IN THE FAMILY COURT OF NOVA SCOTIA
Citation: J.D.M. v. H. J. M., 2004 NSFC 18

Date: November 30, 2004
Docket: FTMCA-020811
Registry: Truro

Between:

J. D. M.

Applicant

v.

H. J. M.

Respondent

Editorial Notice

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

Judge:	The Honourable Judge Corrine E. Sparks, J.F.C.
Heard:	October 19, 2004 and November 9, 2004 , in Truro, Nova Scotia
Written Decision:	November 30, 2004
Counsel:	J. M., personally H. M., represented by Suzanne Litke, assisted by senior law student, Sarah Dykema

By the Court:

[1] At issue in this case is the suitability of joint custody as an appropriate child care arrangement for S. M. M., who is four years of age. Her parents, J. D. M. and H. J. M., cannot agree about child care arrangements as Ms. M., the applicant, claims there have been ongoing communication difficulties with the present co-parenting arrangement between herself and Mr. M.. Mr. M., in contrast, contends the present joint custody agreement should not be disturbed and he puts forth a parenting plan which effectively amounts to shared physical residential care for S..

[2] S. seems to be a reasonably well adjusted child who has benefitted from the love, affection and attention of two devoted parents. However, at one point, Ms. M. was concerned enough about S.'s behavior that she sought the assistance of a child psychologist for S.. These sessions have since been discontinued. Notably and regrettably, the court does not have a professional assessment of S.'s needs.

[3] Presently, S. is in the day to day care of her mother and enjoys parenting time with her father each week from Thursday to Saturday or Sunday alternatively plus special events. S. is enrolled in daycare, but this will end shortly as her mother plans

to relocate soon to another community due to her pending marriage. This new community, however, is relatively close in distance, i.e. 15 minutes, to Mr. M.'s residence. As well, S. will have to be enrolled in school next year; both parents agree child care arrangements should be settled before school starts. Geographical location of school enrollment is one of several contentious issues which separate the parents in terms of long term plans for their child. This, and others areas of disagreement, will be canvassed more fully later in this decision. Mediation services have been used in the past, before the original court application in 2002, but not since the parties entered into two separate consent orders.

[4] Before embarking upon a review of the evidence, there are legal terms which have been used during the course of this hearing which are nebulous and less than clear and precise to the court. In recent years, courts and litigants alike have interchangeably used the terms "joint custody", "shared custody', and even "parallel parenting". Although both parents here have completed a Parent Education Program offered by the Truro Family Court, there continues to be confusion about the definition of these terms. No definitions are offered in the **Maintenance and Custody Act ("MCA")**. The **Divorce Act**, however, does provide a measure of guidance in that it prescribes principles, including maximum contact with both

parents, which should be balanced in any decision promoting the best interest of the child. With pending amendments of the Federal legislation, there will likely be more concrete guidance and clarification respecting the meaning of terminology frequently used in Family Court proceedings such as this. There have been legislative attempts in other jurisdictions such as Washington State, USA; Australia and the United Kingdom to define "joint custody", "shared custody", and "parallel parenting" with definitions statutorily prescribed. Nevertheless, these same definitions, although legislatively precise, have been implemented with mixed results for both parents and children, see: *Hughes, Elizabeth; The Language and Ideology of Shared Parenting in Family Reform: A Critical Analysis*, 2003 21.1 Canadian Family Law Quarterly at page 41 where it is emphasized that:

> ... joint decision - making after divorce is largely an artificial construct, a legal ambition that does not operate in practice according to its theoretical aspirations, except in the minority of cases where the parents are highly committed to its philosophy. There is little evidence that orders bearing the label of "joint legal custody" or "shared parenting" actually result in shared child care responsibilities, increased cooperation, or reduced parental conflict.

[5] Indeed, the philosophy and resulting public policy behind this apparent shift in terminology is laudable as the public policy promotes a shift toward a more egalitarian sharing of parental responsibilities post-separation and divorce. However, even with a strong legislative mandate, these various parenting arrangements remain

a questionable legal instrument to facilitate co-operative parenting in the face of hostilities, especially chronic hostilities, between parents. The key determination for the court in examining the appropriateness of a shared parenting arrangement is the level of conflict between the parents, and the overall ability of two parents to address, from time to time, and perhaps even daily, the ongoing needs of their child, see: *McCann v. McCann* (1993) 120 N. S. R. (2d) 59 and *Rivers v. Rivers* (1994) 130 N. S. R. (2d) 219.

