

D.N. FA-15-5014539-S

CARLTON M. HIGBIE, IV

VS

KAITLYN M. HIGBIE

SUPERIOR COURT
STAMFORD - NORWALK
JUDICIAL DISTRICT OF STAMFORD-NORWALK

2016 APR 15 P 1:13
AT STAMFORD

APRIL 15, 2016

MEMORANDUM OF DECISION FOLLOWING DISSOLUTION TRIAL

Introduction

This case involves a dissolution trial on a limited number of issues between two young adults who both decided to serve the public in significant ways. The parties appeared with their counsel for trial on March 8, 10, 11 and 15, 2016. The following witnesses testified: each party, each party's mother and the plaintiff's step-father. The court has carefully considered the: (1) evidence presented, including the judicially noticed court file; (2) arguments of counsel; and (3) relevant law. As a result, the following factual findings are made:

Basic Jurisdictional Facts

The parties married on July 5, 2008. They have one child; Mackenzie, age three. The court has jurisdiction and all statutory stays have expired. The allegations of the complaint are proven and found to be true. The marriage of the parties has broken down irretrievably. Neither party has received any state or public assistance.

Issues Presented

At the beginning of trial, it was reported to the court by counsel for each party that the parties reached an agreement on all financial and custodial issues except for the following three

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issues: (1) What should be done with the parties' jointly owned Virginia condominium; (2) Whether attorney fees should be awarded to either party; and (3) Whether there should be any restrictions on the plaintiff's right to possess firearms while in the presence of the parties' child.

Factual Background

The plaintiff/father (age 32) is a former Navy SEAL. At the time of the parties' marriage in 2008, he was on active duty. He was twice deployed to Iraq and was a firearms safety instructor with a perfect safety record. His firearms training and experience far exceeds that of an ordinary citizen as well as that of local law enforcement officials. It is clear from the evidence presented that the plaintiff now takes the necessary safety precautions for the appropriate storage and possession of his firearms at all times, including using a gun safe and an appropriate procedure for unloading his firearms as necessary. He possesses a valid state permit and has no criminal record.

The plaintiff receives disability benefits as a result of his military experience. His injuries resulted from the following: (1) a helicopter in which he was an occupant was shot down in Baghdad; (2) an explosive device detonating near him; and (3) his being shot in the back. He has a disability rating of sixty percent. He was honorably discharged from the United States military in 2012 after serving as a Navy SEAL for nine years. There was some military litigation surrounding the plaintiff's discharge as a result of a controversial book he authored while serving as a SEAL. However, that litigation was ultimately resolved in the plaintiff's favor. Currently, the plaintiff is the operations director of a media company and earns \$105,000 per year.

The defendant/mother (age 31) is a hospital emergency room nurse who has experience with firearms as well. When the parties lived together in Virginia, during the early years of their marriage, she was trained in firearms and obtained a concealed carry permit. She testified that she never carried a firearm on her person but she did participate in the activity of shooting with her husband and others. During the marriage, the parties would together go to the gun store to make purchases. It is obvious from the evidence presented that the collection and use of firearms was an activity important to the plaintiff; that this was well known to the defendant from the beginning of the marriage (and likely before); and that both parties participated in the activity together at various times.

The defendant's prior work experience includes serving as an accountant earning approximately \$50,000 per year and assisting the plaintiff in the formation and operation of a tree company in Virginia. She decided to go to nursing school while in Virginia and the plaintiff supported her in that effort. She is now a full-time emergency room nurse at Stamford Hospital.

The plaintiff objects to any restrictions being placed on his ability to carry a gun (other than his being required to comply with all federal and state laws) for two primary reasons: (1) he wants the ability to protect himself and his daughter, particularly in his own home; and (2) he claims that such a restriction would violate his constitutional right to bear arms under both the federal and state constitutions. While the parties lived together in Virginia, there was an incident where the plaintiff was forced to confront a group of six youths who were intruding on the parties' home. The plaintiff defused the situation without the use of his weapon. He apprehended some of the youths until law enforcement arrived while others escaped. He cites this incident in support of his position on gun possession and the right to defend himself and his

home. The defendant cites this incident in support of her position that he does not need a firearm to protect himself due to his size, strength and military training. The plaintiff claims that, prior to the commencement of this divorce action, his wife never objected to his carrying of his pistol (he has other firearms as well) while in the presence of the child. The defendant/mother disputes this and claims that she did object on more than one occasion.

