IN THE FAMILY COURT OF NOVA SCOTIA
Citation: Boutilier v. Macdonald, 2012 NSFC 21

Date: 20120904
Docket: FLBMCA-080993
Registry: Bridgewater

Between:

Andelyn Marie Boutilier and
Dale Wilbert Boutilier

Applicants

- and -

Kyle Macdonald and
Danielle Lyn Wile

Respondents

Judge:	The Honourable Judge William J. Dyer
Heard:	August 30, 2012, at Bridgewater, Nova Scotia
Memorandum:	September 4, 2012
Oral Decision:	September 13, 2012
Written Release of Decision:	November 4, 2013
Counsel:	Franceen Romney, for the Applicants Owen Bland, for the Respondents

By the Court (orally):

[1] Andelyn Boutilier and Dale Boutilier were granted leave to pursue action under the **Maintenance and Custody Act (MCA)** against Kyle MacDonald and Danielle Wile.

[2] At issue are the parenting arrangements for eight year old Tehya MacDonald.

[3] Mr. MacDonald and Ms. Wile are the child's parents. Ms. Boutilier is the maternal grandmother; Mr. Boutilier is her spouse.

[4] There was a contested interim hearing on August 30, 2012. I reserved for an oral decision. Last day, I also authorized an assessment and report regarding the competing long term plans for the child's custody and care.

[5] A final hearing, if needed, is likely many weeks away.

[6] Events overtook the parties. On the (interim) hearing date, it was known that the child's schooling would resume within days. Where she will attend is tethered to the interim ruling regarding her care. In the circumstances, the parties expressed a preference to know the basic outcome as soon as possible - even though a full decision would not be available immediately.

[7] Recently, a Memorandum went out to the parties. The Memorandum provided the result in summary form.

[8] These are my full reasons.

[9] As already mentioned, this was an interim hearing. If need be, there will be a final hearing on another occasion when the parties will have an opportunity to more fully present evidence and their respective positions.

[10] I have strained not to make any final assessments about the credibility of the witnesses and related issues; and my fact findings are limited to those necessary to achieve the interim rulings.

[11] Sometimes the less said the better - especially when professional assessments are pending. This is one of those situations. To be candid, I would not like any of the interested parties to be left with the perception that my interim findings (and the interim order) are intended to influence the independent assessor's work.

[12] This is also as good a time as any to remind everyone that the assessor is expected to make recommendations to the parties and to the court. The recommendations are not binding. Nonetheless, there is an expectation by me, given the time and expense associated with the assessment and report, that the parties will endeavour to abide by the recommendations for a reasonable period of time before requesting that the case be placed back on the docket.

[13] A corollary to this is that the interim order is just that. It will bridge the matter, pending the assessment and final hearing, if needed. The parties should understand and appreciate that the interim order must not be taken as any sign, signal or assurance that the final outcome will be the same. The order flowing from the interim hearing is temporary - no more and no less.

[14] The Court's decision must be based on the evidence presented. Evidence does not include personal opinions, speculation, hearsay statements from individuals who do not testify and other inadmissible content. Where such has seeped into affidavits and the testimony, I have disregarded it.

[15] Especially at interim hearings, the absence of evidence from key individuals, professional reports, and the like, can also be problematic. That absence sometimes raises questions, but never provides any answers. So, for example, in the present case, there was no evidence from professionals (such as doctors, teachers, etcetera), no evidence from friends, neighbours, extended family members or community contacts, no evidence from the father's current spouse or the mother's current boyfriend; no evidence from past, present or proposed day care or pre and after-school care providers, and no evidence from other individuals, who might provide additional information or insight into the circumstances of the respective adults and, most importantly, the child.

[16] Less than complete evidence is not unusual at interim hearings. Judges must make the best of what is served up.

[17] A few passages from the 2011 **Annual Review of Family Law**, published by Carswells and edited by Alfred Mamo are worthy of mention. At page 139 of the **Review**, the following appears. The word "grandparents" could easily be substituted for the word "parents" throughout. This is the passage:

> Deciding on interim custody/access arrangements is a daunting task for any judge. The materials are often self-serving, unreliable, incomplete and untested by cross examination or objective evidence. Contradictions in the evidence make it impossible to determine the ability of the parents to meet the children's needs, or sometimes, even figure out what the status quo really is. The challenge is further complicated by the fact that even though an interim custody/access order is, in theory, intended to be a short-term measure to deal with the immediate problem of where a child should live and what role each of the parents should play on a short term basis, the realities of busy, under-resourced courts is at such that an interim order is likely to be in existence for months on end, creating a "status quo" likely to continue until trial and often beyond.

[18] There are no previous legal proceedings; and there are no written agreements in regard to Tehya's custody and care. Child protection agencies have not been involved; and there is no suggestion of child protection issues or concerns at this time.

[19] With the benefit of hindsight, I am confident that each party likely wishes that she or he had reduced to writing the terms and conditions under which the child would live with her maternal grandmother and her spouse back in mid-2007. Now, five years later, there is conflicting evidence about how much time Tehya actually spent at each home for the first two years, and what understandings there were about what would happen when she started school two years later.

