FAMILY COURT OF NOVA SCOTIA

Citation: *M.O. v. J.W.*, 2011 NSFC 12

Date: 2011-05-31
FKMCA-074346
Registry: Kentville, N.S.

Between:

M.O.

Applicant

v.

J.W.

Respondent

Editorial Notice:
Edited by Judge for grammar, punctuation & readability

Judge: The Honourable Judge Marci Lin Melvin

Heard March 29 and April 7, 2011, in Kentville, Nova Scotia

Final Written May 31, 2011

Counsel: David R. Thomas, for the Applicant, M.O.
David Baker, for the Respondent, J.W.

By the Court:

[1] This application is for joint custody with primary care of the child H.O., reasonable parenting time to the Respondent, a jurisdictional non removal clause and an abstention clause and leave to apply for joint custody with primary care of the child C.M.

[2] R.B. testified on behalf of the Applicant. His evidence was that he and his partner were friends of the parties and their children played together. He saw the Applicant father daily and notes he feeds, diapers and cleans the children so the Respondent mother could "sleep in". His evidence is he never saw M.O. discipline the children and describes him as "kind and patient." He supports the Applicant's application for primary care.

[3] In cross-examination he said the Applicant was "kind of controlling, but not abusive, could be overbearing and a "…jealous type."

[4] The Court finds this witness did not "sugar coat" his testimony in favour of the Applicant. He said what he had observed about both parties and the Court found him to be a credible witness.

[5] The Applicant's step-mother, also testified, to her "grandmotherly" bond and role in the child C.M.'s life, that the parties lived with her for several months, the Respondent did little but watch TV, and stayed in her bedroom, not assisting with any housework or meal preparation.

[6] She further testified she noted the Applicant's close relationship with the child C.M. and was supportive of him having primary care and remaining in Nova Scotia.

[7] On cross-examination she testified the Respondent has always been a good mother. Although a witness for the Applicant, she did not present as being opposed to the Respondent, and on the contrary testified she had a good relationship with her. The Court's impression was that she simply did not want the Respondent to leave with the children. The Court found B.O. to be a credible witness.

[8] The Applicant testified on his own behalf that he is the father of H.O. and guardian of C.M.:

> **"I have been involved in C.M.'s life since she was approximately 18 months old. C.M. has lived with me and the Respondent for the past approximate three-year period. I am the only father figure that C.M. knows."**

[9] The Applicant stated his plan is for the children to remain in Nova Scotia where they have lived for the last two years and C.M. will start school in September 2011.

[10] The Applicant testified extensively as to what he believed were his excellent parenting abilities, and what he believed were the Respondent's abysmal parenting abilities.

[11] The Court found the Applicant to be quite rigid in his beliefs of "right and wrong" and somewhat controlling. Nevertheless, he was candid and forthright and the Court found him to be a credible witness.

[12] The Applicant's father, E.O., testified on the Applicant's behalf. He said whenever he visited the parties, it was the Applicant who cared for the children's needs, had a close bond with the child, C.M., and believes the child C.M. is obviously fond of the Applicant.

[13] The Respondent seeks sole custody and primary care of C.M. and H.O., or alternatively joint custody with primary care of H.O.

[14] The Respondent testified on her own behalf. She said she loves her children, her life has been difficult, and the Applicant is "very controlling", abusive, and often self-medicates with oxycodone and morphine.

[15] The Respondent testified the Applicant was frequently stoned or high on oxycodone. She testified as to what she believed were all of the Applicant's shortcomings and abysmal parenting abilities.

[16] The Court had concerns about the Respondent's evidence, and finds she has "sugar coated" her past. There is clear evidence that she has not always placed C.M's interests first. For instance the Respondent has not seen her father for eight years, and there is no evidence he ever met his grandchild, C.M., so how could the

Respondent's father want to become "reacquainted" with C.M., as set out in the Respondent's Affidavit?

[17] Her Affidavit sets out that her family is close-knit and " . . . they always support a family member in need." Where were they then when the Respondent was a pregnant troubled teenager with no place to go? Where were they when her baby had to be apprehended and placed in care? The Respondent, it seems to the Court, is trying to manufacture a past with her family that now seems loving and harmonious. Unfortunately for her and for C.M., that was not the case.

