IN THE FAMILY COURT OF NOVA SCOTIA
Citation: C.M. v. K.M., 2011 NSFC 24

Date: 2011 10 03
Docket: FLBMCA-053616
Registry: Bridgewater

Between:

C.M.

Applicant

v.

K.M.

Respondent

Judge: The Honourable Judge William J. Dyer

Heard: August 25, 2011, at Bridgewater, Nova Scotia

Revised Decision: The text of the decision has been revised to protect the identity of certain parties. This revised version is released on January 10, 2012.

Counsel: David Hirtle, for the Applicant
Alex Embree, for the Respondent

By the Court:

[1] This is a **Maintenance and Custody Act (MCA)** access variation case between C.M. and K.M. who are the parents of nine year old B. who lives primarily with his father.

Legal History

[2] After a contested interim hearing in August 2007, I approved a shared/joint custody arrangement for B. which specified the parenting arrangements in considerable detail.

[3] In late June, 2008 I varied the 2007 order so as to provide that K.M. would have interim primary care and control of their son, and that C.M. would have reasonable parenting time. By agreement, C.M.'s parenting times were to be supervised by one of several named individuals or another responsible adult approved by K.M.. The mother's interim parenting times were conditional upon her not being under the influence of alcoholic beverages or non-medically prescribed drugs while her son was under her care. A short time later, a final consent order was taken out which reaffirmed the last of the interim orders.

[4] There was no further activity until April, 2010 when C.M. started her present variation application. She requested unsupervised access and overnight access two nights weekly. Settlement discussions between the parties and their counsel followed. The result was that the court was informed in mid July, 2010 that there had been a resolution, that the parties' understandings would be committed to writing, and that the underlying application could safely be adjourned without date.

[5] Unfortunately, the expected consent order was not forthcoming. This prompted C.M. to make a formal application for court approval of what she perceived to be a binding contract. She also sought to advance the matter to a final conclusion.

[6] The upshot was that I was finally presented with and approved a consent variation order in late June, 2011 which was held out as capturing the arrangements agreed upon many months before. The form and substance were consented to by counsel on behalf of their respective clients. In brief, the last order confirmed that the parties would enjoy joint custody, that B. would be under his father's primary

custody, care and control and live primarily at his father's home, and that C.M. would have specified parenting times which included every second weekend from Friday at 3:00 p.m. until Sunday at 6:00 p.m. plus some overnight time.

[7] There was a new provision that C.M. would ensure that B. would not be in the presence of one D.H. while parenting. The prohibition was stated to be on a without prejudice basis and, further, that after December 31st, 2010 C.M. could make application to vary the restriction without having to show a change in circumstances. C.M.'s parenting time continued to be conditional on her not being under the influence of alcoholic beverages or non-medically prescribed drugs during parenting times.

[8] When the matter was adjourned in 2010, there was no disclosure to the court about the circumstances leading to the clause about D.H..

[9] Most recently, C.M. made a formal application for another variation which, if granted, would rescind or delete the term that D.H. not be present during C.M.'s parenting time with her son, and would confirm her right to unsupervised access.

[10] Despite the passage of time, the parties were unable to agree on these narrow issues and the matter proceeded to a contested hearing.

Evidence Summary

[11] The historical background was canvassed in a written decision released in mid-August, 2007 (2007 NSFC 30) and need not be restated. However, it is against that background that I have considered the evidence and submissions recently presented.

C.M.'s Case

C.M. is residing in a nearby community with D.H. and another son, from a different relationship who stays alternate weekends with his father and with C.M..

[12] C.M. said that D.H. has two children from another relationship - a twelve year old daughter, and a ten year old son. D.H.'s children spend every weekend with them. C.M. summarized the most common family activities and involvements which happen on weekends. They rent a large, six bedroom house.

[13] C.M. broadly stated she would like to be able to exercise her parenting time with B. in D.H.'s presence so that B. can be "part of our family and participate in activities with us". She said D.H. is employed at a nearby marina and occasionally has taken her and her children power-boating. Surprisingly, she professed to be unaware if D.H. is licenced to operate or permitted by law to operate such vessels.

[14] She wrote that because she is now cohabiting with D.H., meaningful access with B. without D.H. around is difficult.

[15] She alleged that before relocating to her current residence, there were times when K.M. refused requests for overnight access during the week. Since relocating, she stated K.M. has also refused requested parenting time with B. - even when D.H. would not be present.

[16] She wrote that the only access K.M. has been prepared to allow is a "couple of hours at a time, when I take B. to go swimming, to the movies or some other activity". She described this as difficult to arrange because she does not have her own transportation and must rely on others, including her father.

