SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *R.R. v. S.R.*, 2015 NSSC 206

Date: 2015-07-16
Docket: *Halifax* No. 1201-067155
Registry: Halifax

Between:

R.R.

Applicant

v.

S.R

Respondent

Judge: The Honourable Justice R. Lester Jesudason

Heard: June 29, 2015, in Halifax, Nova Scotia

Counsel: Sally Faught, Counsel for R.R.
S.R., Self-Represented

By the Court:

Introduction

[1] This is an interim motion brought by the Applicant (Petitioner) pursuant to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 17. She seeks an Order granting her interim primary care of the parties' nine year old daughter, H.R., and their six year old son, J.R. The Respondent's position is that both he and the Applicant should have equal parenting time with the children on a "week on/week off" schedule.

Issue

[2] What interim parenting arrangement is in the best interests of the children?

Legislation and Law

[3] Like any proceeding under the *Divorce Act* involving children, I am obliged to take into consideration the best interests of the children of the marriage as determined by reference to their condition, means, needs and other circumstances (s. 16(8) of the *Divorce Act*). In arriving at my decision, I must give effect to the principle that the children should have as much contact with each parent as is consistent with their best interests and, for that purpose, should take into consideration the willingness of each parent to facilitate such contact (s. 16(10) of the *Divorce Act*).

[4] The concept of "best interests" has been the subject of much jurisprudence. In *Young v. Young*, [1993] 4 S.C.R. 3, McLachlin J., as she then was, stated the following in paragraphs 202 to 206:

> 202 First, the "best interests of the child" test is the only test. The express wording of s. 16(8) of the Divorce Act requires the court to look only at the best interests of the child in making orders of custody and access. This means that parental preferences and "rights" play no role.
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> 203 Second, the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has been left to the judge to decide what is in the "best interests of the child", by reference to the "condition, means, needs and

> other circumstances" of the child. Nevertheless, the judicial task is not one of pure discretion. By embodying the "best interests" test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all legal tests, it is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do.
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> 204 Third, s. 16(10) provides that in making an order, the court shall give effect "to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child." This is significant. It stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider. By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase "as is consistent with the best interests of the child" means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted. But only to that extent....
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> 206 I would summarize the effect of the provisions of the Divorce Act on matters of access as follows. The ultimate test in all cases is the best interests of the child. This is a positive test, encompassing a wide variety of factors. One of the factors which the judge seeking to determine what is in the best interests of the child must have regard to is the desirability of maximizing contact between the child and each parent. But in the final analysis, decisions on access must reflect what is in the best interests of the child.

[5] Guidance on applying the best interests concept has been provided in many cases from this province such as *Foley v. Foley*, [1993] N.S.J. No. 347 and *Burgoyne v. Kenny*, 2009 NSCA 34. In the latter, Bateman J.A., as she then was, stated:

> **25** …Each case must be decided on the evidence presented. Nor is determining a child's best interests simply a matter of scoring each parent on a generic list of factors. As Abella J.A., as she then was, astutely observed in *MacGyver v. Richards* (1995), 11 R.F.L. (4th) 432 (Ont. C.A.):
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> > 27 Clearly, there is an inherent indeterminacy and elasticity to the "best interests" tests which makes it more useful as legal aspiration than as legal analysis. It can be no more than an informed opinion made at a moment in the life of a child about what seems likely to prove to be in that child's best interests. Deciding what is in a child's best interests means deciding what,

> objectively, appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention. Because there are stages to childhood, what is in a child's best interests may vary from child to child, from year to year, and possibly from month to month. This unavoidable fluidity makes it important to attempt to minimize the prospects for stress and instability.
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> ...
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> 29 Deciding what is best for a child is uniquely delicate. The judge in a custody case is called upon to prognosticate about a child's future, and to speculate about which parenting proposal will turn out to be best for a child. Judges are left to do their best with the evidence, on the understanding that deciding what is best for a child is a judgment the accuracy of which may be unknowable until later events prove -- or disprove -- its wisdom.
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> **26** The judge must determine in which parent's custody the children's future will best be served on the basis of the available evidence relevant to the children's emotional and physical well-being…

[6] In the present case, I am only dealing with an interim parenting arrangement. Generally speaking, given that interim orders are expected to be of relatively short duration, serious consideration should be given to maintaining the status quo provided that doing so is in the best interests of the child. For example, in *Hewitt v. McGrath*, 2010 NSSC 275, MacDonald J., stated:

