IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA

Citation: J.D.M. v. L.M., 2012 NSFC 2

Date: February 21, 2012

Docket: FNGMCA76451

Registry: Pictou

J.D.M.

Applicant

- and –

L.M.

Respondent

DECISION

HEARD BEFORE THE HONOURABLE JUDGE JAMES C. WILSON, Associate Chief Judge of the Family Court

HELD: January 26, 2012

SUBMISSIONS RECEIVED: February 7, 2012

DECISION DATE: February 21 , 2012

COUNSEL: Kathryn Dumke for J.D.M.

Kymberly Franklin for L.M.

[1] This is an application for leave to apply for access. The applicant is a transman (born female, now presents and identifies as a male). The respondent is the biological mother of the child G.B.M. born October 11th, 2009. The parties commenced a relationship a few weeks after the child was born and they separated in June, 2011. The respondent has maintained sole custody of the child since separation. The applicant brings this matter before the court seeking to re-establish access with the child. The child's biological father has not been involved.

BACKGROUND

[2] The parties started dating in November of 2009. They commenced living together when they moved to Dartmouth in February of 2010. At that time the applicant was employed outside the home and the respondent was a stay at home mom. After about six months the parties returned to Pictou County where they both obtained employment. The applicant works in traffic control during the road construction season and the respondent was employed at Tim Hortons. The respondent subsequently started attending community college in January of 2011.

[3] Much evidence was presented about the nature of the parties' relationship. The applicant claims they presented as a family unit since at least February 2010. A family picture with the baby included the applicant. In support of the assertion that they were a family the applicant tendered into evidence a number of greeting cards he received from the respondent celebrating occasions such as Christmas, Valentine's Day, Birthday, Father's Day, etc. These cards express the sentiments of those involved in an intimate family relationship.

[4] The respondent testified that while she acknowledged giving these cards, they were not a true expression of her sentiments. She claims they were more what she wished things to be or an expression of support for the applicant who was struggling with gender identity issues.

[5] A great deal of evidence focussed on who was responsible for caring for the child. During the time both parties were employed, each of their extended families, that is the applicant's mother and the respondent's

grandmother provided the bulk of the out of home childcare. The applicant claims he frequently had responsibility for childcare whereas the respondent takes the position that his role was quite minor. The court can conclude that while the respondent was the primary caregiver, the applicant was involved in assisting in the child's care while the parties were together.

[6] Since separation the child has remained in the care of the respondent mother. There is no evidence before the court that the respondent is not meeting the child's needs. There is no evidence before the court that the child has suffered any negative consequences as a result of the loss of contact with the applicant. Indeed the bulk of the evidence centered on the parties' relationship, not the needs or interests of the child.

[7] The evidence suggests the applicant was quite motivated to establish a family relationship with the respondent and her daughter. For

her part, the respondent had difficulty describing just what she considered the relationship to represent. She has concluded that it was a failed experiment.

[8] During the time the parties were together they had their difficulties. One incident related in evidence occurred in the summer of 2010. The respondent alleges she returned home early to find the applicant in the kitchen of their home naked with a naked man. The respondent testifies that the explanation given by the applicant is that the man had broken into the home and was attempting to assault her. The applicant's version of events is that neither she nor the intruder were naked, but a confrontation was occurring at the door to the home when the respondent arrived. Whatever transpired, it was sufficient to cause the applicant to write a note of apology to the respondent.

[9] There continues to be tension between the parties. Since their separation last summer, both have obtained peace bonds against the other.

The most recent bond was approved just last month and provides for no contact for a 12 month period. The respondent says that she fears for her safety and will not disclose her actual address to the applicant.

[10] Any application for leave must be based on the best interests of the child. In *MacLeod v. Theriault* [2008] N.S.J. No. 59, Justice Bateman wrote at paragraphs 15 – 18:

> **15** The best interests of the child is the predominant consideration in any proceeding concerning children. Parents are the presumptive custodians of their children (**MCA**, s. 18(4)). As such they make decisions about the best interests of their children. The courts will interfere with that decision making only for substantial reasons.
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> **16** Parental custody is not to be lightly set aside (**King v. Low**, [1985] 1 S.C.R. 87 at 101). It is the role of parents to decide what is in their child's best interests and the court should interfere with their judgment only if persuaded that there is good reason to do so. A non-parent wishing to pursue custody of the child must first seek leave of the court (**MCA**, s. 18):
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> - 18(1) In this Section and Section 19, "parent" includes the father of a child of unmarried parents unless the child has been adopted.
> - (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 ... (Emphasis added)
>
> **17** There is no single test to be applied on such leave applications. The court must balance a number of factors. The applicability and significance of a particular factor will depend upon the circumstances of the case. The relevant factors must be gleaned from the context of a particular situation.
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> **18** In **Gray v. Gray** (1995), 147 N.S.R. (2d) 369 (S.C.), an appeal to the Supreme Court from a Family Court order dismissing an application for

