

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Brewer v. Brewer 2008, NSSC 331

Date: 20081118

Docket: 54530

Registry: Sydney, Nova Scotia

Between:

Lavinia Brewer and Percy Brewer

Applicants

v.

Vicki Lynette Brewer and John Reid

Respondents

DECISION

Judge: The Honourable Justice Theresa M. Forgeron

Heard: October 27th and 28th, 2008, Sydney, Nova Scotia

Oral Decision: November 10, 2008

Written Decision: November 18, 2008

Counsel: William R. Burke, counsel for the applicants
Mark Gouthro, counsel for the respondent, Vicki
Brewer
John Reid, respondent, not present or represented
by counsel

By the Court:

[I] INTRODUCTION

[1] Aaron Brewer is the 11 year old son of Lynette Brewer, and the grandson of Lavinia and Percy Brewer. Aaron is currently living with his grandparents under the provisions of an interim consent order. Aaron's mother wants Aaron to live with her. Aaron's grandparents also seek custody of him.

[2] The trial was held on October 27 and 28, 2008. The following persons testified at the trial: Ms. Giovenetti, Mr. Gouthro, Mrs. Wadden, Mr. Brewer, Mrs. Lavinia Brewer, Mr. Miller, Dr. Christians, and Ms. Lynette Brewer. Aaron's wishes were provided to the Court, by consent, in a letter written by Lisa Fraser-Hill, barrister and solicitor, who had met with Aaron for the purpose of determining his wishes.

[II] ISSUES

[3] The Court will determine the following two issues in this decision:

- (a) Who should be the primary caregiver of Aaron?
- (b) What parenting provisions are in the best interests of Aaron?

[III] ANALYSIS

[4] Who should be the primary caregiver of Aaron?

[5] *Position of Lavinia and Percy Brewer*

[6] Mr. and Mrs. Brewer state that it is in Aaron's best interests to live with them. They list a number of factors in support of their position including the following:

- (a) It is not safe for Aaron to return to their daughter's care because of her past drug addiction and ongoing mental health issues;
- (b) Aaron's educational needs have been met while Aaron has been in their care. In contrast, Aaron missed many school days while in the care of Ms. Lynette Brewer;
- (c) Aaron wants to live with his grandparents and wants little to do with his mother;
- (d) Aaron's brother, Andrew lives with Lavinia and Percy Brewer. Now that the boys are living in the same home, the sibling-relationship and bond has improved substantially from that which existed when the boys lived in different residences;
- (e) Aaron has a close and loving relationship with Percy and Lavinia Brewer, and to his great grandmother, Mrs. Wadden, who lives next door;
- (f) Aaron is involved in extracurricular activities such as basketball and hockey, while in the care of his grandparents;

(g) Aaron feels safe, secure and loved while in the care of his grandparents. He no longer suffers from panic and anxiety attacks and is sleeping well through the nights. His attitude and disposition have improved because of the healthy changes in his environment; and

(h) Percy and Lavinia Brewer are financially secure and are able to meet the needs of Andrew and Aaron. The Brewers live in their own home and each of the boys has his own bedroom. Percy and Lavinia Brewer own their own vehicle. The Brewers are able to provide Aaron with all that he requires from a material perspective.

[7] Percy and Lavinia Brewer have been granted leave to apply for custody of Aaron. Aaron is emotionally, physically and materially secure with them. It is in Aaron's best interests to live with them.

[8] ***Position of Lynette Brewer***

[9] Ms. Brewer states that it is in Aaron's best interests to be in her custody for a number of reasons, including the following:

(a) She is Aaron's mother and as such Aaron should live with her;

(b) Percy and Lavinia Brewer have alienated Aaron against her by their actions and inaction. By their conduct and lack of guidance, Aaron has learned to treat his mother, Lynette

Brewer, with disdain and contempt. Ms. Brewer states that the longer Aaron lives with her parents, the more distant Aaron is with her;

(c) Percy and Lavinia Brewer have refused to follow the access provisions of the current order and cannot be trusted to follow a court order in the future;

(d) Although Aaron missed substantial time from school in the past, these absences did not impact on Aaron's education. Aaron is, and always was, a strong student. There has been no change in his academic performance since having moved in with his grandparents;

(e) Aaron and Lynette Brewer had an exceptionally close and loving relationship in the past. If Aaron is to develop into an emotionally healthy adult, this mother/son relationship must be reinstated and given priority;

(f) Although Ms. Brewer was addicted to illegal substances in the past, she is no longer dependant upon drugs. Thus, she poses no safety risk to Aaron;