> 1 This is an interim proceeding and, as is the case with all proceedings involving children, I must decide what is in the best interest of this particular child. However, the determination of this child's best interest is made understanding that an interim order is intended to be of short duration and is to deal with the immediate problem of where a child should live and what role each of the parents should play until a court has an opportunity to conduct a full investigation into the best interests of the child at a later hearing.
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> 2 In *Marshall v. Marshall,* [1998] N.S.J. No. 172, 1998 CarswellNS 183 (N.S.C.A.), the Court of Appeal gave approval to a finding that it can be considered to be in a child's best interest to continue in the care arrangements put in place prior to the interim application, in other words, to maintain the status quo. The "existing situation", often referred to as the status quo, is generally the parenting arrangement in place while the parents were living together and not any short-term or strategic arrangement made after separation unless those parenting

> arrangements had previously been agreed upon or had existed for significant periods of time or were otherwise considered to be in the child's best interest.
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> 3 There are many reasons why the status quo should be maintained. Interim hearings do not provide the quality or volume of evidence that is provided at a final hearing. To change the child's living arrangements on the evidence usually presented during an interim hearing requires clear and convincing evidence that maintaining the child's status quo would not be in the child's best interest. [emphasis added]

[7] Similarly, in *Webber v. Webber*, 90 N.S.R. (2d) 55 (F.C.), Judge Daley stated:

> **10** Interim custody is directed toward the temporary, short term care of a child. It is a preliminary step taken to ensure the child who is the object of a custody dispute, is looked after as best as possible until a final decision on where the child will live, is made. There must be a recognition that the final custody order may not be the same as the interim order; one parent may obtain the child by interim order, but after all the evidence is in and considering the long term needs of the child, the other parent may obtain the child in the end.
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> **11** Given the focus on the welfare of the child at this point, the test to be applied on an application for an interim custody order is: what temporary living arrangements are the least disruptive, most supportive and most protective for the child. In short, the status quo of the child, the living arrangements with which the child is most familiar, should be maintained as closely as possible. With this in mind, the following questions require consideration.
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> 1. Where and with whom is the child residing at this time?
> 2. Where and with whom has the child been residing in the immediate past? If the residence of the child is different than in #1, why and what were the considerations for the change in residence.
> 3. The short term needs of the child including:
>   a. age, educational and/or pre-school needs;
>   b. basic needs and any special needs;
>   c. the relationship of the child with the competing parties;
>   d. the daily routine of the child.
> 4. Is the current residence of the child a suitable temporary residence for the child taking into consideration the short terms needs of the child and:
>   a. the person(s) with whom the child would be residing;
>   b. the physical surrounding including the type of living and sleeping arrangements, closeness to the immediate community and health;
>   c. proximity to the pre-school or school facility at which the child usually attends;

> d. availability of access to the child by the non-custodial parent and/or family members.
> 5. Is the child in danger of physical, emotional or psychological harm if the child were left temporarily in the care of the present custodian and in the present home. [emphasis added]

Evidence

[8] The Applicant filed three affidavits in support of her motion on July 2, 2013, May 19, 2015, and May 26, 2015. The Respondent did not file any Affidavits and advised that he was not challenging what was contained in the Applicant's affidavits with the exception of the allegations she made against him with respect to alcohol consumption. On that issue, the Respondent acknowledged that there have been some "slight problems" with his alcohol consumption, but suggested that there was no proof with respect to some of the Applicant's allegations. He was therefore given the opportunity to fully cross-examine the Applicant on the issue of his alleged alcohol consumption, as well as any other issues upon which he wished to do so.

[9] After considering all the evidence, it is clear that the parties' respective positions in relation to the relevant history and present circumstances are largely not in dispute. To the extent there are issues in dispute, I do not find those incongruities to be significant when arriving at my decision on interim parenting.

[10] The parties were married on December 31, 2004, and separated on October 10, 2012. They owned a matrimonial home in Fall River which was sold a few days before the interim hearing.

[11] Their children, H.R. and J.R., were born on March 15, 2006, and October 25, 2008, respectively.

[12] The Applicant is an elementary school teacher employed by the Halifax Regional School Board. The Respondent is a 2 RCR Unit Master Sniper with the Department of National Defence.

[13] At various times throughout their marriage, the Respondent was required to perform his duties of employment outside of Nova Scotia for extended periods. For example, in 2008/2009, he was deployed to Afghanistan. From July 2012 to the Spring of 2013, he had various assignments in Ontario and New Brunswick.

