SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: M.U. v. A.U., 2010 NSSC 470

Date: 20101230
Docket: SFSNH1201-064202
Registry: Halifax, NS

Between:

M. U.

Petitioner

v.

A. U.

Respondent

Editorial Notice

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

Judge:	The Honourable Justice Darryl W. Wilson Justice of the Supreme Court of Nova Scotia (Family Division)
Heard:	November 8 & 9, 2010, in Halifax, Nova Scotia
Written Decision:	December 30, 2010
Counsel:	Angelina D. Cunningham, Counsel for the Petitioner Tanya R. Jones, Counsel for the Respondent

By the Court:

[1] MU, the Petitioner/Mother petitions for a divorce from AU, the Respondent/Father. The Petitioner has three children, namely: A, age 12; Y, age 6; and S, age 4. The Respondent is the father of Y. and S. A. is the Petitioner's child from a previous relationship.

BACKGROUND

[2] Both parties were born in *. They were married on July 31, 1998 at a refugee camp in *. The parties and the children A. and Y. came to Canada in March, 2006. The child S. was born in Nova Scotia on July 1, 2006. The parties separated in December, 2006.

[3] In December, 2006, A. disclosed to the Petitioner that the Respondent had sexually assaulted her. The Petitioner took A. to a doctor who made a referral to child protection authorities. A. was interviewed by representatives of the police and Minister of Community Services. The Respondent was charged with sexual assault and improper touching. He was placed on an undertaking not to have contact with the Petitioner and the children except in accordance with an order of the Supreme Court of Nova Scotia (Family Division). The Minister of Community Services did not initiate protection proceedings.

[4] An interim consent order dated June 20, 2007, provided the Petitioner with interim custody. The Respondent agreed to supervised access with Y. and S., once weekly for 1.5 hours at Veith House. The Respondent was required to arrange transportation for the children and an interpreter was to be present during access. The cost of transportation and the interpreter was paid by the Respondent. The frequency and duration of access could increase with the agreement of the parties. In December, 2007, the Minister of Community Services closed their file.

[5] In March, 2008, the Minister of Community Services received a referral that the Petitioner was taken to the I.W.K. Emergency Department and the children had been left at home alone. The Minister of Community Services investigated and determined that the Petitioner had arrangements for someone to be with the children at night but did not have any one available to be with them during the day. The Minister of Community Services assisted the Petitioner with childcare during the time she was at the I.W.K.

[6] The Respondent's criminal trial occurred in June, 2008. During the trial, the Petitioner testified that she and the children had contact with the Respondent on several occasions contrary to the Respondent's undertaking. She also testified that she was pregnant with the Respondent's child when she attended at the I.W.K. in March. The pregnancy ended with a miscarriage.

[7] The Minister of Community Services apprehended the children from the Petitioner on June 25, 2008 and began a protection proceeding. The Petitioner and Respondent separately were provided with supervised access.

[8] In August, 2008, the Respondent was acquitted on the charge of sexual assault against A. and the charge of improper touching was withdrawn.

[9] The Petitioner alleged that her pregnancy was because the Respondent had forced sex with her. The Respondent was charged with sexual assault and breach of conditions of his Undertaking. The sexual assault charge did not proceed as the Petitioner did not provide evidence. The Respondent was found guilty of breaching the terms of his Undertaking and placed on probation, which expires November 12, 2010. One of the terms of his Probation Order provided that he was to have no direct or indirect contact or communication with the Petitioner and the children A., Y. and S., except through a lawyer or through the Department of Community Services. This provision in the Order was subsequently varied on March 31, 2010 to read: "Except through a lawyer or in accordance with Supreme Court (Family Division) of Nova Scotia, or other court of competent jurisdiction."

[10] On September 23, 2008, the children were returned to the Petitioner by the Minister of Community Services pursuant to a Supervision Order. The Petitioner agreed to a safety plan for herself and the children, satisfactory to the Minister that included not allowing any contact between the Respondent and herself, and ensuring the Respondent's access with the children was supervised. The Petitioner agreed to attend personal counselling.