[18] The Court finds the Respondent's evidence was by times embellished and exaggerated.

[19] At the conclusion of the evidence, it was clear that the parties had used the Court to denigrate and degrade just about every aspect of one another, and yet each wanted custody and care of the children. It is always unbelievable that two people can systematically attempt to destroy one another and expect the Court to sift through the dirt looking for diamonds of worth on their own behalf. Perhaps at best a Court may be fortunate to find a few shards of shiny glass.

[20] Essentially the negative evidence of the Applicant is that the Respondent is too irresponsible to get up in the mornings, to care for her children, is a slovenly housekeeper, does not keep the children clean, has a problem when she consumes alcohol and has a past history of drug use and of her child being in care. Conversely, the Respondent would have the Court believe that the Applicant is addicted to pain medication, is jealous and controlling, is lazy when it comes to helping her with housework, and is not involved in C.M.'s life. Is it ever in the best interests of children for their parents to try and decimate one another in Court? With so much disharmony between parents, one wonders if either of the parties could ever put aside their differences to provide for their children's needs and best interests.

[21] The Court finds the evidence of the Applicant and his witnesses to be credible. The Court finds the evidence of the Respondent to be problematic and less than credible.

(a) Should the Applicant be granted leave to apply for the child C.M.?

[22] In **MacLeod v. Theriault,** 2008 NSCA 16, Bateman, J., at paragraph 15 stated:

> **"The best interest of the child is the predominant consideration in any proceeding concerning children. Parents are the presumptive custodians of the children (MCA, s.18(4)). As such they make decisions about the interest of their children. The courts will interfere with that decision making only for substantial reasons."**

[23] Bateman, J., held that there is no single test to be applied on leave Applications. The Court must balance a number of factors in considering whether or not leave may be granted. The relevant factors must be gleaned from the context of each particular situation. However, there is a threshold test that the applicant bears the onus of meeting in order to be granted leave.

[24] Bateman, J., cited Justice Goodfellow's decision in **G.(C) v. G.(M),** (1995), 147 N.S.R. (2d) 369 (N.S.S.C.), paragraph 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 the applicant, and I agree with Justice Legere's review of many of the factors that constitute important considerations depending on the particular facts of each case where she concluded at page 38: any one of these factors in and of itself is not the test."**

[25] In **Ainslie v. Lively-Mannette,** 2001 Carswell NS 589, Ferguson, A.C.J., granted leave to the paternal grandmother after determining that she had met the threshold test of showing that her Application was likely to be of benefit to the child. Ferguson, A.C.J., noted that the applicant had a positive relationship with the child and had visited with the child through the biological father regularly since birth, until the respondent had terminated the applicant's ability to have access with the child.

[26] The factors to be considered in leave Applications, as noted by this Court in **MCS (Annapolis County) v. B.R. and T.S. v. B.B., M.M. and S.M. v. I.B. v. P.E.M.; A.H. and D.H v. R.M. v. W.H** (all unreported) are:

(1) Is there a sufficient interest and/or connection between the child and the leave Applicant and is there an obvious benefit to the child?

(2) Is the child emotionally attached or bonded to the leave Applicant, or is the connection one of which the child is aware?

(3) Does the Leave Applicant have a familial relationship she/he wants to foster?

(4) Is the application frivolous and vexatious?

(5) Are there other appropriate means to resolve the issue? (For example, mediation (especially under C.F.S.A.), or access in conjunction with the other parent (if this is a grandparent application)).

(6) Are there risk factors apparent on the evidence that would preclude the Applicant from having contact with the child if the leave application were granted?

(7) Will the granting of a leave application place the child in more risk of litigation and uncertainty?

(8) Are there extenuating circumstances? (Such as the death of a parent, or a parent not exercising parenting time due to being in jail, or out of the province for extended periods of time).

(9) Is, or would, the involvement of the third party be destructive or divisive in nature?

(10) Would leave put undue stress on the custodial parent, if the leave applicant were successful in the application for access?