Finally, from April 2013 to June 2014, he was posted at CFB Gagetown after which time he returned to the matrimonial home until it was sold. He advised that he is currently in the process of resigning from the military which he hoped would occur in August or September of this year.

[14] During the course of their relationship, and following their separation, the Applicant was primarily responsible for parenting the children, including attending to their medical care, education, social and other activities (e.g. sports and catechism), and their daily needs such as preparing meals, school lunches, baths and purchasing their clothing. However, during the last year, after he returned to Halifax from CFB Gagetown, both parties acknowledge that the Respondent has taken a more active role in the children's lives than he had previously.

[15] The Applicant claims that, in the Spring/Summer of 2013, the Respondent started getting increasingly agitated and angry with her. This caused the relationship between the two to become increasingly tense. As a result, she started to go to her parents' home in Dartmouth when the Respondent came to visit the children in the matrimonial home.

[16] In the Summer of 2013, the Respondent advised the Applicant that he had been diagnosed with PTSD, severe depression and alcohol dependency. He further advised that he was receiving treatment and starting medication for each.

[17] According to the Applicant, since the Respondent returned from CFB Gagetown in June 2014, he continued to be "distant, angry and secretive". She indicated that he has kept his work schedule and the location of his work hidden from her. Also, despite asking on several occasions, she claims that the Respondent has not shared with her any details of his treatment for PTSD, depression and alcohol consumption.

[18] The Applicant further claimed that, more recently, the Respondent's issues with alcohol consumption had escalated and that he has started to consume "hard liquor" in addition to beer. In support of her assertions, she introduced pictures of vodka bottles she claimed to have found under the Respondent's mattress in the matrimonial home during the May 22nd weekend. She expressed concerns about his alcohol consumption and how it could negatively impact with the medications he was taking for his PTSD and depression.

[19] Prior to the matrimonial home being sold, the Respondent kept a number of firearms in a locked box in the garage for which he had the only key.

[20] On May 25, 2015, the Applicant contacted the Respondent's psychologist to discuss her concerns with him. She indicated that the psychologist advised that, due to the Respondent's alcohol consumption, and the presence of firearms in the matrimonial home, he may be obligated to contact "Children and Family Services". The Applicant testified that the psychologist advised her to move out of the matrimonial home with the children and go live with her parents. The Applicant did so later that day and subsequently requested that her motion for interim primary care of the children be heard on an urgent basis.

[21] To the extent the Applicant's evidence of statements allegedly made by the Respondent's psychologist would clearly be hearsay, I do not consider them for the truth of their contents. Rather, I considered them solely as background information which goes to the Applicant's state of mind, and to explain her subsequent decision to move out of the matrimonial home with the children. I have no direct evidence before me that the Minister of Community Services has any concerns whatsoever with respect to the Respondent's ability to parent the children.

Parenting Plans

a) Applicant's Plan

[22] As noted above, the Applicant has been residing with the children in her parents' home in Dartmouth since May 25, 2015. The home has three extra bedrooms so there is a separate room for her and each of the children. The Applicant testified that the children have a great relationship with her parents who are very supportive of her and the children. Her parents have indicated that she and the children can stay with them for as long as needed. They are also planning to be in Europe in August of 2015, and Florida in the Spring of 2016. During these times, the Applicant and the children can, if necessary, remain in their home and have the entire home to themselves.

[23] In the short-term, the Applicant intends to live at her parents' home and arrange for the children to continue going to their school in Fall River after the Summer break. Her ultimate hope, however, is that she will be able to purchase

her own residence in Fall River and live there with the children in her primary care.

[24] The Applicant acknowledged that the children have a "great relationship" with the Respondent and that he has taken a more active role in their lives over the past year. She indicated that, if granted primary care of the children, she wants them to maintain a good relationship with their father and acknowledged that he loves the children, and is a good father to them. She further indicated that the children play baseball approximately four times per week during the Summer and she would have no issue with him attending their games.

[25] Her major issues with the Respondent are that when he becomes angry or stressed, his better judgment becomes "clouded" with respect to the children, and that due to his recent escalation in alcohol consumption, she does not want him to be drinking when the children are in his care. She is also concerned about the lack of information she has with respect to the Respondent's medical issues but indicated that she would have no difficulty with the children being in his care so long as he is not consuming alcohol.

b) Respondent's Plan

[26] The Respondent has moved into his parents' home in Truro following the sale of the matrimonial home. He indicated that the children have a good relationship with his parents.