(g) Ms. Brewer has been undergoing psychiatric treatment and mental health counselling to deal with her health conditions. She is progressing favourably under the guidance of Dr. Christians, who testified on her behalf;

(h) Ms. Brewer is living in appropriate housing and can meet Aaron's financial and material needs;

(i) Ms. Brewer would not attempt to hinder the relationship between Aaron and his grandparents and would also ensure that Andrew and Aaron spend quality time together; and

(j) Ms. Brewer would ensure that Aaron continues with basketball and hockey should he be returned to her primary care. Ms. Brewer attends all hockey games of which she is

aware, and would also attend basketball games if she were told where and when they were being held. She is currently refused this information by her parents and the school.

[10] ***Legislation and Case Law***

[11] Section 18 of the ***Maintenance and Custody Act*** provides this court with the jurisdiction to grant an order for custody. In exercising this discretion, the court is mandated to act in the best interests of the child pursuant to s. 18 (5) of the *Act* which states:

(5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration.

[12] The Supreme Court of Canada confirmed that although parental claims are not to be lightly set aside, the best interests of the child trumps parental claims where there is a conflict between the two: **King v. Mr. and Mrs. B.**, [1985] 1 S.C.R. 87. The court is mandated to place the welfare of the child as the pre-eminent concern in all custodial determinations.

[13] Lavinia and Percy Brewer bear the burden of proof in respect of their application to have Aaron placed in their custody based upon the best

interests of Aaron. It is the civil burden of proof on the balance of probabilities.

[14] The factors which compose the best interests of the child are varied and are dependent upon the unique circumstances of each case.

Goodfellow J., in **Foley v. Foley** [1993] N.S.J. No. 347, lists a number of factors which courts typically examine when determining a contested custody dispute. A number of these factors loom more important than others in the custodial determination which is before me today. My findings in respect of the best interests of Aaron are discussed under the following eight headings.

[15] ***Emotional Needs***

[16] I find that Mr. and Mrs. Brewer are better equipped to meet the emotional needs of Aaron than is Lynette Brewer.

[17] Ms. Lynette Brewer has not completed all of her psychiatric and mental health therapy. More progress is required before her therapy is

successfully concluded. As such, Ms. Brewer does not fully appreciate the seriousness of her past parenting transgressions. Ms. Brewer has not fully assumed responsibility for her serious parenting lapses. Until Ms. Brewer accepts full responsibility for the past, there is a significant probability that she will continue to make poor parenting decisions in the future - all to the detriment of Aaron's emotional stability.

[18] The evidence disclosed many examples of serious lapses in judgement by Ms. Brewer.

[19] First, Ms. Brewer abused drugs and, on at least one occasion, did so in the presence of Aaron. Ms. Brewer attempted to minimize this factor. She pointed to the fact that she told Aaron not to watch her as she took the drugs in the back of the van. This is hardly a positive.

[20] Second, Ms. Brewer took Aaron to a drug house and on one occasion, Aaron was present when a rifle was used to shoot out a street light. Unfortunately, Ms. Brewer mistook Aaron's "laughing his head off" as indicative of pleasure, and not fear.

[21] Third, Ms. Brewer was unable to connect the emotional problems that Aaron was displaying with the instability which Ms. Brewer had created. Ms. Brewer did not send Aaron to school for significant periods of time in grades 4 and 5 because she thought Aaron loved her and did not want to leave her. Aaron did not want to leave Ms. Brewer because he was afraid that she would die from a drug overdose. Aaron was attempting to parent his mother and assume responsibility for her - a task for which he was ill-equipped emotionally or developmentally between the ages of 8-10. Ms. Brewer was blind to Aaron's needs because she was too caught up in her own dysfunctional world.

[22] Fourth, when Aaron went to live full time with his grandparents, he was experiencing panic attacks and sleep disturbances. With their love, attention and nurture, these have subsided. They also took Aaron to see specialists to ensure that they were meeting Aaron's needs.

[23] Aaron is well adjusted and thriving under the care of Percy and Lavinia Brewer because they are able to meet the majority of his emotional needs.

[24] ***Educational Needs***

[25] I find that Percy and Lavinia Brewer are better able to meet the educational and developmental needs of Aaron. Aaron was missing significant time from school while in the care of Ms. Brewer. In grade 3, Aaron missed 33 days; in grade 4, 67 days; and in grade 5, 64.5 days. In addition, his principal confirmed that he was consistently late on the days that he did attend while in the care of his mother. These absences have been effectively eliminated since Aaron has been placed in the care of his grandparents.