[11] In December, 2008, the Respondent's supervised access moved from the Offices of the Minister of Community Services to various locations in the community.

[12] In October, 2009, the Minister terminated court proceedings without a hearing, upon the Petitioner signing a Memorandum of Understanding. The

children, A., Y. and S. had been found in need of protective services pursuant to Section 22(2)(g) of the *Children and Family Services Act* on September 23, 2008. The protection proceedings were terminated by Order dated October 8, 2009. At that time, there was an Interim Consent Order pursuant to the *Maintenance and Custody Act*, providing the Respondent with supervised access. The Memorandum of Understanding required the Petitioner/Mother to notify an agent of the Minister of Community Services of any intended changes to the current custody and/or access arrangements and to not agree to a change without first providing the notice. The Petitioner was also required to notify the Agency of any legal proceedings concerning the terms of custody and/or access relating to the children.

[13] Divorce proceedings were initiated in January 2010. The Respondent has been unable to exercise supervised access at Veith House since October, 2009, primarily because he has been unable to pay for third party transportation and a translator to be present during access visits. The Respondent had been able to exercise access while protection proceedings were ongoing as the costs associated with the access were paid by the Minister. The Respondent intends to leave Nova Scotia soon after his Probation Order expires (November 12, 2010). He did not state where he was going.

ISSUES

[14] The Petitioner seeks a divorce from the Respondent.

[15] The Petitioner requests sole custody of the children Y. and S. She also requests that the Respondent have absolutely no contact, direct or indirect, with her daughter, A. and supervised access through Veith House with Y. and S., to be arranged between the Respondent and Veith House, when the Respondent visits Nova Scotia.

[16] The Respondent requests an order for joint custody of Y. and S. to ensure his parental responsibilities are met. He agrees that the Petitioner should have primary care of the children. He does not seek access with A., but does not agree with a "no-contact" order. He is seeking unspecified, unsupervised access with Y. and S. He proposes to call the Petitioner to arrange access when he is in the local area. He is seeking open-telephone access. He also requests the Petitioner notify him of any change to her telephone number, as well as her address. He wants to make inquiries as to the children's health, education and welfare to the Petitioner and not

third parties. He also requests the Petitioner not be able to leave Canada with the children, or cross a Border without his knowledge or permission.

[17] The Petitioner said joint custody will not work between the Respondent and herself because they do not communicate with one another and when they talked, the conversation ended in a dispute. The Petitioner is not opposed to the Respondent requesting information about the children from third parties, but does not want him to contact her for the information. The Petitioner will advise the Respondent of travel plans but does not agree his permission is necessary for her to travel with the children.

EVIDENCE

[18] The Court heard from the Petitioner and the Respondent and Ann Simmons, who is a social worker with the Department of Community Services. A copy of the trial transcript between **R. v. A.U.** was tendered "not for the truth of its' contents, but rather as the basis upon which the Petitioner is basing her evidence, which is outlined in her Affidavits previously filed with the court".

[19] The child A. did not testify.

[20] The Petitioner did not see the Respondent sexually assault A., but she believes what A. has told her. The Petitioner believes A.'s disclosure because of another incident that occurred while the parties were residing in *. The Petitioner left A., who was three years old at the time, in the care of the Respondent. When she returned home, she observed the Respondent with A. on the bed and he appeared startled to see her. A. told her that the Respondent put hot chilly in her body. A. was examined, but evidence supporting A.'s disclosure was not established because the Petitioner had washed A. before taking her to the examination. Charges were laid against the Respondent. The Petitioner subsequently wrote a letter to the prosecutor advising him that the Respondent had not done anything. The charges against the Respondent were dismissed. The Petitioner said she wrote the letter knowing it was false because people in the community were talking about her and A. and she was not able to go to the market because of this talk.

[21] The Respondent denies sexually assaulting or improperly touching A.

[22] The Petitioner stated that although she reconciled with the Respondent, their relationship was not good. The Respondent had two children with another woman during the time they were together. Initially, the Respondent was evasive when questioned about another relationship, saying that he has only one wife. Eventually, he denied he was the father of other children.