(11) Would granting leave, and the possibility thereafter, granting access, threaten the stability of the Family unit?

(12) Would a Court Order preserve a positive relationship between the child and the leave applicant?

(13) To what extent does the custodial parent's decision affect the child and is it a reasonable decision in the particular circumstances of each case?

(14) In a case under the C.F.S.A., would the granting of a leave application provide the child with a potentially feasible plan to reintegrate into the child's own family that would be in the best interests of the child?

(15) Considering all of the above, is the granting of leave, in the best interests of the child?

[27] The Applicant argues there is sufficient interest or connection between himself and the child, and he is the only father C.M. knows.

[28] The Respondent argues that a person applying for leave must meet a threshold test showing that the granting of the application is likely to be a benefit to the welfare of the child.

[29] The Court has considered all of the evidence of both parties and finds the benefits to the child as follows:

The parties have a biological child, as well as the child, C.M., who is not the Applicant's biological child. To order any type of parenting time to a parent and a biological child, excluding a non-biological child who has coexisted and functioned as part of that family unit, without evidence to the contrary, could potentially cause irreparable emotional harm to the child who has been excluded, as well as the biological child who may wonder why at least two relationships the child has previously known have become fractured. Therefore, in all normal – however normal may be defined – circumstances, keeping as much of the family unit together, even if for brief periods of time, can only be seen as to benefit the welfare of the child.

[30] There is a sufficient interest and connection between the child and the Applicant. The child was less than two years old when she came into the Applicant's life; she is now 5 years and 2 months old. According to the evidence, he is the only 'father figure' she has known.

[31] The Applicant does have a familial relationship he wishes to foster, as C.M. is a step-sister to his biological child.

[32] There is some merit in the Application for leave and therefore it is not frivolous and vexatious.

[33] There are some risk factors which are apparent on the evidence that may limit the Applicant's parenting time with C.M. should leave be granted. However, as noted earlier, the Court accepts the Applicant's version of the evidence regarding the incident between himself and the child in February 2011. Nevertheless, it would obviously upset a child to be treated in that manner, and the Applicant's impatience and frustration bordering strenuously on anger are apparent even by way of his own testimony.

[34] The Court can only speculate on whether the granting of a leave application would place the child in more risk of litigation and uncertainly, however, any Court order – especially involving children – can be, if the parents choose, a revolving door into the Court system.

[35] The evidence of both parties is equally damaging and the Court finds that neither party is without fault.

[36] Complicating the leave issue of C.M. is the Applicant's Application for custody of his biological child, H.O. Would granting leave put undue stress on the Respondent, given the above? There is no clear cut evidence before the Court to answer this question.

[37] What may threaten the stability of the family unit, is – as was alluded to earlier – the confusion C.M. may suffer from having the Applicant as a "father figure" for three years, and then excluded from his life, while H.O. is included.

[38] If there is a positive relationship between them, a Court Order would likely preserve it.

[39] One can only apply a basic understanding of human nature to understand that C.M. may feel left out if she is excluded from time with the Applicant and her sibling, when she was previously included and part of the family.

[40] And finally, because C.M. was in care for much of her infancy, she has known the Applicant almost as long as she has the Respondent.

[41] It is therefore the finding of the Court – whatever the Court may determine with respect to what parenting time, if any, the Applicant might have with C.M. – that it is in C.M.'s best interest for leave to be granted.

[42] (2) What order for custody and conditions of custody would be in the children's best interests?

[43] The Court has considered all of the evidence, and assessed the credibility of the witnesses and the plans for custody the parties have provided to the Court.

[44] In **Foley v. Foley,** 1993 Can Lii 3400 (N.S.S.C.), Goodfellow J., enumerates the factors a Court must consider in determining the best interests and welfare of a child.

[45] They are: physical environment; discipline; role model; wishes of the children; religious and spiritual guidance; assistance of experts, such as social workers, psychologists, psychiatrists, etcetera; time availability of a parent for a child; the cultural development of a child; the physical and character development of the child by such things as participation in sports; the emotional support to assist in a child developing self -esteem and confidence; the financial contribution to the welfare of a child; the support of an extended family, uncle's, aunt's, grandparent's, etcetera; the willingness of a parent to facilitate contact with the other parent.

