FAMILY COURT OF NOVA SCOTIA
Citation: *B.W. v. A.A.*, 2017 NSFC 12

Date: 2017-06-20
Docket: FLBMCA No. 76469
Registry: Bridgewater

Between:

B.W.

Applicant

v.

A.A.

Respondent

Judge:	The Honourable Judge William J. Dyer
Heard:	March 7, 2017, in Bridgewater, Nova Scotia
Counsel:	Michael K. Power, Q.C. for the Applicant Josh Bryson, for the Respondent

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

By the Court:

[1] A.A. ("A.A.") and B.W. ("B.W.") are the parents of a six year-old child. In mid-July 2011 A.A. started proceedings under the *Maintenance and Custody Act* ("*MCA*"). The result was a Consent Order in early December 2011 that awarded A.A. sole custody of the child with no access by B.W. Both parents were represented by lawyers when the Order was presented for approval.

[2] In late August 2013 B.W. made an application under section 37 of the *MCA* requesting an Order for joint custody of the child with specified access to him. The case languished for many months for a variety of reasons including B.W.'s recurring involvement with the criminal justice system.

[3] The last Order and the present application by B.W. must be considered in the context of one important, intersecting criminal proceeding. B.W. was convicted of sexual assault and unlawful confinement of A.A. and sentenced to three and one half years incarceration. He appealed from the conviction and sentence. By unanimous decision, the Nova Scotia Court of Appeal allowed the appeals from conviction and ordered a new trial. The decision is reported as *R. v. B.W.*, 2012 NSCA 13.

[4] I do not propose to incorporate the entire written appeal decision but a brief summary is warranted. I will paraphrase from it, as need be.

[5] The offences allegedly committed by B.W. are connected to events which occurred on Saturday, November 27th and the early morning hours of November 28th, 2010. By then, A.A. and B.W. had lived together for about one year. They separated in October 2010 when A.A. was pregnant with the child. B.W. was admittedly the father. B.W. allegedly misconducted himself at a cottage where sexual intercourse occurred. The parties gave completely different versions about the incident and also gave differing accounts about how much alcohol A.A. had consumed.

[6] At paragraphs 8 and 9 of the appeal decision there is the following:

> [8] Some things are not disputed. They are: the appellant looked at text messages on the complainant's phone; she was upset he had done so; he was upset at what he saw; she wanted to leave; he did not want her to leave; while partially clothed, the complainant crawled out through the bathroom window and went to her car; he saw her, and against her will, used some measure of force to bring her back inside the cottage where she remained till morning.
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> [9] The next morning, they drove to his parents' home where the complainant had breakfast with the appellant and his mother. The complainant kissed the appellant good-bye and left. On Monday morning the complainant went to the police and complained of being physically and sexually assaulted and unlawfully confined. Charges were laid. The Crown proceeded by indictment.

[7] B.W. was convicted at a trial held in early February 2011. As noted, he was convicted on charges of sexual assault and unlawful confinement but acquitted of

common assault on the basis that the latter charge was incidental to the sexual assaults. B.W. was sentenced in mid-February 2011. He was in custody when his appeal was heard and, indeed, he was in custody at the time of the last Family Court Order.

[8] In considering the fact findings of the trial judge, the following observations were made in the appeal decision:

> 13 The judge found he was "obliged to convict". The Crown rightly concedes that the trial judge misapprehended the evidence. The complainant at no time testified that she felt confined when they were in S. and continuously thereafter. In fact, her evidence was to the contrary. She testified that she willingly drove the appellant to the cottage and willingly stayed.
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> 14 She consistently said she did not want to stay the night. But it was not until later in the night, after sexual intercourse, and the argument over the contents of her cell phone, that she said she wanted to leave but could not because the appellant had her car keys and phone. The appellant testified the only reason he prevented her from leaving was because she was intoxicated and he needed to stop her from driving in her condition.
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> 15 The trial judge failed to carry out any analysis of the conflicting evidence between the complainant and the appellant about the sexual contact. Instead he adopted a shortcut which he said made such an analysis "academic". It may very well be correct that if a person is actually unlawfully confined, that any apparent consent he or she may give to sexual conduct may not be true consent, but the complainant did not clearly testify to being unlawfully confined until after sexual intercourse had occurred. Nor did the trial judge examine the evidence to determine if the conduct of the appellant preventing her from driving a motor vehicle while her ability to do was impaired was unlawful.