[17] C.M. said that she once asked for permission to have B. with her when visiting a friend at the friend's residence, in the absence of D.H., but K.M. refused permission. However, she conceded there was one recent family get-together and that K.M. did allow B. to attend with her mother when D.H. was present.

[18] C.M.'s evidence was that all of B.'s toys and belongings are at her new residence, that there is nothing at her father's home where she and B. used to live, and, in any event, there is not much for them to do at her father's home. She mentioned in passing that her father smoked cigarettes.

[19] During her testimony, C.M. admitted to a lengthy history of drug and alcohol dependency. However, she wrote that she has attended addictions counselling and "cleaned up my life" and insisted that she is currently alcohol and drug free and in full compliance with previous prohibitions against use during parenting times.

[20] Until presented with proof in court, C.M. claimed she was unaware that D.H. had pleaded guilty in 2006 to a single count of unlawfully possessing a prohibited

substance (i.e. cannabis-marijuana). The then self-represented D.H. was fined for the offence. C.M. was also unaware that D.H. had entered a guilty plea to three counts of possessing stolen property. In that regard, D.H. was sentenced to one year probation and ordered to make a charitable donation. The items in his possession appeared to have been from a local grocery store.

[21] C.M. vigoursly denied any suggestion that D.H. currently uses marijuana or other illegal drugs. However, she admitted that he has a past history of illicit drug use. She also admitted that she knew D.H.'s lifestyle and character would be a central theme at the hearing. But, when asked if she had discussed D.H.'s legal history with him, she said she had not.

[22] In terms of her current circumstances, C.M. is not actively engaged in counselling. She does not attend Alcoholic Anonymous or Narcotics Anonymous. She is aware that she should not drink and should not use drugs, and that she should use every effort to minimize her associations with those individuals who do use or abuse. She claimed that she last used narcotics over four years ago.

[23] C.M. was residing at her father's residence and paying rent at the time of the last decision. Admittedly, she could have stayed there. C.M. agreed that B. remains close to his maternal grandfather and that the grandfather's home has a pool and other amenities. However, C.M. maintained that the pool is really the only attraction for her son. In any event, she chose to relocate and move in with D.H. about six to eight months ago. C.M., when pressed, admitted that she could go back to living with her father if she wanted but she prefers not to do so.

[24] During questioning, C.M. acknowledged that B. has had contact with D.H. on three occasions despite a clear prohibition against contact in the last order. (One of the occasions was with K.M.'s consent in the presence of C.M.'s mother, as previously mentioned.)

[25] C.M.'s father generally provides transportation for access purposes. She added that D.H. does not have a driver's licence which he apparently lost because of non-payment of fines. Nor does she have a driver's licence at the present time but she stated she will be applying for reinstatement. (She lost her licence as a result of a drinking/driving offence.)

[26] Asked about her employment situation, C.M. said that after 23 years she wanted to move on to a different line of work. Until quite recently when she resigned, she had been working at a senior citizens complex. She asserted that she was not dismissed from her employment and that there were no issues surrounding drug or alcohol use during her employment. She expressed an intention to start a small cleaning/continuing care assistant service which would be home-based.

K.M.'s Case

[27] K.M. continues to live and work in the local area. He is at work from about 8:00 a.m. until 5:00 p.m., weekdays. B. continues to live with K.M. at the paternal grandparents. As noted elsewhere, B. has been living primarily with his father since 2008.

[28] B. entered grade three in September. His father usually drives him to school in the morning and the grandmother picks him up in the afternoon. As recounted in the 2007 decision, B. was diagnosed with autism. However, he reportedly is doing well in school. He is engaged in an after-school program, twice weekly. K.M. said that he has lots of friends. B. takes piano lessons and apparently enjoys board and computer games.

[29] K.M. wrote that the paternal grandmother has been very involved in B.'s care. He also said that C.M.'s father helps drive B. around.

[30] K.M.'s parents did not testify.

[31] B. was described as a helpful, bright and easygoing child. According to K.M., B. likes routine and his father tells him in advance what activities are scheduled.

[32] K.M. acknowledged that in the summer of 2010, the parenting arrangements were changed so that C.M. could have B. unsupervised with a condition that B. was not to be in the presence of D.H., her new boyfriend. As noted at the outset, another condition of all orders has been that C.M. is not to be under the influence of alcohol or drugs while B. is in her care.

