

[3] The parties did not commence residing together immediately upon the birth of their son. Mother lived with her family initially. Subsequently, the couple lived with their son in a house bought by the Applicant.

[4] The separation occurred when the Applicant returned to the residence and smelled marihuana on January 2, 2001. The Respondent mother denies that this occurred and claims that she only rolled a marihuana joint. There had been an agreement between father and mother that there would be no smoking in Christien's presence. Father had been concerned that mother was not observing this.

[5] The child has spent close to half of his time with each parent. A few months ago, the Respondent moved to the Kitchener area and commenced living with another male companion. She took the child with her.

Issues

[6] The issues in this trial focus on the provisions of section 24 of the Children's Law Reform Act. The best interests of the child are the governing factors in the Act. Several specific needs and circumstances of a child are set out as factors for a court to consider regardless of any other considerations.

[7] First, the court shall look at the love, affection and emotional ties between Christien and his parents, other members of Christien's family living with him and people who are involved in his care and upbringing.

[8] Secondly, how long has Christien lived in a stable home environment?

[9] Thirdly, what is the ability and willingness of each party to provide guidance and education, the necessities of life and special needs for Christien?

[10] Fourthly, what are the plans of care by each parent for raising their son?

[11] Fifthly, how permanent and stable is the family unit where each parent proposes to raise Christien?

[12] Is the health of the child at risk from exposure to tobacco smoke?

The Facts

[13] The Applicant and the Respondent began dating in the fall of 1997. Mother became pregnant within about a month of the commencement of dating. She continued to reside at her parents' home during her pregnancy and following the birth of their son, Christien on July 19, 1998.

[14] When Ms. LeClair moved out of her parents' home, she moved into a home that Mr. Miles had purchased. They lived together for about fourteen months.

[15] Ms. LeClair was sixteen when she became pregnant. Mr. Miles was twenty-one.

[16] Ms. LeClair smoked ordinary cigarettes, used marihuana and drank alcoholic beverages prior to and following becoming pregnant. Mr. Miles did not smoke tobacco products, but admitted that he had used marihuana when he was seventeen to nineteen years old. He has asthma and in particular was opposed to the Respondent continuing to smoke during her pregnancy and after their son was born.

[17] Ms. LeClair's family smoke tobacco products. The evidence indicates that persons in that household simply plan to avoid smoking in the same room as Christien and they think that is good enough. Katherine Miles, the Applicant's mother, has been to the LeClair residence and has observed tar film from tobacco products on the windows. She noted this on the day of the baby's christening when there was a social gathering at the residence of Ms. LeClair's parents. She concluded that there was a considerable amount of smoking in that residence. Although Ms. LeClair testified that she does not smoke in the presence of her son, she is caught on video in Exhibit 17 driving a car with a cigarette in her mouth and her son in the car in March 2001.

[18] The separation occurred on January 2, 2001 when Mr. Miles returned home and concluded that Ms. LeClair and a girlfriend had been smoking marihuana in the home because he could smell it. Their son was in the home and the child of the other woman was there as well. Ms. LeClair denied smoking marihuana, but acknowledged that she had rolled a marihuana joint.

[19] The child exhibited breathing difficulties early in his life. He has been taken for medical attention because Mr. Miles was concerned that he might have asthma, as does Mr. Miles. There is a debate about whether or not Christien is asthmatic or is a person with some form of breathing difficulty.

[20] Christien's speech development is delayed. Father arranged for Bonnie Breadner to assess him. Ms. LeClair was skeptical about this and maintained that Mr. Miles did not give her full information.

Analysis of the Facts

[21] The major focus of the evidence in these proceedings is the health of the child. He has breathing problems. Mother smokes as does her family. She has stated that she and her family would not subject her son to cigarette smoke by simply not smoking in the residence or in a motor vehicle with Christien. Father maintains that mother does not follow court orders regarding the child and has smoked in the same area with Christien being present.

[22] There was a court order of January 3, 2001 prohibiting mother from removing the child from Simcoe County.

[23] There is a court order of January 8, 2001 prohibiting the child being exposed to tobacco smoke in a room. Ms. LeClair agreed that she would consider a motor vehicle in the same category as a room for the smoking prohibition.

[24] On November 13, 2001 Justice Wood ordered that neither parent was to change the child's residence more than 250 kilometres from Midland, Ontario.

[25] A secondary problem for Christien is the need for assistance for delayed speech development. Mr. Miles consulted Bonnie Breadner about Christien's speech development. Ms. Breadner was qualified as an expert with respect to speech and language development. Her reports are included in Exhibit 1 at Tabs 3 and 4. Ms. Breadner was consulted for possible speech delay difficulties being experienced by Christien. She found that there is some delay in expressive language and opined that the issue should be addressed. Her reports are dated March 13, 2001 and May 2, 2002. At the last report, Christien was three years and ten months of age. Ms. Breadner noted mild delays in expressive language and articulation skills. The child would benefit from regular speech/language therapy which has a purpose of encouraging continued development of expressive language skills and improving overall speech clarity. Ms. Breadner reported that there are services available in Simcoe County to assist Christien.