[9] In the penultimate paragraph of the decision authored by Beveridge, J.A., there is the following passage:

> 21 **I am not persuaded by the appellant that the evidence is so wanting that a properly instructed trier, acting judicially, could not reasonably convict. There was evidence at trial reasonably capable of supporting a conviction. The complainant testified that she did not consent to sexual conduct with the appellant and told him so. She also denied being impaired and said she was confined against her will.** Accordingly the appropriate remedy is to quash the convictions and order a new trial on all of the counts in the Indictment, including that of common assault, should the Crown be so disposed to proceed again. (**Emphasis added.**)

[10] In support of his present application, B.W. testified and offered affidavit evidence. Supporting affidavits from two collateral witnesses were also entered.

[11] R.W. is B.W.'s father. He is retired and lives in the local area. He wrote that he is prepared to assist his son in developing a relationship with the child and that he will do whatever he can to foster a safe and loving environment for this purpose. With that in mind, he also expressed a wish to establish a relationship with the child as a grandfather and wrote that he is prepared to do whatever is necessary to foster it. He stated he has no criminal record. He offered no evidence about his son's extensive criminal record, the specific matters involving A.A., or his understanding (if any) about the impact of past events on the interpersonal dynamics between the parents as they may relate to the child.

[12] C.W. is B.W.'s common-law spouse. She is approximately 39 years old and is employed outside the home. She and B.W. live in a six bedroom house in Lunenburg County. C.W. has two children by a previous relationship. They are 13

and 22 years of age, respectively. She stated she has no criminal record. She characterized B.W. as a good and loving father to her children, and also to his son, T.W., who used to live with them.

[13] C.W. said that she and B.W. became engaged in December 2014. She wrote that she is prepared to assist him in developing a relationship with the child and will do whatever she can to foster a safe and loving environment. However, like the paternal grandfather, C.W. side-stepped any reference to B.W.'s legal history and appreciation (if any) of the impact of past family violence. She has not met the child.

[14] In his December 31, 2014 affidavit B.W. also referred to T.W.. B.W. wrote that he had full custody and primary care of T.W. from 2001 onward, but did not elaborate. T.W. is now an adult and living independently. According to B.W., T.W. would like to have contact and get to know his younger brother. T.W. did not offer any evidence at the current hearing.

[15] B.W. said that the criminal conviction (later overturned) in which A.A. was the complainant resulted in him spending over eight months of incarceration on remand before his final release. He wrote that the Crown did not re-prosecute the sexual assault charge, but neglected to mention [in his affidavit] that he

subsequently entered a guilty plea of common assault. In any event, he insisted that over the months and years, and despite having no access to the child, he has continued to wish for contact and asserted that he loves his son.

[16] B.W. is now in his early forties and wrote that he is employed full time as a carpenter. He said his work takes him all over the Province and that he earns about $41,000 annually. Like C.W., B.W. provided information regarding his residence and provided some demonstrative photos of the surroundings.

[17] B.W. acknowledged that in August 2013 he was convicted of threatening A.A.'s then partner, T.H. This was the same month he started the variation application. He received a 120 day conditional sentence. He alleged that T.H. has abused controlled substances in the presence of the child, but cited no sources; and he called no witnesses to support the claims.

[18] Later, in his 2014 affidavit B.W. wrote "I admit that I have a criminal record, but I am committed to turning my life around". As will later appear, he was unable or unwilling to keep that commitment.

[19] B.W. believes that it is in the child's best interest to have a relationship with both of his parents. He said he loves the child and wishes to start building that relationship. He suggested that access might commence on a supervised basis,

initially “in order to bond with my son”. He offered to do whatever the Court requires in order to be permitted to establish and maintain the relationship. He did not articulate with any clarity or precision the benefits the child would derive.

[20] Recognizing A.A.’s concern about direct contact with him, B.W. suggested that contact and transition for access purposes could be facilitated through a third party including, if necessary, a designated official from the local child protection agency. There was no evidence from agency representatives corroborating eligibility for, or the availability of, agency services in the present situation.

[21] B.W. gave assurances that he has not been in contact with A.A. since he was released from custody. He stated he has no intention of contacting her. Rather, he said he just wants to have a connection with his son and to establish a relationship with him.

[22] During testimony, B.W. insisted he does not currently use non-prescription drugs or drink alcoholic beverages. He outlined some of the activities enjoyed with his present family unit. He smokes cigarettes. He does not regularly attend church or profess any strong religious faith or beliefs. He confirmed T.W. (now about 23 years old) lives in Ottawa. He conceded T.W. has a criminal record and has served time in custody, but gave no particulars.