[23] The Respondent disagreed with the Petitioner that their relationship was not good. He believes the Petitioner fabricated the charges against him when they were in * so she could return to her former husband. He said their relationship was good because they had two children and travelled to Canada as a family. The Petitioner also identified him as A.'s father on her application to relocate to Canada.

[24] The Petitioner replied that many woman who have children are not in good relationships. Many women in Africa are oppressed. She also stated that although the Respondent was found not guilty of sexually assaulting A., she believes A.'s disclosure. The Petitioner acknowledged that A. had heard a counsellor tell her that the Respondent might go to jail if convicted. A. then told her that she was joking when she said the Respondent assaulted her. The Petitioner believed A. only said this to protect the Respondent from going to jail. The Petitioner said that removing the Respondent from her application to come to Canada would delay the processing of her application, which she did not want to do.

[25] Ann Simmons, a Social Worker with the Department of Community Services, who did not interview the child, stated that the allegation of sexual assault was substantiated in a joint interview with police and an Intake Worker. At that time, a disclosure was made by A. Protection proceedings were not initiated after the disclosure because the Respondent was charged criminally and was subject to an undertaking not to have any contact with the Petitioner and the children. Protection proceedings were initiated in June, 2008 when it was discovered the Petitioner was having contact with the Respondent. The children A., Y. and S. were found to be in need of protective services pursuant to Section 22(2)(g) of the *Children and Family Services Act*, substantial risk of emotional harm, on September 23, 2008.

[26] Services were provided to the Petitioner and Respondent, including supervised access. The Petitioner was referred to personal counselling and the child A. received counselling. Daycare services were provided for Y. and S. The

Minister of Community Services paid the cost of transportation and interpreter services. The Respondent declined an assessment request by the Minister. He was referred for individual counselling to New Start.

[27] In June, 2009, a settlement conference was arranged in an attempt to deal with the issue of the Respondent's supervised access to Y. and S. The Respondent had been acquitted of sexual assault in August, 2008, and the time-limit for concluding the protection proceeding was near. According to Ms. Simmons, an agreement was reached that the Respondent would be referred to Martin Wiseman for counselling. The Minister was to identify five issues they wanted the Respondent to address in counselling, including how the allegations of sexual abuse affected him as a parent, the anxiety around the allegations, and how that impacted him in his relationship with his children. The Minister did not receive a report from Mr. Wiseman and, therefore, is not sure if the Respondent attended for counselling and addressed the issues identified by the Minister.

[28] At the time the protection proceedings ended in October, 2009, the Minister was still concerned about the risk of harm to the children if their access with the Respondent was not supervised because the disclosure seemed truthful and the Minister was not satisfied the Respondent had reduced the risk through accessing services. In the Minister's opinion it was in the children's best interest to continue supervised access with the Respondent at Veith House. The Minister was concerned about the impact the allegations had on the Respondent and his relationship with the children and the Petitioner and not just the risk of harm associated with the allegation of sexual abuse. The Minister wanted the Respondent to speak to a therapist about these concerns and to find a way to arrive at a point where future access could be unsupervised.

[29] Ms. Simmons stated that the Minister has not received any information since their involvement ended that would alleviate the concerns they had at the time the protection proceedings were terminated. The Minister was not aware if supervised access continued after the protection proceedings terminated.

[30] According to Ms. Simmons, the Minister is also concerned about direct contact between the Petitioner and the Respondent. The basis for the Minister's concern is the Petitioner's statement that the Respondent tricked her into visiting him by feigning illness and when she responded to his plea, he forced himself on her. The Respondent also causes the Petitioner emotional stress by speaking to

people in their community about the court proceedings, which upsets her and makes her feel isolated.

[31] Ms. Simmons acknowledged the Petitioner, at one point, asked her about having another baby. Ms. Simmons informed her that she was not to have any contact with the Respondent and satisfied herself that the Petitioner was not considering resuming a relationship with the Respondent. Ms. Simmons stated that the Petitioner cooperated with the Minister, was very focused on her children and their needs and was consistent in her parenting practices. She also observed the children to be very polite.