[46] The Court has considered the factors enumerated in **Foley v. Foley,** *supra,* in light of the evidence.

[47] The Applicant set his evidence against the backdrop of **Foley v. Foley,** alleging he has provided stability for the children, disciplined gently, was a good role model, had plenty of time for the children, has been the primary financial provider, has extended supportive family, is willing to facilitate contact with the Respondent, and has a proven plan for caring for the children.

[48] The evidence of the Applicant is that he will continue to reside in the family home, and when he returns to work he will rely on child care of some form.

[49] The Respondent's plan is to take the children to British Columbia, to an environment, which is unfamiliar to the children, where she will live with her father, a man from whom she has been estranged for many years although recently has begun to rebuild their relationship. There was little to support this proposition.

[50] The Applicant does have an extended family and the Court accepts that his family are involved – at least to some degree – in the children's lives.

[51] The Respondent's family – with the exception of perhaps an annual reunion – is a lesser known entity to the children.

[52] The Applicant, once he has recovered from his injury, intends to either return to his original job, or find another. His intent is to be employed to be able to provide financially for his family.

[53] There isn't sufficient evidence before the Court to make a finding with respect to the Respondent's ability to contribute financially for the children. She is twenty-one years old, has no formal education, no job skills, and no prospect of employment, should she move to British Columbia.

[54] The Court has assessed the evidence and the credibility of the parties and their witnesses, as noted earlier in this decision.

[55] The Court finds that while the Applicant is, even in light of his own evidence, “controlling”, he sincerely wants to be involved in his children’s lives. The Court has concerns about the Applicant’s use of prescription drugs, however accepts his evidence that he does not “over-medicate.” The evidence that he neglects two other children that are apparently biologically his, is distressing, but the evidence has afforded the Court no concrete information as to how or why this has happened, and it could have happened for a myriad of reasons.

[56] The Court has great sympathy for the Respondent. As she notes in her Affidavit, she has not had an easy life. A single mother at sixteen, with no family to support her, her first child, C.M., ended up in care for a considerable time. She only had C.M. returned when she became involved with the Applicant, which certainly sheds some light over the stability he offered her. However, she appears to have become overwhelmed in the relationship, and being responsible for the care of two small children, and the upkeep of the house, and having a partner at home, who was frustrated and in pain, from an injury. She is only twenty-one and still not fully mature herself. No wonder she felt overwhelmed with all of the responsibility.

[57] However, the Respondent has no track record of being on her own with the children, and her previous track record – before the Applicant came into her life – is sadly lacking. The Court would be concerned that if she were to ever have the responsibility of parenting the children alone, that she could end up in the same situation she was in prior to her involvement with the Applicant.

[58] Each parent has done such a successful job of ensuring the Court is fully aware of every potential and actual failing of the other

[59] It is the finding of this Court, based on the evidence before it, that neither parent could effectively parent these children alone, nor to the exclusion of the other, for reasons earlier noted. Further, as set out in **Harvey v. Harvey,** 2004, BCSC 514 (S.C.), if a Court is of the view that by granting sole custody to either parent he or she would interpret that as giving him or her control over the child’s relationship with the other parent, then the Court should consider other forms of custody.

[60] The Court has considered all of the other types of parenting arrangements and the pertinent jurisprudence associated therewith: joint custody with primary care to one parent, split custody, shared custody, parallel parenting, even “bird’s nest” arrangements. It is of the utmost importance that whatever the Court decides with respect to the parenting arrangements, that the children’s best interests are well and fully met.

[61] It is a child’s right to know both parents equally. Often times this isn’t possible, especially if the parents don’t live in the same community or general location. If a primary caregiver, for instance, disallows contact, or the non-primary caregiver can’t be bothered to make the effort to maintain contact, who suffers most? The child. It is up to the parents to put whatever past bitterness they retain about their relationship behind them, and start a fresh new chapter for the sake of their child or children.

[62] The Court finds that the Respondent’s intent, should she have her way, is to minimize and restrict the Applicant’s parenting time to the children.