[23] At this juncture I will say that I found no expression of remorse or contrition by B.W. for past conduct directed to, or involving, A.A.. He professed some recognition of what he described as A.A.'s "protection concern" - but only in the context of proposing third party, supervised access. He articulated no empathy or insight into the impact of family violence generally, or upon A.A. personally. With respect, I find this to be a troubling and glaring gap in what he knew was a central theme in the case and a significant consideration for the Court by statute and case law.

[24] J.E. ("J.E.") is the mother of T.H. In her December 2, 2015 affidavit she wrote that she knows A.A. as the child's sole caregiver since birth and, to her knowledge, that B.W. has never met the child. She has maintained regular contact with A.A. and the child, and frequently babysits the child. Near the end of July 2013, she said she was at home when T.H. returned from work and pulled into the backyard driveway. She said she saw another car immediately drive in behind him. She wrote that she heard T.H. holler, "Who are you? I don't know you?" She said she opened the back door of the house and saw B.W. swinging his fist at T.H. repeatedly. According to her, T.H. stepped back to avoid being hit. She wrote that she asked B.W. what he was doing and told him to leave. According to her, B.W. yelled, "My son is calling him 'Daddy'". Her evidence was that B.W.

continued to yell derogatory comments about T.H. and she continued to tell him to leave. On this occasion, she was undergoing chemo-therapy and had very little energy to respond to the situation. She said that B.W. eventually left. The incident was reported to the RCMP and she understands that B.W. was later charged (as discussed elsewhere).

[25] A few days later, according to J.E., she was getting ready to go to work when she heard a knock on her door. When she opened the door, she saw B.W.. She said he began by telling her he was there to apologize. However, according to her, he immediately told her he was going to go to T.H.'s place of work to "put him in the hospital". She said B.W. then went on to tell her he would get his son T.W. to do it for him - so one way or the other, T.H. would end up in the hospital. According to J.E., B.W. said T.W. would have no problem doing this because "he doesn't mind going back to Burnside for his old man because we run Burnside". Her version is that B.W. then told her that she would never see the child again and that he was going to go to the babysitter's place to get the child. J.E. said she believed B.W. waited to come to her door when no one else was home with the intention to take the child if he had been there. This, of course, is pure speculation. In any event, she ordered him off her property and she said his response was that

T.H. would be dead by the end of the day. She closed the door and reported the incident to the RCMP.

[26] On three subsequent occasions, J.E. said she observed B.W. come to their backyard and shake his fists and/or yell out names. She said he makes nasty remarks when she or members of her family see him in public. She alleged that since late 2013 B.W. has been sending text messages to T.H. and that she has seen messages in which B.W. has insulted A.A. with degrading names. Indeed, her evidence was that one message included a photo of A.A., naked, with a vulgar reference.

[27] On those occasions that she has observed B.W., J.E. broadly alleged that he has been violent and very aggressive; and she expressed concern about the impact such behaviour could have on the child.

[28] In his December 4, 2015 affidavit, B.W. responded to some of J.E.'s assertions. Referring to paragraph 9 in the J.E. affidavit, he wrote as follows:

> 5. With respect to paragraph 9, I wish to comment on this incident. I did not at any time swing my fist but I did point my finger and this was deemed to be an assault. I confirm that I did yell comments to Mr. T.H. about not consuming alcohol and driving with the child and not to have the child on the four wheeler without a helmet. These comments were made for the safety of my child and in his best interest.
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> 6. With respect to paragraph 10, it was not "a few days later" but in fact on Halloween 2013 and I went there to apologize to J.E.. At no time did I threaten

> Mr. T.H.'s [sic] life. My statement at the time was that I felt that two dads are better than one. Ms. J.E. stated to me that in her opinion T.H. was the child's dad and I would never see my son again. I was subsequently arrested and charged in November 2013. Josh Bryson was the Crown Prosecutor and I plea bargained with Mr. Bryson to receive a 120 day Community Sentence Order.
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> 7. With respect to paragraph 12, I deny that I sent any text messages or inappropriate photographs to [sic] Ms. A.A..
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> 8. With respect to paragraph 13, I have had no contact with J.E. [for] over two years (since the Halloween incident in 2013).

[29] Weighing the conflicting versions of what transpired in 2013 and later, I find there is some corroboration for J.E.'s version in other evidences presented on behalf of A.A.. I am mindful that J.E. was not called to testify. Her evidence is not determinative. That said, when considered against the background of all the other admissible evidence, I find it more likely than not that J.E.'s recollections are closer to the truth than B.W.'s. I will add that the foregoing is illustrative of what I find to be B.W.'s propensity to minimize responsibility for his conduct. As discussed elsewhere, he routinely deflects responsibility onto others and attempts to divert attention away from himself and his behaviours. In the course of doing so, I find he rarely, if ever, expresses empathy or remorse. I find any insight about the seriousness of his conduct or the impact on others is noticeably absent.