[20] From the evidence, there is no credible explanation for the absence of a written agreement at the very outset or the failure of the parties to seek court approval of the unique care arrangements.

[21] The same is true for 2009 and subsequent school years - when it may be safely said, if nothing else, that Tehya lived most of the time at her grandmother's residence and that her parents enjoyed regular parenting times during the school year, during the summer months, etcetera.

[22] Again, it is not as if the parties did not have plenty of time to settle upon a written agreement or to seek direction from the Court.

[23] There was some evidence of failed settlement efforts by way of a proposed agreement or contract last winter and into the spring of 2012. But even on this, the evidence is in conflict. What is clear is that the most recent initiative failed and that all parties dragged their heels in getting the matter into court.

[24] There is nothing to be gained at this stage by assigning blame or fault for the extraordinary delay. In my opinion, responsibility should be shared equally.

[25] In the same vein, the fact that Mr. and Mrs. Boutilier ultimately were first to the post, so to speak, carries no special weight. Nor with respect, does the somewhat lackluster formal defence or reply by the parents, or the unfortunate delay in securing a hearing date, sway the outcome of the case.

[26] Any perceived shortcomings of the parties or their counsel in mustering the case for hearing must yield to the court's paramount consideration, by statute and by case law, which is the child's best interests and her welfare.

[27] Under section 18 (5) of the **MCA** I must apply the principle that the welfare of the child is the paramount consideration. Under section 18 (4), the father and the mother are the child's joint guardians; and they are equally entitled to the care and custody of their daughter, unless otherwise ordered or provided by statute.

[28] [As at the hearing date] under the statute , third parties (such as grandparents and other members of a child's extended family or community) are not granted any presumptive rights regarding guardianship, custody or care.

[29] Mr. and Mrs. Boutilier's written application included a claim for joint custody - as among themselves, Mr. MacDonald and Ms. Wile.

[30] Mr. MacDonald and Ms. Wile are seeking joint custody - as between themselves - but to the exclusion of the Boutiliers.

[31] At this interim stage, I do not intend to launch into a detailed discussion about the legal concepts of custody and care. But, for today's purposes I will state that the essence of joint custody is shared decision-making. This may be contrasted with sole custody, for example, where one party is vested with ultimate or exclusive decision-making authority. Either scenario may include consultation, discussion and the like - regardless of who has the final say regarding major issues in a child's life - such as schooling, religious faith, non-emergency medical care, etcetera.

[32] Again, for today's purposes and by contrast, when the word 'care' is used by me, I am referring to the real-life parenting arrangements - such as where the child is living, and the parenting times by the parents and others.

[33] There are many variations on the theme or the legal concept of care. So, for example, primary care usually refers to a situation where a child is living most of the time, with one individual. Shared care implies that a child is living with at least two individuals, either for equal amounts of time (for example "week about",or in some other proportion - for example, 60% of the time with the mother, 40% of time with the child's father, and so forth.)

[34] Even at the interim stage, in my opinion, the prerequisites for a joint custody order include evidence of sufficient communication, sufficient cooperation and sufficient respect among the individuals to satisfy the court that joint decision-making is viable and, that in the child's interest, any lingering distrust, animosity and the like, will be set aside. Regrettably, in this case, as between the parents and Mr. and Mrs. Boutilier, I find that threshold has not been met. The communication between Mr. MacDonald and the Boutiliers is civil, at best. The communication between Ms. Wile and the Boutiliers is non-existent, for all practical purposes.

[35] There is some evidence of improved communication and cooperation between Ms. Wile and Mr. MacDonald - but this is relatively new, and it is against the background of significant interpersonal conflict and disagreements between the two of them. Moreover, Ms. Wile's living arrangements, as at the hearing, were in a state of transition or flux; and virtually nothing has been disclosed about the circumstances of her current boyfriend and the role he might play in the already complex family dynamics.

[36] Accordingly, at this time, I do not approve of the respective joint custody regimes as envisioned by, and as proposed by, the respective parties.

[37] Regarding the issue of interim care for the child, many of the factors which are relevant at final hearings, are relevant at interim hearings. They include, but are not limited to, those set out by Justice Goodfellow in *Foley v. Foley* (1993), 124 N.S.R. (2d)1998. Very briefly, they include physical needs, emotional availability, the relationship between the child and her caregivers, educational needs, social, cultural and recreational needs, spiritual and moral development, family connections and support, the maximum contact principle, experts assistance (if any), role models, discipline, violence (if any), and the children wishes, to the extent they can be determined and the primary care history. [As at the hearing, amendments to the **MCA** had been approved but were not in force.]