> leave to apply for custody, Goodfellow, J. discussed the leave requirement of s. 18:
>
> - [16] ... In my view the existence of any particular factor or combination of factors does not in itself warrant the granting of leave.
>
> ...
>
> - [20] ... on an application for leave the person who is applying must meet a threshold test showing that the granting of leave is likely to be of benefit to the welfare of the child. This is the threshold or test that must be met by an applicant, and I agree with Judge Legere's review of many of the factors that constitute important considerations depending on the particular facts of each case where she concluded at p. 38:
> - Any one of these factors in and of itself is not the test.
>
> (Cited with approval by this Court in **Elliott v. Mumford**, 2004 NSCA 22; (F.C.) per Sparks, J.F.C. at para. 16.)

[11] Counsel for the applicant has referred the court to the case of *Forrester v. Saliba* [2000] O.J. No. 3018, (Ontario Court of Justice), a case where the father was involved in gender reassignment. In that case the parents had decided on a joint custody arrangement before the father disclosed his transsexuality. The mother then sought to vary the order from joint custody to sole custody. In dismissing the application to vary, the court held that transsexuality by itself would not be considered a negative factor in a custody situation. Wolder, J. stated at paragraph 30:

> **30** The entire focus of this trial has been upon the consequences of the applicant's transgendering, the mental health issues that have arisen as a result of the applicant's transgendering process, and the respondent's mental health issues. The evidence discloses that throughout all these problems suffered by the parties, the child Christine has remained healthy and happy and continues to enjoy a positive relationship with both parents. Frankly, it is remarkable how little impact all this storm swirling about the

> parties has had upon this little girl. It appears from the evidence that Christine is a very well-adjusted, happy, healthy little girl, who in her own way has been able to accept the changes in her father and continues to enjoy a healthy relationship with her father, now a woman psychologically, as a person and a loving and caring human being. It is clear from the evidence that the child has moved beyond the feelings of betrayal and loss sustained by the child's mother. There is no doubt that this little girl craves to continue to enjoy an equal relationship with both of her parents and this she should not be denied.

[12] While *Forrester* supports the proposition that transsexuality by itself is not a negative factor in a custody situation, the circumstances in *Forrester* are substantially different then this case. There the transsexual individual was a natural parent and their child (almost 6), had an established relationship with the parent. In the case currently before this court the applicant is not a biological parent, the child is an infant, with a much less established, if any, current relationship with the applicant.

[13] In *Elliott v. Mumford ,* 2004 NSCA 22, the applicant for leave had a relationship with the child's mother for a period roughly similar to the facts of the present case. The trial judge, in refusing leave, noted that the potential for conflict between the applicant and the child's mother was not in the child's best interest. On appeal, the court stated at paragraph 12:

> **12** Judge White considered that in this case the principal factor to determine Drew's welfare was the potential for confusion, turmoil and disruption if Mr. Elliott, who is not Drew's natural parent, maintained legally enforceable custody or access, contrary to the wishes of Drew's mother. Clearly Drew will remain with his mother who may choose to join in a family with another partner such as Mr. McCulloch. Given this, it was reasonable to emphasize the possible confusion, turmoil and disruption as the deciding factor. There was no error in principle or material error in fact, and no patent injustice in Judge White's ruling.

[14] The court does not doubt that the applicant has experienced a loss as a result of the breakdown in his relationship with the applicant and the child. There is however no evidence that the child has suffered any corresponding loss or that it is necessary to re-establish a relationship to meet some needs of the child. The applicant's evidence focussed almost entirely on what the relationship meant to him, not how it benefited the child. Given the complicated failed relationship between the parties, the current no contact orders, the age of the child, and all other factors, this does not appear to be an appropriate case to grant leave to apply for access. The granting of leave contrary to the wishes of the natural mother is likely to generate future litigation, and risk creating further disruption in the life of the child.

[15] In the circumstances the court will dismiss the application.