[6] There are, nonetheless, cases where courts have permitted these various shared child care arrangements even in the face of intense, chronic and deep rooted conflict between parents with courts by fiat deciding that parents shall co-operate by exchanging communication or access notebooks, resolving conflicts through a mediator, police enforcement and so on; for example, see: *Broder v. Broder* (1998) 42 R.F.L. (4th) 143 and *Burwash v. Mirosh* (2001) 282 A.R. 399 (Alta. Q. B.).

[7] Nevertheless, broadly speaking, it is perplexing to understand how the court can modify, even change, clashing parental behaviors when conflict and confrontation have become entrenched over years. Moreover, it becomes more disconcerting to award shared child care responsibilities when trained professionals, such as social

workers, psychologists and others, are often unsuccessful in changing the omnipresent combative behavior between parents, even with the aid of, often prolonged, therapeutic interventions. Perhaps it takes tremendous belief and faith in the long reach of court orders to curtail, or adjust, deleterious human behaviors which compromise the best interest of a child. It is apparent some courts, at times, simply will not choose one parent, but rather will impose a shared parenting arrangement despite major and chronic parenting differences between two parents, believing all along that a strictly worded order with "rules of engagement" will eventually serve the best interest of the child.

[8] Having said that, courts have also declined to order shared parenting arrangements where there is persistent parental conflict; for example in *Meyer v. Meyer,* [2002] O.J No. 3013 (Ont. S.C.J.) and particularly *Kappler v. Beaudoin* (2000) 6 R.F.L. (5th) 269 (Ont. S.C.J.) where Justice Rutherford stated:

> I appreciate that there has been recent attention and public debate on what is perceived to be a bias in the courts in favour of mothers being granted custody of children in preference to fathers. The cry for co-parenting is loud. I am all for it, but only where it is likely to be better for the children than some other arrangement. I cannot simply turn my back, however, on the accumulated wisdom and learning in cases and the literature which cautions against co-parenting and joint custody in circumstances in which the parents are unlikely to achieve a sufficient level of co-operation.

[9] While a determination of the sufficiency of the level of co-operation between the two parents is a major consideration, it becomes a difficult determination for the court, especially when there is conflicting testimony, and furthermore no expert evidence to assist with such a determination. Indeed, even minor conflicts in a family setting can, at times, escalate into major disputes when there is mistrust and entrenched acrimony between two parents.

[10] In the present circumstances, Ms. M. states there is no communication between herself and Mr. M.. She states she is uncomfortable around him "to the point where there is nothing left to be said", and she finds his behavior to be irrational with fits of ranting and raving as he indicates she is making his life difficult. After making inquiries about S., she has been told bluntly by Mr. M. it is none of her business. Also, she states the communication between the parties has worsened since the 2003 court order, and Mr. M. tries to undermine her parenting role with S.. Communication is presently in writing and transferred by courier. She also finds it exceedingly troublesome that Mr. M. consults with her ex-husband from time to time about her actions.

[11] Ms. M. feels S. is at an age where communication between her parents is essential, and if this cannot be accomplished, she believes a sole custody order in her favour would be in S.'s best interest. She has expressed concerns about S. being transported in a motor vehicle without a car seat (which I understand has been resolved). While it is not necessary to itemize her litany of complaints, she also mentions concerns about divergent parenting approaches regarding school selection, religious upbringing, education about procreation, birthdays and so on. Generally speaking, she feels S.'s behavior deteriorates after spending parenting time with her father.

[12] In contrast, Mr. M. contends communication between the parties worsened after Ms. M. filed her present application to vary. He states that he has no problem talking with her, but the level of communication rests entirely with Ms. M.. In his affidavit, he mentioned being unaware of any communication difficulties until the present application was filed with the court. Furthermore, he states Ms. M. can communicate with him "when she wants something, otherwise she is silent".