[30] Social worker, Neil Kennedy, was engaged to complete a Custody and Access Assessment upon the consent of both parties. His conclusions and

recommendations were straight foR.W.ard and are reproduced in their entirety below:

> I do not for a minute doubt B.W.'s sincerity or wish to minimize his attempts at changing his life around, however, there is no relationship between father or [sic] son. In most cases these assessments occur in the context of an existing relationship which needs to be maintained. When we discussed his drug use he indicates that he discontinued this on his own presumable cold turkey. This does happen. He points out that when he was in Federal Penitentiary he was not able to participate in a program as he was appealing his conviction.
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> I reviewed B.W.'s criminal history and it is chronic and spans a period of twenty years not including as a young offender. He tends to minimize the impact on [sic] this in relation to the child. First of all, B.W., is currently on a conditional sentence in the community and this would be followed by three years' probation. Presumably if he was to have further contact with the criminal justice system he will be incarcerated. This may or may not happen. If it did what would be the impact on the child if contact was occurring. Also there is the issue of being a role model.
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> B.W.'s son T.W. is I believe also on probation and has served time in Burnside Correctional Facility for weapon offences. He currently does not live with B.W. and C.W. but did so until recently.
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> I am also concerned when I review B.W.'s criminal history and note that there were a number of incidents of failure to attend court, failure to comply with conditions, breaches, etc. Also, he appears to have made an effort in 2013 to confront T.H. as to what he perceived as a parenting issue. This does not bode well for a cooperative parenting arrangement.
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> In conclusion, I am of the opinion that there should not be any change for parenting time of Mr. B.W.. The absence of any existing relationship is of significant importance.

[31] During his work, Kennedy visited B.W.'s residence. He observed no safety or other issues that would have an impact on parenting and he confirmed that B.W. lives in a rather modern, large and immaculate home.

[32] Kennedy did not interview the child because of his age. In Kennedy's opinion, it would be inappropriate to do so given not only the child's age but the central issue – that is, whether there should be any contact between the child and B.W.. Although Kennedy had opportunity to observe the child within the mother's home, he studiously avoided any mention of B.W. in the child's presence..

[33] Kennedy interviewed B.W.'s current partner, C.W.. He confirmed that C.W. supports B.W.'s application, her willingness to facilitate access if awarded and her general presentation as an individual with no outward issues or concerns.

[34] As was the case with A.A., Kennedy relied heavily on self-disclosures by B.W. regarding his personal circumstances and his current application and position. He did not attempt to independently verify any of the substantive disclosures made by either parent to him during the course of their respective interviews.

[35] Asked directly that if access was granted to B.W., if access could be monitored, Kennedy cautiously answered that "potentially" it could be. He did not elaborate. He emphasized that communication and cooperation between parents is essential to carry out most, if not all, parenting plans but stated that such is clearly absent in the present case.

[36] That there is no current father and son relationship in the present circumstances was found by Kennedy to be exceptional and, in all of his years of practice, Kennedy said he has not encountered a similar situation. In that regard, Kennedy's evidence was that he has authored over 300 assessments and that he has qualified as an expert and testified at least 50 times in various courts.

[37] Kennedy expressed concern about B.W.'s significant legal history (discussed elsewhere). He described B.W.'s most recent involvement with the criminal justice system as significant and postulated that episodic incarceration is generally problematic and disruptive to any parent/child relationship. He expressed his opinion that any parent who has been repeatedly in and out of jail is unlikely to be the best role model. And he received with considerable caution, the assertions by that he had "turned his life around".

[38] Kennedy emphasized that this is not a case where a parent is trying to re-establish a relationship with a child. Rather, this is a situation in which there is no parent/child relationship and the child would not even recognize the parent who currently has no contact.

[39] Kennedy corroborated that A.A. continues to have concerns about any contact with B.W. because of the history of alleged domestic violence and other issues surrounding B.W.'s legal history and lifestyle.

[40] In considering the foregoing, I am mindful that Kennedy's assessment is not binding on the parties or the court; and that his evidence must be considered along with all evidence presented on behalf of the parties.

[41] A.A. submitted an affidavit and testified. She lives in the local area with the child and her 11 year-old daughter by another relationship.