[26] Ms. LeClair appeared to go through the motions of accepting a speech development problem when she testified. By the way she hesitated in giving answers in chief about Christien's speech delay, I had the impression that she was prepared to say she would pursue speech therapy for Christien but she just wanted to get over this trial and then would not be concerned with the issue. She claimed that in effect she was kept out of the loop on Christien's speech therapy, but I note that Ms. Breadner, who was qualified as an expert, advised the court that she contacted Ms. LeClair who was not receptive to such therapy. I conclude that Ms. LeClair does not take Christien's speech development seriously.

[27] Dr. Gaffney provided evidence and his reports are found in Exhibit 9. His report of July 26, 2002 concludes that he is not diagnosing Christien with asthma but rather that the 59 visits to his office during the past three years, the child had four documented utilizations of asthma bronchodilator therapy. He concludes with an opinion that the child has rare bronchospasm generally associated with upper respiratory tract infections that at this time does not qualify Christien for a diagnosis of asthma. I note that the number of visits with respiratory conditions noted by Dr. Gaffney is significant and at the very least demonstrates respiratory problems for Christien.

[28] Cigarette smoke is not good for the health of any person. Second hand smoke is accepted as harmful to the health of non-smokers. The parties and their witnesses accept that cigarette smoke and second hand smoke is not good for a child.

[29] There has been a great deal of evidence about the health of Christien. Father has taken the child for medical attention dozens of times, and mother plays down any suggestion of health challenges for Christien. Family and friends for both litigants have testified in a supportive way

for each. Understandably, they have been supportive of the respective parents for whom they were called to testify. There has been a sharing of negative evidence about both.

[30] In spite of the best of intentions of mother and her family, I am persuaded that having a child who at the very least experiences respiratory problems and living in a residence in which the inhabitants smoke tobacco products is dangerous to the health and well being of the child. That is a major concern of the court when considering the best interests of Christien. Promises not to have the child in the same room as someone who smokes are not good enough. The debate about the use of tobacco products has gone on for an extended period of time. Mother plays down the seriousness of the issue and suggests that father is exaggerating. I return to the evidence of Ernest Ashbery, a private investigator, who videotaped Ms. LeClair in Exhibit 17. That videotape captured mother on film with a cigarette in her mouth while she was driving her car and her son, Christien, was in the car. She was with her girlfriend, Stacey Toebes, who testified that Ms. LeClair did not allow smoking in the same room with Christien. The video places in doubt the value of the evidence of Ms. Toebes. Smoking in this manner is contrary to an existing court order. Mother appears not to pay attention to a court order. There was another example of Ms. LeClair ignoring a court order when Mr. Ashbery followed her from Simcoe County to Kitchener in March 2001 in spite of the fact that there was a court order that neither parent remove Christien from Simcoe County.

[31] During her testimony, Ms. LeClair on many occasions testified that she did not recall when she was giving evidence contrary to prior affidavits signed by her. She played down anything that goes to the health issue of her son. She swore in an affidavit that she rolled a joint of marihuana the day of separation, but that she went outside and smoked it. In the trial, she would only accept that she rolled the joint. She stated that she did not read the affidavit over in the past when she signed it because she was in a rush for an emergency court appearance. It is significant that mother appears to take that approach when she faces conflicts in what she has said in the past and what she has said in the trial. When she gave her evidence at trial, she filed a sworn financial statement that left her open to challenges about its accuracy. When facing those challenges, the Respondent simply said that she did not read the affidavit when she signed it. When asked about the recommendations of the assessor, Dr. Telegdi, with respect to speech therapy for Christien, she answered in a manner that indicated to me that she really did not accept the need for such therapy but she would agree to it at least until she got over the hurdle of this trial. In another affidavit located at page 116 of the Continuing Record on June 18, 2001, Noella LeClair stated that the mother of Stewart Miles had a back disability and would be unable to bath the child; yet, there is a photograph in the exhibits showing Katherine Miles bathing Christien. This approach of Ms. LeClair leaves me with the impression that she adjusts her evidence and position to whatever she perceives to be necessary to obtain a custody order. Once the trial is over, she will revert to doing what she wants. I do not believe her when she says that she does not smoke in the presence of her son and does not allow others to do so whether it is in her residence or in a motor vehicle. She testified that she has not quit smoking. I don't believe her when she says that she did not smoke the marihuana joint on the date of separation. Nor do I believe her that she was not going to smoke it. It is beyond reason to think she would be in possession of the marihuana, rolled a joint and yet was not going to use the product.