The parties own a townhouse in Virginia that the plaintiff purchased, with the assistance of his family, prior to the marriage. The purchase price was approximately \$330,000 to \$340,000 and the down payment was approximately \$60,000 to \$70,000. The plaintiff put down approximately \$15,000 to \$20,000 of that amount and the rest was a loan from the plaintiff's parents that was later forgiven in part. The home was eventually titled in the names of both parties. The defendant and her child left the Virginia home and came to Connecticut to live in October of 2013. The parties then lived together for some time in the defendant's mother's home in Greenwich until September of 2014 when the plaintiff left. The parties have been separated from each other since then. Each party now lives in Connecticut and the Virginia townhouse is being rented; however, it has a negative cash flow that requires each party to make regular contributions to meet expenses. Although no formal appraisal was ever produced in court, it appears that both parties agree that the current fair market value of the property is less than the debt secured by the property. The plaintiff wants to maintain joint ownership of the property until it can be sold at a profit. The defendant no longer wants to own it; she wants it transferred to the plaintiff or sold.

Discussion

The plaintiff cites the second amendment to the United States constitution and article first, § 15 of the Connecticut constitution in support of his argument that the court cannot and should not impose any restrictions on his ability to possess firearms. The second amendment to the United States constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Article first, § 15 of the Connecticut constitution provides: "Every citizen has a right to bear arms in defense of himself and the state."

Section 29-37i of the Connecticut General Statutes is also relevant because it sets forth the law in Connecticut for the storage of loaded firearms. It provides: "No person shall store or keep any loaded firearm on any premises under such person's control if such person knows or reasonably should know that (1) a minor is likely to gain access to the firearm without the permission of the parent or guardian of the minor, (2) a resident of the premises is ineligible to possess a firearm under state or federal law, or (3) a resident of the premises poses a risk of imminent personal injury to himself or herself or to other individuals, unless such person (A) keeps the firearm in a securely locked box or other container or in a location which a reasonable person would believe to be secure, or (B) carries the firearm on his or her person or within such close proximity thereto that such person can readily retrieve and use the firearm as if such person carried the firearm on his or her person. For the purposes of this section, "minor" means any person under the age of sixteen years." General Statutes § 29-37i.

A violation of § 29-37i that results in injury or death is punishable as a class D felony pursuant to § 53a-217a of the Connecticut Penal Code. Sections 29-37i and 53a-217a were enacted together in 1990 as part of the “Kids and Guns Bill”, which was the legislature’s response to public concern over accidental shootings involving children in the homes of gun owners. See *State v. Wilchinski*, 242 Conn. 211, 222 (1997). Although no particular method of storage of loaded firearms is required under §29-37i, “some physical impediment to access is mandatory.” *Id.*, 225. The Connecticut Supreme Court concluded that “what is reasonable must be determined on a case-by-case basis, because a safeguard that may be appropriate in one case may be inappropriate in another.” *Id.*, 223, n. 13. “The most appropriate and efficient means to achieve the goal of restricting access to a loaded firearm depends on facts uniquely within the knowledge of the individual gun owner. The most obvious variables include the ages of children in the household, the physical layout of the home, and the availability of locked safes or closets. A high shelf in a closet may be a secure location when the only child in the household is a toddler, but when older children are present in the home, it may be necessary to use trigger locks and a locked container.” *Id.*, 228.

In this case, while the parties have stipulated to joint legal custody, the defendant/mother seeks an order that either grants her final decision making authority on the issue of the presence of firearms, concealed or otherwise, during parenting time, or that all firearms shall be secured in a locked container when either party exercises their parenting time. Thus, the defendant is essentially asking this court to remove subsection (B) of § 29-37i as an option available to each party in determining how to store loaded firearms. The parenting plan agreement, particularly the joint legal custodial provision, leads this court to infer that each party believes that the other party is an appropriate, reliable and competent parent.

Had the defendant presented any credible or convincing evidence that the plaintiff is a danger to himself or others, or engaged in dangerous, reckless or negligent behavior with his firearms or other weapons, or exhibited any significant mental health or substance abuse issues or concerning behaviors, or that there occurred domestic violence between the parties, this court might very well have considered imposing restrictions greater than that currently imposed by federal or state law in order to serve the best interests of the parties' child. However, that did not happen. There was no credible evidence presented that the plaintiff brandished his firearm in a reckless or negligent manner or that the parties' child was ever in danger of gaining access to a loaded firearm. No credible evidence was presented to establish that the plaintiff is predisposed toward committing a crime or that he has any criminal record of any kind. To the contrary, the evidence establishes that the plaintiff, a former firearms instructor, has a clean firearms safety record and served in combat as a Navy SEAL.