[42] Her evidence was that the parties started to co-habit in December 2009 and separated in mid-October 2010. While co-habiting, she said she became increasingly aware of B.W.'s "tendency towards volatile behaviour". She wrote that she observed B.W. buying illegal drugs, including prescription pills. She alleged she frequently came across glass plates with crushed pill residue and "snorting straws". She said she made these observations during her pregnancy with the child and around the time of the separation.

[43] A.A. briefly recounted her version of the events in October 2010 which led to criminal charges against B.W. and the criminal court cases discussed elsewhere. She stated that upon learning that a new criminal trial had been ordered for B.W.,

that she "could not physically bear the thought of going through a second trial". By then B.W. had served many months in custody. With her knowledge, if not consent, the Crown did not move to retry the case but accepted a guilty plea to a lesser offence.

[44] A.A. alleged, and B.W. denied, that he texted a topless photo of her with derogatory comments [discussed above] to her former boyfriend. She said she gave a statement to the police about the incident. She referred to B.W.'s lengthy criminal history (discussed elsewhere). She also referred to events in 2015 when police officers came to her house looking for B.W. who was apparently on "house arrest" at the time. I find this incident was unrelated to the current case except to indicate that B.W. continued to be on police radar, so to speak, during 2015.

[45] A.A.'s evidence was also to the effect that within the past couple of years, B.W. showed up at her former boyfriend's house and allegedly assaulted him. She alleged that B.W. also made threats to the boyfriend and his mother but A.A. has no personal knowledge of these matters.

[46] A.A. wrote that she continues to fear for the child and her daughter's safety and well-being. She said she changed her son's daycare service provider when B.W. allegedly threatened her former boyfriend and she was concerned that B.W.

might attend at the daycare facility. More broadly, she wrote that she suffered significant physical and emotional abuse throughout her relationship with B.W. and that she continued to suffer even after the relationship ended. She said she sought treatment for extreme anxiety, frequent panic attacks, uncontrollable crying, claustrophobia, physical illness, etcetera. She said she never had these conditions before her relationship with B.W.. She stated her family physician has prescribed Xanax as part of her treatment regime. After the relationship with B.W. ended, A.A. participated in several courses offered by Harbour House for victims of domestic abuse and also engaged in counselling. I am mindful that A.A. did not provide any medical or other professional reports. However, I found her testimony to be generally credible and trustworthy on these issues.

[47] Before concluding, A.A. described herself as a "shell of my former self" because of her relationship with B.W.. She wrote that "the thought of even facing him in the courtroom for this hearing is virtually unbearable". During testimony, she emphasized that she and B.W. could never co-parent the child and that she remains fearful of him. She stated "he's destroyed my life".

[48] A.A. is opposed to any contact by B.W. with the child. She asserted that it is not in the child's best interest to have any contact at this time and reiterated her

characterizations of him as an angry, violent and manipulative individual who she, in good conscious, cannot trust to be with her son.

[49] A.A.'s evidence was that she has gradually managed to stabilize her personal circumstances and that since the child's birth she has maintained a safe and nurturing environment, schedules, etcetera for him. She expressed concern that the child would withdraw emotionally and become fearful upon any contact with B.W.. She reaffirmed that the child's life is currently happy and free from negativity and stress. As at the hearing, the child was continuing with his schooling and daycare without any obvious difficulties or challenges.

[50] A.A. works outside the home part-time. She gave some elaboration regarding her employment and childcare arrangements. It is likely that A.A. will re-locate to Halifax County to better pursue employment opportunities.

[51] According to A.A., B.W. has paid no child support for the child's benefit, directly or indirectly, but she does not seek child support in any event.

[52] During testimony, A.A. confirmed that she is now the mother of a newborn child such that she is now the principal caregiver for three children.

[53] The child has contact with T.H.. This relationship was described in positive terms. A.A. acknowledged that the child may perceive T.H. as his father,

but A.A. insisted that she has never disclosed who the biological father really is. Notwithstanding the current benign relationship between she and T.H., she admitted they separated in 2013, that there were criminal court proceedings involving alleged domestic violence. She conceded that she did not disclose all the particulars of her relationship with T.H. to Kennedy when interviewed. When pressed, she candidly admitted that T.H. continues to have regular contact with the child and that the child refers to him as "Daddy". When asked about the domestic violence between her and T.H., she admitted that it did prompt the break-up of their relationship but she asserted that the events did not occur in front of the child. More to the point, she said there have been no recurrences and that her relationship with T.H. is now stable and non-violent. She confirmed that J.E., who is T.H.'s mother, is permitted to have contact with the child whenever she wants and there is usually contact on Tuesdays and Thursdays. I accept her evidence regarding T.H. and his family.