[38] What should be obvious is that the last factor that I mentioned [that is, primary care history], is but one of a host of considerations. And, on that point, the weight of the evidence was that arrangements prevailing until now were not intended to be permanent, that attempts to change the so called *status quo* pre-date current litigation by a least a couple of years, and that (rightly or wrongly) the parents capitulated to Mr. and Mrs. Boutilier, largely to defuse or to reduce conflict. By so doing, I find they did not waive or foreclose their rights under section 18 of the **MCA.**

[39] By the same token, knowing that there was no permanency to the arrangements, with all due respect I find that Mr. and Mrs. Boutilier knew or ought to have known that in the absence of an agreement or court order, they were at legal risk should the parents reassert their rights under section 18, and that they (as non-parents) had no presumptive or countervailing statutory rights.

[40] The weight of the evidence was that the only prerequisites for repatriation of the child to her parents, were stability in Mr. MacDonald's work and personal life. To a lesser extent, the same may even be said regarding Ms. Wile.

[41] Importantly, for our purposes, the current short term plan is for Tehya to live primarily with her father. In my assessment, he has easily met any understood or tacitly agreed preconditions, prerequisites or conditions for repatriation.

[42] On the evidence Tehya appears to be a bright, active and healthy child who has no physical or emotional challenges. She performs well at school and in the two communities where she has connections. As noted, there are no child protection concerns or issues.

[43] There is no evidence that the child is unlikely to adapt to living with her parents or adjust to a different school and activities. Dare I say, that changes in residence and changes in schools by children is common-place in our increasingly mobile society?

[44] More to the point, there is no evidence to suggest that the proposed changes will adversely affect the child. And, accordingly, there is no reason to believe that she will not thrive just as well away from the Boutiliers, as with them.

[45] The evidence is that Tehya is bright, happy and healthy - despite the thinly veiled conflict which has been swirling behind her for months, if not years. So, on a positive note, it seems to me that credit should be given to all of the adults; and that no single household or single individual adult, can or should, claim credit.

[46] Interestingly, neither parent criticized the Boutiliers' parenting capacity or skills, their dedication, or the quality of their care. Nor did they seriously challenge the many financial and personal benefits the child has enjoyed, thanks to Mr. and Mrs. Boutilier.

[47] On the flip side, there was no serious challenge to the present circumstances of the parents or their ability to resume Tehya's care. Indeed, the grandmother volunteered in her testimony, "I have no idea what goes on in their lives today". The implication was either she had no responsibility to find out, or that the parents had the burden of keeping her informed (failing which the *status quo* was going to prevail). But, the evidence was that the Boutiliers have routinely sent Tehya off to her father's home - with no expressed or documented concerns or worries, knowing full well that during such visits there would be unsupervised and independent parenting time by the mother.

[48] The evidence was that Mr. and Mrs. Boutilier's knowledge of the mother's circumstances has been limited to that which has been gleaned from Mr. MacDonald (and perhaps the child or that which has been recently disclosed in the

affidavits). But, it seems there are no serious complaints or issues regarding Ms. Wile's care. Certainly, if there were any, one would have expected legal action long before now. So, with all due respect, it was somewhat - I hesitate to use the words - naive or perhaps innocent, of the Boutiliers to think the Court would, at the very last minute, just before school starts, carefully sieve and scrutinize the parents' lifestyles and parenting capabilities.

[49] I should add that the parents, and Mr. and Mrs. Boutilier, propose to encourage and support ongoing contact with the non-custodial party or parties. All of them are to be commended in that regard.

[50] In my opinion, the child needs the stability and security of knowing where she is going to live and go to school, pending the assessment and a final hearing. Ms. Wile supports Mr. MacDonald's proposal for primary care - at least on an interim basis.

[51] Looking at the evidence as a whole, and keeping in mind section 18 of the statute and the case law, there is no compelling reason not to vest care in the father at this time. In so concluding, I am mindful this is not the outcome preferred by Mr. and Mrs. Boutilier - but as touched on already - their preferences must yield to what objectively is best for the child.

[52] Accordingly, I order that Mr. MacDonald shall have primary day-to-day care of the child and that he may enroll her at the school proposed by him during the interim hearing.

[53] Ms. Wile shall have reasonable parenting time with the child upon reasonable notice to Mr. MacDonald, as they may agree.

[54] Mr. and Mrs. Boutilier shall have care of the child at their residence for reasonable times upon reasonable notice to Mr. MacDonald which shall include, but not be limited to, at least one weekend per month and reasonable telephone and, what I will call media access - for example, by way of Skype, Facetime, etcetera.

[55] Responsibility for transportation and transition shall be shared.

[56] Mr. MacDonald shall keep Ms. Wile and Mr. and Mrs. Boutilier informed regarding the child's school attendance, progress and activities, as well as her extra-curricular activities and involvements, and general well-being.

[57] While under Mr. and Mrs. Boutilier's care, the child shall have no contact with Andelyn Boutilier's father (the maternal grandfather) whose name I believe was stated as Norman Herritt.

[58] Lastly, the case shall be adjourned without date, pending the assessment.

[59] There were only cursory submissions regarding court costs. I am inclined to award no costs, given all of the circumstances. However, if counsel want to pursue the question, they shall have three weeks to make written submissions.

[60] In the meantime, Mr. Bland shall prepare and submit an appropriate order for the approval, as to form only for Ms. Romney, within 10 business days.

Dyer, J.F.C.