[32] Ms. Simmons was only able to observe the children with the Respondent during supervised visits at the offices of the Minister. She was unable to say much about his parenting practices other than his interactions were appropriate but there were occasions when he brought junk food to the visits. She did not observe him during visits with the children in the community. He missed visits when he was in jail and for a time when the Minister did not have an address for him. The number of visits missed were not indicated. Ms. Simmons met the Respondent in August, 2008, after his release from jail to discuss the resumption of visits and what was expected. They also discussed S's upset behaviour after access visits, which the Respondent attributed to the children not wanting to leave him.

CUSTODY

[33] The Respondent's submission is that a joint custody order is in Y. and S.'s best interest because he has been an interested involved parent in the past and wants to be an involved parent in the future. He was prevented from developing a meaningful relationship with his children due to the prolonged criminal and child protection proceedings arising from A.'s allegations of sexual abuse. The Respondent submits it is in the children's best interest to have his influence in their lives as well as the Petitioner's influence.

[34] The Respondent relies upon the statutory direction found in Section 16(10) of the *Divorce Act*, that children should have as much contact with each parent as is consistent with the children's best interest and each parent's willingness to facilitate such contact. Counsel for the Respondent also referred the Court to **Rivers v. Rivers** (1994), 130 N.S.R. (2d) 219, wherein Justice Stewart stated at page 6:

> Children have a right to meaningful relationships with both parents and the benefits derived from having both parents' guidance and input. This is particularly true when each parent has maintained a meaningful relationship with them, and wishes to continue it, as well as possessing parenting capabilities that are adequate to meet their needs.

And also at page 7, wherein Justice Stewart states:

> Recent, but sparse, case law suggests the simple refusal of one party to agree to joint custody should not be sufficient in and of itself to prevent the court from ordering it in the appropriate circumstance**.**

And later:

> To order joint custody only when the parties are able and willing to cooperate can encourage some parents to refuse to do so, in order to pursue a sole-custodial order.

[35] Counsel for the Respondent submits that he has the parenting capabilities to meet the children's needs, which is not contested by the Petitioner; the parties were able to communicate until the children's apprehension by the Minister who has prevented future communication through court proceedings and orders; the Petitioner's allegations of a difficult relationship is contradicted by evidence of their immigration to Canada as a family and the Petitioner's unwillingness to agree to a joint custody order is only to pursue sole custody. The children know the Respondent as their father and their contact with him has only been limited for two years. Counsel for the Respondent submits a joint custody order will end the disruption and discontinuity prior court proceedings have had on the Respondent's ability to have a say in the development of the children.

[36] Counsel for the Petitioner also referred the court to **Rivers v. Rivers** (supra), wherein the Court listed the following considerations in deciding to grant sole custody to the Petitioner.

> Besides the obvious there is no mutual agreement to joint agreement, does the actual evidence mitigate against joint custody? Do obstacles exist to joint custody? In answering, any number of questions should perhaps it first be asked:

> (1) A very basic question would be has each parent maintained a meaningful relationship with their children, does each possess parenting capabilities that are adequate to meet their children's needs?
>
> (2) Will the parents be able to make decisions together about the children? Are they able to co-parent despite any conflict on a personal level between themselves? Can they separate feelings for each other to focus upon the children's need for a relationship with both parents? Can they separate their personal relationship for the parent/child relationship?
>
> (3) Will the children be involved in a conflict between the parents in a detrimental manner?
>
> (4) Will the proposed joint custody arrangement cause disruption and discontinuity to the children's developmental needs.

[37] Having reviewed the evidence and the submissions of counsel, I find it is in the children's best interests that the Petitioner/Mother be granted sole custody. I agree with the submissions made on her behalf. The evidence mitigates against a joint custody order. The unresolved conflict between the parties over A.'s allegation that the Respondent sexually assaulted her; despite the Respondent's acquittal of the charge, is a major obstacle to the parents' ability to make decisions together about the children.