[13] At first, during the proceedings, Mr. M. was unrepresented by legal counsel. And during his evidence, and partial cross-examination, before retaining legal

counsel, he basically asserted there was no need for a change in the present court order. Indeed, even when asked by the court if he had an alternative plan, he appeared to be inflexible and could not offer an alternative parenting plan even after S. starts school. After questioning in this regard, he requested and was granted an adjournment to retain legal counsel. Noteworthy to the court is Mr. M.'s new parenting plan which consists of alternate weeks with each parent as it was stipulated in the original order for joint custody; and he, furthermore, contends that this schedule would suit S. better as it is consistent with current arrangements. Mr. M. believes S. should be enrolled in the public school located in his residential area as this was discussed by the parents when they co-habited. Mr. M. is presently employed working up to 40 hours per week. He proposes to take S. to school each day himself and otherwise S. would be picked up after school by either himself or a caregiver. Generally speaking, Mr. M. believes both parents should share parenting time equally with S. and this would provide more stability for her.

[14] Both parents have a loving relationship with their daughter, but, obviously, the main problem is the level of communication between them and whether their level of communication is compatible with S.'s overall best interest. In the present circumstances, Mr. M., in my judgment, has overstated his ability to communicate

with Ms. M.. He very carefully, on cross-examination, avoided answering questions which would put him in a bad light such as using profanities while being intoxicated when speaking to Ms. M. about S.. Furthermore, he seemed to have selective recall concerning child rearing responsibilities when the parties co-habited, again this seemed to be an attempt to inflate his involvement with S. when the parties co-habited. It should also be noted that Mr. M. appears to be inflexible as his parenting plan seems to unduly focus on the past parenting arrangement where the custody alternated from week to week when S. was younger. This was also exemplified in his evidence when he alluded to the fact that the parties had discussed, when co-habiting, that S. would attend school in his residential area. This seems to point to a level of rigidity which is, at the very least, dim to an awareness of S.'s ever changing needs given her age and development.

[15] Moreover, in a situation such as this when one parent states the communication is manageable and the other parent states the communication is virtually non-existent, it should be recognized and underscored that meaningful communication cannot materialize unless both parents are able and willing to communicate without feeling threatened or demeaned in verbal exchanges. Both parents, therefore, must acknowledge communication deficiencies before they can be remedied. If the finger

is constantly pointed at each other, without an acceptance of responsibility on both sides, there can be no marked improvement in the level of communication, but rather the perpetuation of continual allegations and counter allegations which ultimately serve to cause more confusion.

[16] It seems to me, whenever possible, parents should be encouraged to have equal parenting time with a child, but it must also be remembered that this is not always possible. Parenting times cannot be based upon a strict mathematical calculation of time, but rather must be decided after carefully weighing competing parenting plans while devising a course of child care which will serve the short and long term needs of the child, and not the parents *per se.* Under the umbrella of the best interest of the child doctrine, there are numerous factors to be weighed as set out; for instance, in *Foley v. Foley* (1993) 124 N.S.R. (2d) 198.

[17] While it is not necessary to comment on each category listed in *Foley v. Foley*, *supra*, it is important to acknowledge the love and devotion of each parent in the rasing of their daughter thus far. But in the present circumstances, it must be S.'s needs which dictate the appropriate parenting arrangement which will ensure consistent stability and guidance for her. I find, in the present circumstances, Mr. M.

has downplayed the nature of the mistrust and poor communication between himself and Ms. M.. Even though the parents have had a joint custody order since 2002, I find the level of communication and co-operation between them has worsened over time, especially since 2003. Moreover, in my view, there appears to be little, if any, likelihood of the tension and mistrust abating between these two parents, even with mediation, communication notebooks and so forth. It seems to me a sufficient level of trust cannot be restored even in the face of an ironclad court order. Rather, the court concludes it is more likely that the lack of co-operation between the parties will, on the balance of probabilities, escalate as S. becomes older and more and more decisions have to be made consistent with her best interest. As well, Mr. M. is working full-time, and even though he has flexibility with his hours of employment, his proposed plan of care does involve caregivers. Thus, I can find no compelling reason to have S., albeit occasionally, placed in the care of professional caregivers when her mother is a stay at home mother who can more than adequately meet her daily needs. Furthermore, the parties, immediately after separation, had disputes about appropriate care for S. and had to resort to mediation. Now, Mr. M. suggests that the joint custody order should be maintained and disputes arising between the parties should be resolved through a mediator. In my view, this seems impractical and imprudent when the essence of present parental disputes center around

contrasting parenting styles as well as specific matters such as school selection, religious upbringing and so on. Furthermore, if there is no effective communication between the parents, emergency decisions, such as medical treatment, etc., would be compromised.