[33] K.M. has ongoing concerns about D.H., some of which are connected to C.M.'s admitted past difficulties with drugs. Without going into all the historic detail, several years ago K.M. said that C.M. told him that she had a problem with crack cocaine and

that she had bought the product from D.H.. They were not cohabiting when the disclosure was made.

[34] K.M. said that just before C.M. moved to D.H.'s residence that his son disclosed that he (B.) had been around D.H. at D.H.'s house during a weekend visit. K.M. said that C.M. admitted this occurred.

[35] Allowing that it is hearsay, K.M. is quite concerned about D.H.'s reputation in the community. Whether his concern is well-founded or not, K.M. said that he has repeatedly told or informed C.M. about his concern and worry about B.'s potential contact with D.H.

[36] K.M. stated that he and C.M. rarely speak directly to each other. He admitted that parenting issues continue to dominate their discussions when they do speak and that parenting is a constant source of conflict.

[37] Regarding the last order, K.M. admitted that he thought C.M.'s access had to occur at the maternal grandfather's residence - even though no such stipulation is in the last order. This is difficult to fathom because he has had the advantage of legal counsel for several years. In any case, he stood his ground and insisted to the mother that her access occur at her former residence.

[38] K.M. broadly stated that he agreed to overnight access when requested - before C.M. moved to D.H.'s home. He conceded that a few overnight visits may have been missed but insisted they would have been because of schooling or other commitments.

[39] Since cohabitation with D.H. started, K.M. acknowledged that C.M. has requested access incidental to visits with her friends which he has denied. He cited her refusal to disclose who the friends were and he felt he had no assurance that D.H. would not be present.

[40] K.M. also admitted that C.M. gave him assurances several times that if B. visited her new residence that D.H. would not be there. He admits he denied access - quite simply because he was not convinced that D.H. would not be present and mentioned in passing that "it is his [D.H.'s] house" and that there is nothing that could be done to stop D.H. from being there.

[41] Asked directly to elaborate on some of the rumours he had heard about D.H., he said the nickname "Needles" was once attributed to D.H. by a co-worker. Apparently, the co-worker suspected drug use or had heard rumours and therefore repeated the nickname. Otherwise, K.M. has no direct knowledge of current or past drug use/abuse by D.H.. However, K.M. quickly reiterated that C.M. disclosed to him several years ago that D.H. was a drug user and supplier. Based on that past experience, perhaps not surprisingly, K.M. is very suspicious of D.H.'s character and lifestyle.

[42] Regarding D.H.'s legal history, K.M. has no knowledge of the particulars surrounding the offences or the circumstances surrounding the guilty pleas, etcetera. K.M. candidly admitted that he does not think D.H., whom he has never met, will be a good influence on B. or C.M.. He continues to be concerned about drugs and does not want to take a chance on permitting contact. He admitted that he is not prepared to give D.H. the benefit of the doubt.

[43] Having labeled D.H. a criminal, K.M. was compelled to admit he also has a criminal conviction - for assaulting C.M. to which he entered a guilty plea many years ago. He stated that the criminal record was extinguished, presumably on his application.

Discussion/Decision

[44] By virtue of the last order, C.M. need not show a change in circumstances as a prerequisite to a hearing on the merits. However, the child's best interests are still paramount when it comes to making a decision about parenting arrangements.

[45] The present case bears some similarities to the presenting issues in ***G.S. v. C.H.,*** *2011NSFC 19*. It too was against the background of an existing joint custody agreement. In ***G.S.*** the parents agreed to change primary care from the mother to the father when she was seriously injured in an accident and, later, concerns about the mother's drug use and associations. The latter were serious enough that conditions or restrictions were placed on the mother's contact with her son.

[46] In ***G.S.***, I found the mother had met the variation threshold requirements of **MCA** section 37and decided her variation application on its merits. In doing so, I stated that all the circumstances surrounding the order sought to be varied and the prevailing circumstances must be considered. On the particular facts, I also held that

a prior consensual prohibition against the child's contact with a named individual was not a barrier because there was evidence that the mother agreed to the stipulation to help restore and enhance trust with the father and that it was a prelude to further changes, if things went as hoped and planned.

[47] In ***G.S.***, the father's concerns centred on the criminal record and admitted past drug use and abuse by the mother's current partner, coupled with the mother's own past addictions. Testimony was heard from several witnesses - including the partner, the partner's estranged wife, a former probation officer, one of the grandmothers, and both parents. Against that background, I determined that the mother had shown she is currently not using non-prescription drugs or otherwise substance-dependant, and that the same could be said for her partner.