[26] Ms. Brewer attempted to minimize the problems caused by Aaron's lack of school attendance. Although his marks may not have suffered, Aaron needs were not being met by his chronic absences from school. Aaron was not being taught the importance of punctuality and the importance of fulfilling one's obligations. If Aaron is taught that chronic absenteeism is acceptable as a youth, he will think such is acceptable as an adult. This is not appropriate parenting to prepare Aaron for the future.

Further, as school work becomes more difficult, it would be virtually impossible for Aaron to do well while being truant.

[27] ***Recreational Needs***

[28] I find that both Percy Brewer and Lynette Brewer appear dedicated to developing Aaron's interests in hockey and basketball. Ms. Brewer attends all games of which she has knowledge and will do so in the future. She appears to understand the importance of sports to Aaron's development. So do Percy and Lavinia Brewer.

[29] ***Sibling Attachment***

[30] Andrew lives with Lavinia and Percy Brewer. I find that Aaron and Andrew have become closer because of their current circumstances. They spend time together and share interests. They talk. They laugh. They have fun. They enjoy each other's company. I find that Aaron was not as close to his brother when they lived at different residences.

[31] ***Aaron's Wishes***

[32] Aaron's wishes were entered by consent. The parties agreed to the process to be followed by Ms. Lisa Fraser-Hill. After meeting with Aaron, Ms. Fraser-Hill provided the court with a letter outlining Aaron's position. Aaron states that he wants to live with his grandparents and have visits with his mother. Aaron states that he loves his mother and grandparents.

[33] Aaron's wishes are not determinative of the issue. Aaron does not need to be burdened with such a weighty decision. This decision has been placed in the hands of the court, and not in the hands of an 11 year old boy caught in the throes of a parenting dispute.

[34] ***Physical Environment***

[35] I find that Ms. Brewer has an appropriate residence at the present time. She did not at one point. I find that Percy and Lavinia Brewer also have an appropriate residence. Both can meet the basic material needs of Aaron, including shelter, food and clothing.

[36] ***Aaron's Disposition***

[37] I find that Aaron' disposition and attitude have improved, for the most part, since he was placed in the primary care of Percy and Lavinia Brewer. I accept the evidence of Mrs. Wadden, Mr. Gouthro and Mr. and Mrs. Brewer on this point. Aaron is less aggressive with children and better equipped to resolve disputes in a non-confrontational manner since he has been placed in the care of Mr. and Mrs. Brewer. I do, however, have concerns about Aaron's treatment of his mother.

[38] ***Access Facilitation***

[39] I find that the relationship between Aaron and his mother is fractured. Aaron advised Ms. Fraser-Hill that he wanted to have regular contact with his mother by telephone, and in person. He did not want overnight access, nor lengthy visits. The interim consent order calls for access. The court order has not been followed. What happened between March 4th and October, 2008? Each party assigns blame to the other.

[40] I find that Ms. Lynette Brewer is very much interested in establishing and maintaining a relationship with Aaron. I find that Aaron loves his mother and she loves him.

[41] I am concerned about the mixed messages which Aaron is receiving from his grandparents. On one hand, he is told that he should talk to his mother, and yet there is not even a hello or nod of the head when Ms. Brewer and her father pass at hockey games in Aaron's presence. Little discipline occurred as a result of Aaron using vulgar and disrespectful language when texting his mother. Aaron is an intelligent boy. He understands his grandparent's disdain for Ms. Brewer.

[42] The lack of relationship between Aaron and his mother, however, is not solely caused by Percy and Lavinia Brewer. There are likely many reasons for the lack of relationship. It is a multi-faceted issue.

[43] Aaron himself has mixed emotions. He is concerned that the instability that he endured while living with Ms. Brewer will return if he resumes contact with his mother. Aaron is concerned for his own physical

safety because of the poor parenting decisions which Ms. Brewer made in the past. Aaron now knows security and does not want this jeopardized.

[44] Further, Aaron is growing and developing. He no longer is an 8 year old boy who wants to have his mother toss his hair and hug him while in the presence of other teammates. Aaron, like most 11 year olds, is developing independence. Parent/child relationships must change as a result. Parents must recognize this need for independence, while still being present.

[45] In addition, Lynette Brewer, although actively participating in therapy, has not successfully concluded her treatment. There is much yet to learn. Impulse control, reactivity, and anger management continue to be challenges as Ms. Brewer learns to deal with her diagnosis of bi-polar disorder with mood swings, generalized anxiety disorder, and borderline personality traits, with a prior history of substance abuse. Until Ms. Brewer successfully concludes the treatment plan, she will continue to experience communication challenges which will negatively impact on her ability to interact with Aaron.