[38] It is extremely unlikely the parties can separate their feelings for each other to focus on the children's needs, given the history of the parties' relationship, including the emotional upset the Respondent caused the Petitioner by talking to people in their community about the court proceedings, and the Respondent feigning illness to attract the Petitioner's sympathy and attention for his own sexual needs. The Petitioner's unwillingness to agree to a joint custody order is reasonable in these circumstances.

[39] The Respondent was prevented from developing a meaningful relationship with the children by protracted court proceedings. Now, when he has the opportunity to spend more time with them, he is relocating to another province, which limits the time available for access. He was not able or not willing to indicate where he is going or where he will be residing. He could not be specific when asked how often he could return to Nova Scotia to visit with the children. The Respondent's relocation is a further impediment to the parties being able to

make joint decisions in the best interests of the children. The level of cooperation necessary for a joint custody order does not exist.

[40] The Petitioner has been the children's primary care-provider since their birth. She has been making decisions unilaterally on their behalf for the last four years. According to Ms. Simmons, she is a caring parent who has consistently focused on the needs of her children, who are described as polite and well-behaved. Given the limited role the Respondent has had in the lives of these children, and the conflict that has existed between the parties in their relationship, consultation is more likely to cause disruption and discontinuity than benefit in the children's developmental needs. I find it is in the children's best interest that the Petitioner be able to make decisions in the future on their health, education and general welfare, without consulting the Respondent.

ACCESS

[41] As with custody determinations, the predominant consideration in determining access issues is the "best interest" of the child. Further, Section 16(10) of the *Divorce Act* directs that children should have as much contact with each parent as is in their best interest and the court should consider the willingness of each parent to facilitate such contact.

[42] The burden of proof is on the Petitioner to show on a balance of probabilities that supervised access is in the children's best interest. It is not necessary for the Petitioner to prove supervised access would be harmful to the children.

[43] In **Abdo v. Abdo,** [1993] N.S.J. No. 445, Pugsley JJ.A. at paragraph 75 stated:

> 75 The foregoing comments of the trial judge suggest that while she was satisfied that the burden rested on Mrs. Abdo to establish that it was in the best interests of the children to eliminate supervised access (a burden that Mrs. Abdo did satisfy), the use of the word may in the phrase (supervised access may be harmful . . .) suggest that Mrs. Abdo may not have established on the balance of probabilities that supervised access would be harmful.
>
> 76 The "best interest" test adopted by the trial judge is consistent with the decision of the majority of the court in Young v. Young, a case recently decided by the Supreme Court of Canada (File No. 22227, October 21, 1993).

> 77 While considering the "best interests" of the child test in the context of the provisions of the *Divorce Act, R.S.C. 1985 (2nd Supp.) C. 3,* McLachlin, J. determined that risk of harm is not a "condition precedent for limitations on access" (para. 21).
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> 78 L'Heureux-Dube, J. while dissenting, reflected the opinion of the majority when she stated:
>
> > "The best interests of the child remain the prism through which all other considerations are refractable." (para.125)
>
> 79 It was not, therefore, necessary for Mrs. Abdo to establish that supervised access would be harmful to the children.

[44] In evaluating the Petitioner's evidence, the Court must consider the credibility of that evidence, which contains several contradictions, including an allegation the Respondent sexually abused A. while the parties were residing in *, which was subsequently retracted; immigrating to Canada with the Respondent even though she alleged he fathered two children with another woman while they were together and their relationship was not good; and alleging the Respondent sexually assaulted her while he was awaiting trial for sexually assaulting A., but declining to give evidence against him. The Petitioner attributes these contradictions to vulnerable personal circumstances, that is, feelings of isolation in her community, not wanting to delay the processing of her immigration application and not wanting to go through another trial when the first criminal trial ended in an acquittal. While these explanations may be difficult for the ordinary person to understand, they are credible if viewed from the perspective of a person in the Petitioner's circumstances. Also, the Respondent's evasive response when questioned about fathering children with another woman lends credibility to the Petitioner's evidence that their relationship was not good.

[45] The Petitioner had been told by A. that the Respondent had sexually assaulted her. The Petitioner's belief that A. was molested by the Respondent may be erroneous but I do not attribute any bad faith to her in holding this belief. Others who interviewed A. also believed her disclosure. The Petitioner's unwillingness to agree to unsupervised contact is not unreasonable.