[18] In the end, the court is, therefore, satisfied based upon all the evidence, on the balance of probabilities, that the level of communication between the parties has deteriorated to the level where the overall short and long term best interest of S. will be compromised. Under Section 37 of the **Maintenance and Custody Act** a substantial change, as required, has been established by the applicant. Thus, the court is satisfied both parents can continue to enjoy meaningful parenting time with their daughter without the benefit of a "shared" or "joint" custody order. Thus, it seems to me, in light of the above concerns, it is in S.'s best interest to be placed in the day to day care and control of her mother, subject to reasonable and liberal parenting times with her father. All major decisions pertaining to the upbringing of S. shall be communicated to Mr. M.; however, all final decisions shall be made by Ms. M.. School and day care selection shall be decisions which rest with the primary caregiver, Ms. M.. Mr. M. shall have parenting time with S. each week from Thursday to Saturday or Sunday, alternately until she commences school.

[19] Once S. commences school in September, 2005, Mr. M. shall enjoy parenting times with the child from Friday after school until Sunday every second weekend. As well, once S. commences school, Mr. M. shall enjoy parenting time with S. at least one day after school until 7:00 p.m. There shall be daily telephone contact. Special events should be shared equally between the parties, as much as possible. Christmas, as agreed by the parties, should be alternated. In 2004, Ms. M. shall have S. from Dec 24th at 3:00 p.m. until Dec 26th at 3:00 p.m., alternating each year thereafter. As the parties live relatively close to each other, there seems to be no compelling reason why S.'s birthday cannot be shared; however, confusion has arisen in the past with the presentation of birthday gifts and S. having three birthday celebrations at one point. If each parent has S. for at least four hours on her birthday, she can at least share her birthday with each parent.

[20] So as to avoid confusion with the operation of this court order, S. is hereby placed in the sole care and custody of Ms. M., subject to liberal access by Mr. M.. Mr. M. shall be informed of all major decisions concerning S.'s well being.

[21] No financial disclosure was made by Mr. M.; however, he has indicated a willingness to do so if the parenting arrangement for S. is varied. Thus, Mr. M. is directed to file appropriate financial records with the court upon receipt of this decision. Although his legal counsel has requested another court appearance to do so, this will not be necessary if the parties agree upon child support in keeping with the **Child Support Guidelines**. Counsel for Mr. M. can submit the monthly child support figure in writing to the court as inclusion in the final order. Of course, if there are difficulties in determining the appropriate level of child support, the matter may be scheduled for a hearing. Mr. M.'s counsel should specify the date of the month for these payments, as well as to whom the payments should be paid, directly to Ms. M. or through the Maintenance Enforcement plan. As the parents have had disputes with regarding child support payments in the past, I would strongly recommend that all child support payments henceforth be made payable to the Maintenance Enforcement Plan.

[22] To summarize, based upon all of the evidence, on the balance of probabilities and as a result of changed circumstances of the parents:

> 1. S. is hereby placed in the day to day care and control of Ms. M. who shall be responsible for major decision making including selection of public school and daycare. S. is hereby placed in the sole custody of Ms. M..

2. At all times Mr. M. shall be kept informed of all decisions (preferably in writing) affecting S.'s well being; however, all final decisions shall rest with Ms. M..

3. Mr. M. shall have liberal and generous access visits with S. which shall consist of parenting times from Thursday until Saturday and Sunday alternatively as long as S. is not enrolled in public school. Once S. is enrolled in school, Mr. M. shall have parenting time with S. every second weekend from after school on Friday until Sunday at 6:00 p.m.

4. There shall be generous telephone contact between Mr. M. and S. at all times.

5. S.'s birthday shall be shared equally by the parents with each parent having the child for at least four hours.

6. Christmas parenting time shall alternate on a yearly basis with Christmas 2004 to be spent with Ms. M. commencing December 24th to Dec 26th, alternating each year thereafter.

7. Child support to be determined in accordance with the **Child Support Guidelines** after full financial disclosure is made by Mr. M..

[23] As Ms. M. is unrepresented by counsel, I would ask counsel for Mr. M. to prepare an appropriate court order in keeping with this decision.

Order accordingly.

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Corrine E. Sparks, J.F.C.