[48] I wrote:

> Broadly speaking, a parent's conduct and lifestyle (past and present) is relevant if it impacts on her/his ability to meet her/his child's needs and best interests. On the health front, when a parent's problematic mental or physical health demonstrably affects ability to care for a child and poses a risk, custody and access may also be influenced - as was the case here. However, should the concerns be resolved - as was the case here - there is no basis to continue restrictions (for those reasons alone).
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> ***D. (M.K.) v. I. (A.J.)****, 2008 ABQB 199 (Q.B.)* is an example of a situation in which a father's access was ordered to be supervised because of his mental health but varied to remove the condition when it was shown to the court's satisfaction that his health had improved and that supervision was unnecessary to protect and advance the child's best interests.
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> And, one does not have to look too far to find examples of parents who have had a history of substance abuse but who have changed their lifestyle and who have been granted unsupervised contact with very young children. [See ***T. (M.) v. G.(M.)***, *2010 NSSC 89 (S.C.),* for example.]
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> Restricted and/or supervised parenting regimes are supposed to be exceptional not the norm. They may be imposed, by agreement or by court decision, if necessary to protect a child or where there are concerns about capacity or ability to parent. However, long-term or indefinite "restrictive" court orders are anything but routine, in my experience. The onus remains on the parent who wants to impose

> limits to prove, on a balance of probabilities, that what is proposed is in the child's best interests.

[49] I am satisfied that supervision of C.M.'s parenting time is no longer necessary in the child's best interests. Indeed, were it not for D.H.'s relationship with the mother and the previously agreed contact prohibition, the litigation would probably have ended by now. To the extent necessary, I reaffirm and order that the supervision clause shall be terminated. I am confident counsel can reach agreement on the refinements.

[50] The prime focus of the hearing was the prohibition regarding D.H.. In the ***G.S.*** case, I had the advantage of evidence from the parents and a cross-section of other individuals - including the person who was named in the prohibition. This gave me an opportunity to assess the credibility of the key players and to get a clear picture of the circumstances as a whole, past and present.

[51] In the present case, I only heard from the parents. As might be anticipated, it quickly devolved into a "she said; he said" exercise. No other witnesses were called - supportive of one parent or the other, or "independent". This is not without significance because C.M.'s own disclosures about D.H.'s drug use and lifestyle underpin much of K.M.'s lingering concerns (leaving aside rumour and innuendo). Moreover, as already mentioned, there was no disclosure to the court about the rationale for the prohibition in the first place and, therefore, no standard by which to measure the circumstances then as compared to now.

[52] It would have been helpful to have had first-hand testimony from D.H. and/or other witnesses on behalf of the parents who could speak to the prevailing situation and concerns, and to have had the testimony tested in the courtroom. With respect, the tactical decisions to limit the evidence to parents has handicapped my ability to determine on a balance of probabilities whether unconstrained contact with D.H. does or does not pose any risks to the child. Both sides must accept some responsibility in this regard.

[53] Based on the evidence presented, I am not prepared to endorse wholesale rescission of the prohibition at this time. Pending further review, I order that there may be contact, within or without C.M.'s residence, by the child with D.H. provided that it is personally supervised by C.M. or another responsible adult approved by K.M.

in consultation with C.M.. K.M.'s approval shall not be arbitrarily or unreasonably withheld.

[54] The upshot is that the mother must ensure that B. is not left alone with D.H., at least for now. Given that C.M. has left her full-time employment, this requirement should not prove insurmountable. B. is now old enough to disclose any breach of this condition to his father. C.M. would be wise to keep this in mind.

[55] For his part, K.M. should now make every effort to open up the lines of communication not only with C.M., but with D.H.. In the longer term, if D.H. is going to be a fixture in B.'s life as the mother's partner, there is nothing for K.M. to lose and everything to be gained by making the effort. That C.M. (and K.M.) might enter new relationships and that B. would have contact with other significant adults was (and is) foreseeable. Such is life.

[56] Both parents must deal with things as they are - not as they might wish. And, both should keep in mind their previous commitments to a joint custody arrangement in B.'s best interests.

[57] The modified prohibition regarding D.H. shall remain in place for four months after which the parties may schedule a review hearing in consultation with a Family Court Officer.

[58] I encourage (but do not order at this time) the parties to seek out and engage in counselling services to help improve their communication and cooperation skills, to gain better insight into their own feelings, to appreciate the potential impact of continued conflict on their son, and to help each of them to adapt to new family relationships.

[59] Mr. Hirtle shall submit an Order which reflects the result.

Dyer, J.F.C.