[46] There is an unease not knowing the truth of a molestation allegation. There can be false allegations and false denials as well as false recantation of true allegations. However, in this proceeding, there has been no evidence presented by the Petitioner to establish the Respondent sexually abused A. He was acquitted on the charge of sexual assault in August, 2008 where the burden of proof is beyond a reasonable doubt. In this proceeding, the child A. did not testify and there was no evaluation of A.'s disclosure by a mental health or other professional.

[47] However, the children were found to be in need of protective services in September, 2008, pursuant to Section 22(2)(g) of the *Children and Family Services Act*, which provides:

> (g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm**.**

[48] At the time the child protection proceedings were terminated, the Minister still considered Y. and S. a protection risk if the Respondent's access was unsupervised. The Minister's concerns were twofold - risk of sexual harm because of A.'s disclosure and risk of emotional harm arising from the impact A.'s disclosure had on the Respondent and his relationship with the Petitioner and Y. and S. The nature of the emotional risk was not fully addressed during the hearing. The Minister has no knowledge if the Respondent addressed the risk of emotional harm to the children through services subsequent to the termination of the protection proceeding.

[49] The Respondent does not seem to recognize or accept the substantial risk of harm to Y. and S.'s emotional well-being determined during the child protection proceedings. The Respondent did not participate in services to address the risk of emotional harm because he denied sexually assaulting A. and, in his opinion, there was no reason for him to participate in services. He was referred to counselling with "New Start", but the nature and extent of his participation or whether the counselling was beneficial, is unknown. He was referred to Martin Wiseman after a settlement conference in June, 2009, to address the anxiety in the family caused by the allegations, the impact the allegations had on his relationship with the children and the Petitioner and how to move from supervised to unsupervised access. The extent of his participation in this counselling, or whether it was beneficial in addressing the risk of harm identified during child protection proceedings, is unknown.

[50] In determining the appropriate access order the Court's focus is on the needs of the children and their best interests and not parental rights. The Minister clearly has concerns about the children's emotional well being in the future if access is not supervised. In these circumstances the child protection authorities are the best evaluators of that risk. Although the overall burden is on the Petitioner to show an order for supervised access is in the children's best interest, the Respondent has an evidentiary burden to show he has addressed child protection concerns. He has not done so. By requesting the Respondent's access be supervised, the Petitioner is taking steps to protect the children from the risk identified during protection proceedings.

[51] Taking into account the young age of the children, the unresolved child protection concerns and the Respondent's inappropriate conduct towards the Petitioner I find it is in Y. and S.'s best interest that the Respondent's access be supervised. The Respondent is not seeking access to A.

[52] Neither party put forward a specific access proposal. The Respondent's relocation from the Halifax area and the Petitioner's unwillingness to have direct contact with the Respondent to facilitate access makes it difficult to set out a specific access schedule.

[53] Given those circumstances I find it is in Y. and S.'s best interest that access be as follows:

> Petitioner is to establish an email account and the Respondent shall have access to that account for the sole purpose of communication between them in the interest of the children.
>
> The Petitioner is to include in the email account all relevant, educational, health and general welfare information regarding the children including their current schedules, activities, pictures etc.
>
> The Respondent shall have telephone contact with the children at reasonable times up to two times a week provided the telephone contact is only to speak with the children and not to engage the Petitioner in conversation.

> The Respondent shall have reasonable access at reasonable times with the children at various locations in the Halifax area in the presence of a person from the parties' community, acceptable to both of them. Notice requirements and other arrangements can be facilitated through the Petitioner's email account.
>
> The Petitioner shall notify the Respondent of any changes to the children's residence or telephone number and provide the Respondent with 30 days written notice if she intends to relocate the children's residence from Halifax.
>
> The Petitioner shall keep the Respondent informed of any travel plans for the children.

[54] The Petitioner's request for a divorce judgment is granted. The Court's jurisdiction has been established, the grounds have been proven and there is no possibility of reconciliation.

[55] There will be no order for costs.

J.