[27] The Respondent indicated that he was awaiting the outcome of the interim hearing before deciding whether to rent or purchase his own residence. He further indicated that, if granted equal parenting time with the Applicant, he would find "appropriate accommodations" for the children but, until then, the children could stay with him at his parents' home in Truro.

[28] The Respondent stated that his long-term goal would be to find a place in Fall River near his children but that would depend on how much parenting time he was given with them.

[29] The Respondent currently has a flexible work schedule which he indicated would become even more flexible once he officially retired from the military. He

did not provide the Court with any details about the status of his medical issues but did indicate that he had requested records which he had not yet received.

[30] On the issue of alcohol consumption, the Respondent advised that he would have "no issue" with refraining from the consumption of alcohol when the children were in his care, as well as four hours prior to then.

Prior Interim Hearing

[31] While the parties clearly currently have widely diverging parenting plans, it is worth noting that they once appeared to reach a mutually acceptable arrangement on parenting time shortly before a previous interim hearing scheduled for October 22, 2013. Indeed, in an email to the Applicant's former counsel dated October 15, 2013, the Respondent indicated that he was prepared to sign a proposed Separation Agreement if certain changes he was requesting were made to the draft. Those changes included that the Applicant would be given interim "sole custody" of the children and that he would have "supervised visitation". He indicated, at that time, that he wanted those changes made so that "there will be no problem for her [the Applicant] in the future to make decisions without my interference" (Supplemental Affidavit of the Applicant affirmed on May 12, 2015, Exhibit "C").

[32] The Applicant agreed to the Respondent's suggested changes and, on October 21, 2013, the Applicant's former counsel wrote to the Court and advised that the hearing could be removed from the Court docket as the parties had reached an interim agreement. Unfortunately, the tentative agreement was never executed by the parties, nor was any interim Order ever issued. Consequently, the Court is now placed in the position of having to decide what interim parenting arrangement is in the best interests of the children.

Analysis:

[33] Based on the evidence before me, I have no hesitation in concluding that both parents very much love their children and have been good parents to them. Unfortunately, both acknowledged that the communication between them has deteriorated to the point that it has become difficult for them to work together on parenting issues. For example, the Applicant indicated that she and the

Respondent could not even agree on the children's haircuts and that they generally only communicate by texting each other.

[34] Needless to say, the poor communication between the parents is not good for the children. Hopefully, that situation can be improved prior to a final hearing on custody and access as both parents struck me as wanting to do the "right thing" for their children, and wanting to support their healthy development. Thus, I am prepared to give both parents the chance to improve that communication on a go forward basis for their children's benefit by leaving some of the details with respect to the implementation of my decision on interim parenting to them to work out. I do so because I believe it is in the best interests of the children for their parents to build some momentum towards improved communication without requiring the Court to specify each and every detail of their respective interim parenting time. Indeed, it is they, not the Court, who are the ones most uniquely positioned to foster the children's future healthy development. It is they, not the Court, who hopefully will have an ongoing nurturing relationship with these children for the rest of their lives. That being said, should the parties not be able to work out certain details within the parameters I have provided, I reserve the jurisdiction to decide them for the parties.

[35] After carefully comparing the respective parenting plans of the parties, and considering all the evidence before me, I am concerned that the Respondent has given the Court very little information upon which to realistically assess what impact his issues with PTSD, depression and alcohol consumption may have on his ability to parent his children. I am also concerned that, at present, he has no concrete plan in terms of his future living arrangements beyond waiting for the outcome of this interim hearing. Until then, his plan appears to be to continue to reside with his parents in Truro which is a significant distance from their school, and presumably their friends and activities. I am therefore not prepared, at this interim stage, to grant him equal parenting time with the children as I do not find that doing so is in the children's best interest.

[36] On the other hand, the Applicant has clearly turned her mind to both the current and the prospective arrangements for the children and, by all accounts, has been their primary caregiver for the vast majority, if not entirety, of their lives. These children are still relatively young in age and I believe that stabilizing their situation, and avoiding causing unnecessary disruption to their lives pending the outcome of a final hearing on custody and access, is in their best interests.

Furthermore, in my view, the status quo clearly favours the Applicant. When these factors are combined with the fact that I accept that the Applicant wants the children to maintain a good relationship with the Respondent, and will help facilitate same, I have no hesitation in finding that the best interests of the children favour granting her interim primary care of the children.