[63] Justice Fry, in **Furlong v. Furlong,** 2009 NLUFC 14 (U.F.C.), decided to award joint custody to parents who – while each wanting sole custody – did little more than complain about each other.

[64] Therefore, the Court orders joint custody and finds that the parties are likely capable of meeting the children’s needs (albeit with effort on some levels) but it is in the children’s best interests to continue to have the bond with both parents, and the support of both parents.

[65] The children will be in the care of the Applicant, for four days a week. During that time he will not be under the influence of alcohol, non-prescription drugs, and will not over-use or over-medicate on prescription drugs. He will reside with the children at the home he lived in with the children and the Respondent. He will treat both children with kindness, dignity and respect. He will only use “time-outs” as he described in his testimony: “one minute for each year of their age.” He will take a parenting course. As a further condition of custody he will have a drug and alcohol assessment, and attend counselling to ensure he is not angry or frustrated in his manner of dealing with the children.

[66] The children will be with the Respondent, for three days a week. During that time she will not be under the influence of alcohol, non-prescription drugs, and will not over-use prescription drugs. She will treat the children with kindness,

dignity and respect, and discipline them in accordance with the method set out above in "time-outs." She will take a parenting course. Further conditions of custody include a drug and alcohol assessment, and counselling to understand her role as a parent and her own self-worth.

[67] The parents will be flexible with each other with respect to the parenting times.

[68] The Applicant, will pay child support to the Respondent, pursuant to the Guidelines.

[69] The parties will keep a large scribbler-type notebook which they will send back and forth with the children. The parents will write interesting and pertinent information about the children, in the book, and will not use the book to write negative thoughts to or about the other.

[70] The parties will be respectful to each other at all times, and not undermine the other or speak ill of the other, especially in the presence of the children.

[71] Counsel for the parties, upon discussion with them, will determine which days the parties will spend with the children. If they are unable to reach an agreement, the Court will decide.

[72] The final issue to be determined is the Respondent's Request for Parental Relocation.

[73] The matter before the Court is not an application to vary, but an application in the first instance. The Court has already determined that neither of these parents have the capability at this point in their lives to parent the children alone. More succinctly put, it would not be in the best interests of these children – as noted earlier – to be in the sole custody of either one of the parties.

[74] The Court finds that the existing *de facto* custody arrangement is one that has been imposed upon the Applicant without his consent. His parenting time, thus far, has been limited, as a result of this matter being before the Court. Recent jurisprudence pertinent to mobility, and indeed common sense, as well as the legislation governing this application, reflect on the child's right to know each parent equally, the child's right to have a bond with each parent and the child's right to emotional – if not physical – stability in their lives. Children, especially very young ones, are voiceless in this type of application. It is up to the Court to

provide a voice for children by looking past the vitriolicisms of their parents, and finding what is in the children's best interest.

[75] According to the evidence, the Respondent is not moving to B.C. for any other reason than to see if she can re-establish a relationship with her father from whom she has been estranged for at least five years. The Court finds her reasoning to be flawed. She has not reached a level of maturity to yet think past the ramifications of her knee-jerk reactions. She has not taken into account how the children might feel or react now or in the future if the Applicant is not in their lives. She has put much emphasis on the issue of the Applicant having two other children that he doesn't bother with, however, she has been aware of this for some time and it didn't stop her from having a relationship with him, allowing him to be a father figure to C.M., and having another child with him. Further, she does not have a concrete plan – simply she'll move in with her father – or any type of future planned for herself and the children should she move to British Columbia. If it doesn't work out with her father, what happens to the children then? Will the children both end up involved in Child Welfare proceedings? The Court finds this much too tenuous and too great of a risk for the children.

[76] Having thoroughly considered all of the evidence, the Court finds that it is in the best interests of the children to remain in Nova Scotia, pursuant to the terms as set out above.

[77] Further, this matter is adjourned for review on December 12th, 2011, at 10 a.m. to review the conditions of custody as is in the best interest of the children.

[78] The Court thanks counsel for their excellent submissions on behalf of their clients.

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Marci Lin Melvin, J.F.C.