[54] A.A. expressed general awareness about professional services that might assist with establishing a parent/child relationship between B.W. and the child. However, that has not moved her to reconsider her position. She firmly believes that the child is far too young to understand the complex background circumstances and the implications of having B.W. now introduced into his life.

[55] A.A. broadly asserted that B.W.'s son T.W., like his father, has been involved in criminal activity and made poor lifestyle choices that she believes can be attributed to B.W.'s parenting. She fears that any contact with B.W. would bring or attract involvement with T.W. whom she also believes would be a very bad influence. (As mentioned, T.W. did not provide any evidence at the hearing.)

[56] A.A. characterized the child as very impressionable and fears that any significant changes in his life will "throw him off". She said he is just learning about the world about him, boundaries and so forth. I accept this evidence.

[57] A.A. did not entirely rule out any future contact by B.W. with the child. She allowed that such might occur when it is appropriate. I find the questions and answers along these lines were highly speculative and, with respect, did not assist with resolution of the immediate issues.

[58] Exhibit 6 is the J.E.IN Offender Summary for B.W.. It spans 64 pages, dating back to December 1992. It includes a wide spectrum of orders and processes (eg. arrest warrants, remand warrants, fine orders, undertakings, probation orders, committal orders, etcetera) and includes both provincial statute cases (eg. *Motor Vehicle Act*) and federal statute cases (eg. *Criminal Code of Canada*). The contents were not challenged by B.W..

[59] It is impractical to precis the entire document. The Summary speaks for itself. B.W. candidly admitted that his criminal record includes convictions for serious offences such as break and enter, and assault, and that he has served about a half dozen custodial sentences. B.W. admitted that in mid-November 2013 a conviction under section 733.1(1) of the *Criminal Code* resulted in a Conditional Sentence Order plus probation. At the same time, a conviction for assault (section 266) upon T.H. [discussed above] that occurred in October, 2013 led to a Conditional Sentence including 120 days in custody plus probation.

[60] October and December 2015 saw sentencing for charges under section 145(2)(b) of the *Criminal Code* and section 348(1)(a) – two convictions – which attracted sentences including custody (11 months), probation (3 years), restitution, firearms prohibitions, "secondary DNA", etcetera.

[61] During testimony, B.W. admitted that his most recent conviction in early September 2016 (by guilty plea) resulted in a 120 day custodial sentence which was completed in November 2016. As at the hearing, he was still under a Conditional Sentence Order and house arrest (two years) plus probation.

[62] When B.W. was questioned about his convictions - notably the assaults - as mentioned before, I find he minimized the seriousness of the charges and his

actions and strived to deflect responsibility on to the complainants/victims. (See his evidence about T.H., for example,) That said, he emphasized that his guilty pleas demonstrate some acceptance of responsibility and that he has suffered the consequences of his misconduct.

[63] B.W.'s evidence was that the custodial and probation sentences prompted counselling and other services. However, no professional reports were presented to give any substance to his generalized assertions. If professional interventions and services or supports have helped him, and if B.W. thought they might help pave the way for acceptance of his assurances, in my opinion there should have been evidence from those sources. There was none.

[64] I also find B.W. did not offer any credible explanation for his continued involvement with the criminal justice system after his experiences before the Supreme, Appeal, and Provincial Courts (in relation to A.A.) and after he started his variation application. And, with respect, he made no serious effort to explain how his substantial record and episodic criminal activity would be addressed with his son should access be granted, let alone how the child's best interests will be advanced by exposing him to the same.

Legal Framework

Parenting

[65] I will paraphrase section 18 of the *MCA* as it read at the time of the hearing [ie., before recent amendments and renaming of the statute].

[66] The court has authority to make an order that a child shall be in or under the care and custody of a parent and to also make an order regarding access and visiting privileges.

[67] Unless otheR.W.ise ordered or provided by statute, the father and the mother of a child are joint guardians and are equally entitled to the care and custody of the child. In the present case, there is a consent order in place vesting custody in the mother with no access by the father.

[68] In any proceeding regarding parenting, paramount consideration must be given to the best interests of the child.

[69] In determining the best interests of the child, the Court must consider all relevant circumstances. Relevant circumstances include those set out in section 18(6) subsections (a) to (j). Some subsections do not pertain in the present case.

For example, the child's views and preferences cannot be ascertained given his age and stage of development.