The court finds the plaintiff's testimony more credible than the defendant's testimony in many respects. The defendant's financial affidavit understated her income and overstated her expenses. She exaggerated the details of an argument that occurred between the parties in their car while driving from Virginia to Connecticut. She described incidents in support of her present concerns that date back to the plaintiff's attendance at elementary school. These examples of inaccurate or exaggerated testimony and of such remote events all lead the court to question the credibility of other portions of her testimony including, but not limited to, her alleged concerns about the plaintiff's anger or possession of a firearm. As a result, it is unnecessary for the court to now engage in an analysis of the plaintiff's right to bear arms in the context of this case since this court will not impose any restrictions on either party other than those already imposed by federal and state law.

If, at some point in the future, either party has a concern about the other party's use or possession of a firearm, they are free to contact the appropriate authorities for intervention, which may include the seeking and obtaining by law enforcement of a warrant to seize firearms under General Statutes § 29-38c. That section provides that a warrant to seize firearms may be obtained upon a finding of probable cause to believe that a person who possesses one or more firearms poses a risk of imminent personal injury to himself or herself or to others and that the firearm(s) are within or upon any place, thing or person. See *Hope v. State*, 163 Conn. App. 36 (2016) (holding that § 29-38c does not violate the second amendment). Simply put, this court now concludes, based on the totality of the evidence presented over the course of the four day trial, that there is an insufficient evidentiary basis for the imposition of restrictions upon either party that are greater than those otherwise provided by law.

The plaintiff asks that the court award to him counsel fees for having to defend his constitutional right to bear arms. However, the court does not find that the defendant has any greater financial ability to pay counsel fees than does the plaintiff within the meaning of General Statutes § 46b-62. No litigation misconduct has been established. There is simply no factual basis for the plaintiff's position that the defendant should pay counsel fees to him under these circumstances and none will be awarded. Similarly, there is no factual basis for counsel fees to be paid by the plaintiff to the defendant. As a result, neither party will pay counsel fees to the other.

ORDERS AND OTHER FACTUAL FINDINGS

1. Dissolution of Marriage. Effective the date of this decision, the marriage of the parties is dissolved on the ground of irretrievable breakdown and each party is declared to be single and unmarried.

2. Parenting Plan. The Custody and Parenting Plan, dated September 1, 2015, and Stipulation Re Parenting Plan, dated March 8, 2016, are both found to be in the present best interests of the parties' child and they shall be incorporated by reference into the decree of dissolution of marriage. As a result, the parties shall have joint legal custody and the defendant/mother shall have primary physical custody of the parties' child. Each party shall at all times comply with all federal and state laws regarding the ownership, use, possession and storage of firearms. Each party shall take all steps necessary to insure that their child shall not, at any time, have any contact whatsoever with any firearms unless and until the parties otherwise agree in writing; obviously, it goes without saying that it is common sense that a three year old child should not, under any circumstances, at any time, be near a loaded weapon.

3. Financial Stipulation. The financial stipulation, dated March 8, 2016, is fair and equitable, approved and shall be incorporated by reference into the decree of dissolution of marriage. No alimony shall be paid to either party.

4. Virginia Home. The defendant shall transfer to the plaintiff within thirty days of the date of the decision all of her right, title and interest in the Virginia property located at 5500 Summer Crescent, Virginia Beach, Virginia. From and after the date of transfer, the plaintiff shall indemnify the defendant from, and hold her harmless against, any debts, charges or expenses incurred in connection with the property.

5. Counsel Fees. Each party shall pay their own counsel fees.

6. College Education. As requested by the parties, the court shall reserve jurisdiction to enter educational support orders as provided by law.

7. Judgment File. The plaintiff's counsel shall prepare the judgment file within the time required by the rules of practice.

8. Financial Affidavits. The parties' financial affidavits shall be unsealed.



Colin, J.

Decision entered in accordance with the findings. 4/15/16.

Attorneys of record notified on 4/15/16.

H. V. Adams,
Assistant Clerk
4/15/16.