete and, with all due respect, in large measure, self-serving. Contradictions, again not surprisingly, are found within the affidavit material; and there are assertions and counter-assertions from both camps which have yet to be proven objectively to the usual standard of proof in civil cases.

[34] Broadly speaking, an interim hearing should provide a short term arrangement to deal with the immediate parenting issues on the clear understanding that whatever is imposed may not be the same as will be awarded following a final full hearing when both parties have had an opportunity to fully develop and present their respective cases. The parents must understand that any resulting order today is only temporary and ought not to be taken as suggesting what the final outcome may be. There is strong case law to this effect. [For example, see **Stefanyk v. Clancy**, (1996) 156 N.S.R. (2d) 161 (S.C.).]

[35] The focus of my decision must be the child's needs, not the needs of the parents, not the preferences of the parents, and not the wishes of other interested individuals.

[36] From the evidence so far I will highlight some, but not all, of the factors which I have weighed. I should add that the list is not presented in any particular order; and there is no particular emphasis among the factors:

- There was a viable form of parenting in place before February/March, 2007 when it was disclosed that C.M. was experiencing addiction problems which she characterized as recreational use.
- There is no evidence of harm, direct or indirect, to B. or his step-sibling. There has been no child protection agency investigation or intervention.

- C.M. acted responsibly by committing to therapy and/or assessment and/or treatment and by agreeing to a change in the prevailing parenting arrangements. There is some evidence of her proactive steps to address her admitted problems. There is no evidence of current drug or alcohol abuse or misuse.
- The maternal grandfather is in a position to monitor much of the child's care and his daughter's lifestyle. There are frequent opportunities for others, including a constellation of professionals, and including K.A.M.'s family, to observe inappropriate or unusual conduct or activities by Ms C.M..
- The paternal grandmother has been a consistent and supportive personality throughout and generally enjoys the respect of both families.
- The break from the former shared parenting regime has been relatively brief. There is evidence that the regime is again in place; and there is no evidence that it is floundering or otherwise not beneficial to B..
- There is no evidence, direct or indirect, of B.'s preferences or wishes.
- There is no evidence that shared parenting would be disruptive or negatively impact on B.'s schedules or routines.

[37] In assessing the mother's unilateral conduct in late June or early July, I am mindful that there was not a court order or written agreement in place governing the parenting arrangements and that in the real world there was nothing to preclude either parent from acting arbitrarily. Whether or not, with hindsight, such conduct would be perceived as morally correct is not the issue.

[38] However, I do want to make it clear that I do not endorse or condone the mother's conduct in late June and early July. It does appear that to some extent she may have acted out of frustration and at a time when she believed the progress she had made was not being reflected in the parenting arrangements.

[39] I am mindful that the Court of Appeal has generally endorsed the principle of joint guardianship at the interim stage and that the maximization of contact with both parents is seen as generally beneficial. See **Shaikh v. Quershi**, 2004 NSCA 14. In **Marshall v. Marshall** (1998), 168 N.S.R. (2d) 48, the Nova Scotia Court of Appeal also endorsed the proposition that "if there is no reason to change the existing situation that situation should continue until the trial". Words to the same effect will be found in the British Columbia Court of Appeal Decision in **Prost v. Prost** (1990), 30 R.F.L. (3d) 81.

[40] Mr. Whynot, in his submissions, referred to **Webber v. Webber** (1989), 90 N.S.R. (2d) 55. That decision is frequently cited in support of arguments to maintain the status quo as closely as possible and that the short term needs of the child (that is in

terms of stability, protection and support) should be emphasized. Indeed, one will find a comprehensive analysis (that Mr. Whynot touched on) of the relevant factors at pages 57 to 58 of the Nova Scotia Report. I am also alert to the Supreme Court Decision in **Foley v. Foley**, [1993] N.S.J. 347.

[41] Against the background of section 18(4) of the **Maintenance and Custody Act**, I agree with the submission that the onus is on the one who seeks to limit parental contact, or to have it supervised, to demonstrate by preponderance of evidence that such is necessary in the child's best interests and/or to protect the child from potential harm, or risk of harm. Accordingly it is not without some irony that Ms. C.M. assumed much of the evidentiary burden.

[42] Having regard to the evidence as a whole, and the principles of law as I understand them, on an interim basis, I order that K.A.M. and C.M. shall have joint custody of B..

[43] Mindful of the significant role played by the paternal grandmother in B.'s care (who, of course, is not a party to the proceeding) my references to care by Mr. K.A.M. necessarily are to be read as including *defacto* care provided by P.M. when he is at work or otherwise unavailable. In short, in large measure, when I use the surname M., one could use K. and P.'s names interchangeably.

[44] I also want to clearly express my intention to restore the parenting regime which was in place before March, 2007 - full particulars of which are not in evidence and which will have to be modified in any event to encompass B.'s new school schedule.

[45] Accordingly, shared parenting shall include alternate weekends with each parent. Until school starts during the week, B. shall be under Ms. C.M.'s care when she is not working and under K.A.M.'s care when Ms. C.M. is working.

[46] When B.'s school resumes, and on those occasions when Ms. C.M. herself is working on a part-time basis (as it appears she may), B. shall be under K.A.M.'s care.

[47] During the week, starting in September, when Ms. C.M. resumes her community college program and is not working outside the home, B. shall be under Ms. C.M.'s care, provided that B. may be under K.A.M.'s care, upon completion of his school-day, until supertime, if transportation and transition can be arranged with Ms. P.M.'s cooperation.

[48] Additional parenting time by K.A.M., having regard to his work schedule and B.'s school and bed-time routines is encouraged. To that end, I order that K.A.M. shall have additional, reasonable parenting times upon reasonable notice. So for example, I would encourage but I am not going to formally impose, early evening week-day access whenever possible.

[49] I also order that C.M. shall not be under the influence of alcoholic beverages or non-medically prescribed drugs when B. is under her care.

[50] I order that Ms. C.M. shall provide to K.A.M. or his counsel written proof of her enrollment in and, where applicable, completion of, the various programs regarding her addictions as from reference to paras 25 - 31 of her affidavit will appear.

[51] With respect to B.'s autism, I do not propose on an interim basis to include any special terms or conditions. However, in imposing an interim joint custody order, it is expected that the parties will cooperate and will communicate with each other so as to ensure that B. receives optimum supports and services at home, at school and in the community. As P.M. has been active and supportive, including attendance at professional appointments and the like, she should be included whenever possible.

[52] If the parties can not work out the minutia or the specifics of this parenting regime within the next two weeks, they may seek a date for review when I will receive further submissions.

[53] As far as scheduling of the final hearing is concerned, what I am going to suggest is that counsel speak with one of the Family Court Officers who will be in a position to assign a date, time and place in consultation with them and with the me.

[54] I would invite Mr. Whynot to submit an order consented to as to form as soon as convenient.

Dyer, J.F.C.