[70] The impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed is a relevant factor. In that regard, the Court must consider the impact on the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child and the appropriateness of an arrangement that would require cooperation on issues affecting the child, including whether requiring such cooperation would threaten the safety or security of the child or of any other person.

[71] "Family violence, abuse or intimidation" is defined in section 2(da). It means deliberate and purposeful violence, abuse or intimidation perpetrated by a person against another member of that person's family in a single act, or a series of acts forming a pattern of abuse, and includes causing or attempting to cause physical or sexual abuse as well as causing or attempting to cause psychological or emotional abuse that constitutes a pattern of coercive or controlling behaviour. Such behaviour may include engaging in intimidation, harassment or threats, including threats to harm a family member, other persons, pets or property. It may also include placing unreasonable restrictions on, or preventing the exercise of, a family member's financial or personal autonomy. The section also contemplates

stocking or intentionally damaging property but does not include acts of self-protection or protection of another person.

[72] The authority to consider a variation application to a Parenting Order is found in section 37 of the *MCA*. There is a threshold requirement that there has been a change in circumstances since the making of the last Order. Circumstantial changes encompass those related to the child and the parents. Should the threshold test be met, the Court may consider all of the circumstances, past and present, in determining what is in the child's best interests, as at the variation hearing, upon considering the evidence and the factors set out in section 18 plus the relevant case law.

[73] I conclude there have been changes in the circumstances since the last Order as contemplated by cases such as *Robichaud v. MacKay,* 2014 NSSC 199, particularly at paragraphs 34-37. The intersecting criminal court cases involving the parents have been concluded. In that regard, B.W. served a period of incarceration and was ultimately released. A two-year "no contact" prohibition imposed by another court has expired.

[74] Both parents have re-partnered and their personal, employment, etcetera, circumstances have changed during the intervening years. With the passage of

time, there have been changes in the child's age, stage of development, and needs. Accordingly, I have considered all of the evidence presented going to the merits of B.W.'s application in the context of the child's best interests.

[75] I am mindful that the onus is on the parent who seeks to deny or restrict parenting time to establish by a preponderance of evidence that such is in the child's best interest. I find A.A. has done so.

[76] The following was submitted on behalf of the mother:

> 9. With respect to violence and threats of violence, the following principles emerged from *Ahdo v. Ahdo*, (1993) CANLII 3124 (NSCA), a copy of which is attached, with respect to supervised access:
>
> (a) The right of a child to know and to be exposed to the influence of each parent is subordinate in principle to the best interests of the child;
>
> (b) The burden of proof lies with the parent who alleges that access should be supervised or denied, although proof of harm need not be shown in keeping with the decision of *Young v. Young* [1993], 84 C.L.R. (2d) 1 (SCC);
>
> (c) The court must be slow to compromise or extinguish access, unless the evidence dictates that it is in the best interests of the child to do so.
>
> 10. In *V.S.J. v. L.J.G.*, [2004] O.T.C. 460 (SC), Blishen J. conducted an extensive review of the case law involving the termination of access. She summarized the seven factors which are frequently cited in support of access termination, often in combination form, as follows:
>
> (a) Long term harassment and harmful behaviours towards the custodial parent causing that parent and the child stress or fear;

(b) History of violence; unpredictable, uncontrollable behaviour; alcohol, drug abuse which has been witnessed by the child or presents a risk to the child's safety and well-being;

(c) Extreme parental alienation which has resulted in changes of custody and, at time, no access orders to the former custodial parent;

(d) Ongoing severe denigration of the other parent;

(e) Lack of relationship or attachment between the noncustodial parent and child;

(f) Neglect or abuse to a child during the access visits; or

(g) Older children's wishes and preferences to terminate access.

11. In *Studley v. O'Laughlan,* (2000) CarswellNS 190, access was terminated because the father suffered from significant anger management and control issues for which professional assistance was not sought. There was no parent-child relationship established despite the regime of supervised access which had been designed for that purpose. The father's relationship with the child was found to be "accented by abuse[d], hot temper and cruelty".

12. In *Baker v. Zwicker*, (200) CarswellNS 376 (Fam. Ct.), access was terminated because the father made little effort to change his violent behaviour and abusive attitude. Further, the father had no access for a period of approximately three years.

13. In *Roach v. Roach*, (2008) NSSC 384, a copy of which is attached, supervised access was terminated due to the father's little ability to self-monitor and self-control, and his tendencies to be reactive, impulsive, and manipulative. The father was also found to be degrading to a female roommate, attacking her personal integrity and confidence by yelling, name calling and using language which should never be directed at anyone.