[32] Tabs 6, 7 and 8 of Exhibit 1 contain reports from The Hospital For Sick Children. The report of March 14, 2001 shows that there was a positive test for cannabinoids and nicotine with Christien. Then, at Tab 7 the report from The Hospital For Sick Children dated March 22, 2002 found the tests on the hair of Christien established the presence of nicotine significantly in the hair of the child and to a mild degree marijuana. The nicotine concentration was considerable and was equivalent to being in the range of people who smoke seven to ten cigarettes a day. This analysis was a strong indicator of passive exposure to cigarette smoke. The reports found at Tabs 6 and 7 of Exhibit 1 are the result of test samples being taken on March 5, 2001. Finally, Tab 8 is an additional report from the The Hospital For Sick Children after obtaining a sample on April 29, 2002. This report concludes that Christien was exposed to drugs during the third trimester of pregnancy and further that such exposure occurred one to five days before delivery with the exception of cannabinoids that might have been present up to one month after exposure. These reports lead me to conclude that mother is not telling the truth at this trial regarding smoking around her son.

[33] I conclude that this child is not being kept away from tobacco products. The only time that is happening for sure is when he is with father or his extended family. Dr. George Rogan, a specialist in diseases of children, has addressed this. He has reviewed the medical records for Christien including prescription records and the above report of the Hospital For Sick Children. He notes as well that the report from that hospital shows that the child is still exposed to cigarette smoke. Further, Dr. Rogan states that Christien does have an element of reactive airways disease. Continued exposure to such smoke is deleterious to his health.

[34] I am not prepared to play with the life and health of this child. He has a respiratory challenge. The medical evidence demonstrates that Christien has been taken to doctors and health care facilities a lot during his three years. It may be that the child cannot be diagnosed at this age as being an asthma patient. On page one of Dr. Gaffney's reports in Exhibit 9 the doctor states that at this time he cannot diagnose the medical condition as asthma, but he does note that Christien as having rare bronchospasm generally associated with upper respiratory tract infections. At the very least, it is a significant caution for the well being of Christien. The number of prescriptions issued by Dr. Gaffney and other doctors confirms that Christien's condition is more than a passing circumstance that he will overcome without medical assistance.

[35] In spite of continuing debates between mother and father about what is good for their son, mother is not doing enough to address her smoking habit. I don't believe her when she says she is not exposing her son to cigarette smoke.

[36] The test set out in Children's Law Reform Act directs a court to consider the love, affection and emotional ties Christien has with his parents and extended families, the length of time Christien has lived in a stable home environment, the ability and willingness of each party to provide guidance, education, the necessities of life and special needs for Christien, the plans of care for each party and finally how permanent and stable the family unit is for each parent.

[37] I do not doubt the love and affection of everyone in Christien's life for him. Both parents have a degree of stability in their home environments. The difficulty arises when advancing to the willingness of each parent to provide for the necessities of life and special needs for their son. Their plans of care are tied to this consideration as well. I conclude that Stewart Miles addresses these features in a way that is better for Christien than does Noella LeClair. I find that the health of Christien is being placed at risk by exposure to tobacco smoke when in the care of his mother.

[38] This trial is not an attempt to determine what is best for the parents. There is one important person here, and he has not given evidence because he is too young. Christien deserves the best opportunity to get a healthy start with his life. To make sure of that, he is going to reside with his father.

[39] The report of Dr. Telegdi found at Exhibit 1 Tab 2 provides several recommendations. Those will be adapted to the circumstances as they now exist.

Conclusion

[40] The parents shall have joint custody of their son, making mutual decisions regarding his schooling, recreational options, medical and other professional interventions.

[41] Christien will live with his father who will have him for daily care and control. Mother will have Christien three out of four weekends from Friday at 6 p.m. to Sunday at 6 p.m. This would also include the full Friday or Monday if there is a professional development day or a long weekend.

[42] Christmas, Easter, March Break and summer holidays be divided equally between the parents on the basis of one or two week alternating basis. Special arrangements will have to be made for the day of Christmas, Easter Sunday, Thanksgiving, birthdays, Mother's Day and Father's Day. I will hear further submissions for precise times if the parents are not able to agree on them.

[43] Christien will have free telephone access to either parent.

[44] Christien's speech and language therapy will be continued.

[45] Neither parent shall allow Christien to be exposed to tobacco or cannabis smoke. The prohibition is that these products are not to be used in the same room or motor vehicle as the child. Second hand smoke is harmful to human beings. Since there is no evidence before me that mother has authorization for the legal use of marihuana, it is a given that her use of such a product would be illegal. Although one might wonder at the need for an order prohibiting the use of an illicit drug, I wish to make it clear that for the purposes of this order and the health of Christien cannabis smoke is prohibited. I question whether prohibiting the use of tobacco products in the same room as the child is good enough. If the parties were to return before me

with further evidence that second hand tobacco smoke in the same residence as compared to the same room is a hazard to Christien's health, I would consider enlarging the smoking ban.

[46] I will hear submissions on costs on October 10, 2002 at 10 a.m.

Justice B. Glass

Released: October 7, 2002

COURT FILE NO.: 9-2001
DATE: October 7, 2002

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

STEWART MILES

Applicant

- and -

NOELLA NICHOLE LeCLAIR

Respondent

REASONS FOR JUDGMENT

Justice B. Glass

Released: October 7, 2002