[37] While I grant interim primary care to the Applicant, I direct that the Respondent will have parenting time with the children as follows:

> (a) As long as he is residing in Truro, he will have parenting time with the children every second weekend from approximately 5:00 p.m. on Friday to approximately 5:00 p.m. on Sunday. He will be responsible to arrange the transportation of the children. This weekend parenting time will begin during the July 24th weekend.
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> (b) As long as he is residing in Truro, he will also be able to have additional parenting time with the children on one evening during the week, to be agreed upon by the parties, from 4:00 p.m. until 7:00 p.m.
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> (c) Should he obtain his own residence in the HRM area, the one day during the week when he is to have evening access will be extended so that he can keep the children overnight. He will make arrangements to return the children to the Applicant's care no later than 8:00 a.m., or such earlier time as is reasonably necessary for the children to attend school and/or Summer activities; and
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> (d) At no time while the children are with him, shall the Respondent consume any alcohol or be impaired by alcohol. In this regard, he will also refrain from consuming any alcohol at least four hours prior to receiving the children.

[38] In directing the above parenting time for the Respondent, I also state that the parties can decide, by mutual agreement, to make changes to same should they feel it would be necessary or helpful to give effect to the spirit of my decision, or better suit the children's needs. I also leave it open to the parties to make mutually acceptable changes because I do not get the impression that the Applicant is trying to undermine the Respondent's relationship with the children. Thus, if she was given some comfort that his medical issues and other circumstances are being

satisfactorily addressed, she may very well be open to the Respondent spending more time with the children particularly during the Summer when there may be more flexibility to have some block parenting time with him without unnecessary disrupting the children's lives and activities. Not only would such a gesture likely be well-received by the Respondent, but it would be consistent with her own evidence that the children love to spend time with their father and she wants them to maintain a good relationship with him.

[39] In addition to the above, given that communication has deteriorated between the parties, I also direct the following:

Communication with Children

> (e) During times when the children are with one parent, he or she will permit reasonable electronic, telephone or other communication to the children by the other parent. Both parties will also encourage and help facilitate contacting the other the parent when the children are in their care.

Attendance at Children's Activities/Appointments

> (f) Both parents are permitted to attend the children's Summer activities such as baseball games, etc., medical appointments, appointments with teachers, and other significant events. Each parent will keep the other informed, on a timely basis, about any such events when the children are in their care.

Right to be Informed

> (g) Each parent must inform the other about any significant changes, problems or recommendations relating to the children's physical and mental health, dental care, physical and social development, and education, and must provide copies of all written reports received from service providers in relation to same.

Right to be Consulted

(h) On any major decisions with respect to the children's physical and mental health, dental care, physical and social development, and education, the parties will engage in meaningful consultation with each other.

Right to Contact Third Parties

(i) Both parents are entitled, without obtaining the consent from the other parent, to directly contact the children's doctors, dentists, teachers, and any other third party service providers to request and receive information and consult about the children.

Listed as Contact

(j) Each parent must be listed as a contact parent on all significant documents relating to the children.

[40] Notwithstanding the fact that the Respondent has not persuaded me that more equal parenting time with the children at this time is in their best interests, I am sympathetic to his situation and emphasize that my ruling is an interim one, based on the evidence which was before me. My ruling should not be taken as a finding that the Respondent is not a loving father to the children or that he has not been a good parent to them. Indeed, as I stated earlier, I find he is quite the opposite.

[41] Rather, my present decision largely stems from concerns I have that there simply are too many unknowns for me with respect to the Respondent's present health issues, alcohol consumption issues, future living arrangements, employment situation, etc., which do not give me sufficient evidence to realistically assess whether or not they may impact on his ability to parent the children. I am also concerned that he has not adequately turned his mind to his future living arrangements and, at this interim stage, do not want to see the children's lives unduly disrupted. Thus, without pre-judging the issue, I want to give the Respondent some time to address these unknowns and, should he be able to do so in a manner which puts the Court's mind at ease, wish to leave open the possibility that his parenting time with the children could be increased if it is in their best interests.

[42] Thus, I direct that the parties come back to me for a review of the interim parenting arrangement in approximately two months at which time I reserve the right to modify same based on any new information which is provided to me. In this regard, I will have the Scheduling Office confirm a return date with the parties and would ask that if they wish to file any new materials for my consideration, they do so no later than two weeks prior to the appointed date. If, on the other hand, the parties both agree that no review is necessary, they can notify the Scheduling Office and the appearance will be removed.

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R. Lester Jesudason, J.