[77] *Abdo* pre-dates enactment of the section 18(6) amendments and codification of the relevant considerations. Nonetheless, in my opinion, the Nova Scotia Court of Appeal's commentary continues to provide insight and guidance.

[78] The mother has been the child's sole custodial parent since his birth. The father has had no contact with the child. There is a history of significant domestic violence as defined by the statute (perpetrated by B.W.). Despite the passage of time, A.A. remains fearful of B.W. and continues under medical care for issues directly related to B.W.'s past conduct. B.W. has evidenced no empathy or insight regarding the impact of his conduct on A.A. and expressed no remorse. That the conduct of perpetrators may have long term direct effects on victims, and thereby indirectly affect parent/child relationships are foreign concepts to B.W.. I find B.W. is propelled by his own wishes, preferences and needs which are relevant considerations, but not decisive. B.W. has an extraordinary criminal record which includes crimes of violence and other serious offences. Despite assurances, his episodic involvement with the criminal justice system has continued until recently.

[79] B.W. confined his original application to requests for joint custody and access (ie., not shared parenting). the child's best interests are paramount.

[80] There are many reported cases about the "best interests of the child". For example. Justice Beryl MacDonald wrote about the topic in *Nova Scotia (Minister of Community Services) v. C.D.C.* 2015 NSSC 123. Regarding *MCA* section 18, Justice MacDonald touched on joint custody [and shared parenting] arrangements. In my opinion, her comments may be applied to most, if not all, elements of parenting as contemplated by the statute.

[81] She wrote, in part:

> Section 18 of the *MCA* summarizes what should be considered by a court when it is asked to determine what arrangements are in a child's best interest. Section 18(8) provides that in making an order concerning care and custody or access and visiting privileges in relation to a child, the court shall give effect to the principle that a child should have as much contact with each parent as is consistent with the best interest of the child. Paragraph 8 does not suggest there is to be a presumption it is in the best interest of children to be parented by both parents in a joint custodial equal time sharing arrangement, although many strive to suggest this is so. The question is - what arrangement is in the best interest of children given their ages, stages of development, personalities, educational and other needs in the context of the ability of each parent to carry out his or her parental responsibilities and obligations?
>
> … Conflict between parents does not necessarily mean they cannot be awarded joint custody or shared parenting. If there is sufficient indication of their ability to place the needs of the child before personal needs and to cooperate on issues of vital importance to the child these parenting arrangements may be appropriate. (*Gillis v. Gillis* (1995), 145 N.S.R. (2d) 241 (N.S.S.C.); *Rivers v. Rivers* (1994), 130 N.S.R. (2d) 219 (N.S.S.C.)
>
> It has been suggested that parents who have joint custody and shared parenting may be less likely to consider their parenting role to have been diminished and therefore these parents are less likely to withdraw from meaningful contact with their children. Continuing to respect the role and responsibility both parents have in fulfilling parental obligations may encourage parents to overcome existing conflict between them. These are suggestions found in reported decisions. However, joint custody and shared parenting must not be granted as a form of

> wishful thinking. The nature and extent of the conflict between the parties must be analyzed to determine if joint custody and the requested parenting plan is in a child's best interest.

[82] I adopt Justice MacDonald's analysis and statements of principles, by reference. The lists of considerations developed by judges when deciding upon the parenting arrangements in any given case are not exhaustive; and each case must be decided on its own facts and merits.

[83] In the present case, I find insufficient evidence to sustain the request or proposal for joint custody. There is no communication and no cooperation between the parties. Minimum standards of trust and respect between them needed to sustain access - let alone joint custody - are glaringly absent. Interpersonal relations between the parents are toxic. All of this is deep-rooted, troubling, and in my opinion, unlikely to change in the foreseeable future.

[84] The parents should have clear direction about primary care and decision-making. I find the child needs safe, secure and stable parenting that (for now) must preclude direct or indirect interaction or contact between his parents. I conclude that the child should not be subJ.E.cted to wholesale upheaval in his life that would inevitably follow should B.W.'s prevail. His wishes and preferences are important, but must yield to what obJ.E.ctively is best for the child.

[85] Without hesitation, I conclude this is an inappropriate case for any consideration of "joint custody". I also conclude that it is not in the child's best interests that B.W. be granted access. Child support was not requested; no order for support is made. B.W.'s applications with respect to custody and access are dismissed.

There were no submissions regarding court costs. If they are sought, and if the parties cannot agree on the award, written submissions should be submitted within three weeks of the release date of this decision.

[86] Mr. Bryson shall submit an appropriate Order within ten business days.

Dyer, J.F.C.