[46] Finger pointing and blaming is not the solution to this problem. Counselling and therapy must be undertaken, the details of which will be outlined later in this decision.

[47] ***Decision on Primary Care***

[48] I have determined that Percy and Lavinia Brewer have met the burden upon them. I find that it is in the best interests of Aaron to be placed in the custody of his grandparents, Percy and Lavinia Brewer. A joint custody regime is not possible given the level of hostility and given the fact that there is little hope that the relationship will improve once the litigation ceases: **Mackeigan v. Reddick** 2007, NSSC 300, para 33.

[49] I also find that it is in the best interests of Aaron to have access to his mother. If access does not improve, Aaron will be negatively affected. The lack of a positive relationship with his mother will likely cause Aaron to experience personal troubles in the future. Aaron loves his mother. Lynette Brewer cannot be erased from Aaron's memory.

[50] Aaron does not get to chose whether to exercise access or not. Such a choice would place too much responsibility on an 11 year old. Aaron deserves to have a strong custodial parent in charge to ensure that his interests are met, with or without his approval. Mr. and Mrs. Brewer, you have been entrusted with the care of your grandson. You will get him to the appointments which I order. You will get him to the access visits which I order. That is your job. If you are unable to do so, then the court will likely question your fitness to act as custodians of Aaron in the future. I expect that all parties will comply with all conditions of the court order.

[51] **What parenting provisions are in the best interests of Aaron?**

[52] The following parenting plan will be followed by the parties:

(a) Percy and Lavinia Brewer will have sole custody of Aaron born February 27, 1997.

(b) The parties will participate in sessions to be provided by Dr. Christians, or his designate. These informational sessions will include discussions and material on bi-polar disorder with mood swings, generalized anxiety disorder, and borderline personality traits, with a prior history of substance abuse. Percy and Lavinia Brewer will follow Dr. Christians' reasonable instructions when relaying information about these conditions to Aaron in a child appropriate manner. No discussions will be had

with Aaron until such time as the informational sessions are held with Dr. Christians.

(c) Aaron will participate in individual and group counselling to assist in the re-establishment of his relationship with his mother. Percy, Lavinia and Lynette Brewer are directed to attend the sessions as per the instructions of the therapist. The purpose of the counselling sessions is to aid in the development of a healthy, mother son relationship.

(d) Percy and Lavinia Brewer will engage in counselling to assist in the learning of appropriate skills to communicate in a healthy fashion with Lynette Brewer.

(e) Lynette Brewer will continue with her therapy with Dr. Christians and the other mental health professionals with whom she currently engages. Lynette Brewer will follow all reasonable advice of Dr. Christians, including the non-consumption of illegal drugs and alcohol.

(f) Percy and Lavinia Brewer will keep Lynette Brewer apprised of all important health, educational and recreational matters involving Aaron. Such information will include timely notification of Aaron's hockey and basketball games and report cards. All communication between the parties will be in written form and delivered on Sunday of every second week, unless in the case of an emergency or a change in the activity schedule, in which case, telephone contact is permissible. All communication will be respectful and child focused.

(g) Each party will speak respectfully of the other party in Aaron's presence.

(h) Lynette Brewer is permitted to attend Aaron's parent teacher meetings and all hockey and basketball games in which Aaron is participating.

(i) Until otherwise ordered, Lynette Brewer will have access to Aaron at the following times:

(i) two hours per week through the YMCA supervised access program;

(ii) on December 25, 2008 and Easter Sunday 2009 at the home of Victorine Wadden from 3:00 p.m. until 5:00 p.m. on each of those days; and

(iii) one telephone call per week to occur on Wednesday at 7:00 p.m. unless there is a hockey or basketball game scheduled for that time, in which case the telephone call will be held at 9:30 p.m. on Wednesday. Lynette Brewer will initiate the call and Percy and Lavinia Brewer will ensure that a conversation occurs.

(j) The access provisions will be reviewed at a hearing to be scheduled in May 2009. Affidavit evidence and reports from any counsellors will be filed 14 days in advance of the review hearing. Affidavits in response and briefs will be filed 7 days in advance.

IV. CONCLUSION

[53] An order will issue which places Aaron in the custody of his grandparents, but subject to supervised access with his mother and subject to the conditions stipulated, including counselling. There are many relationship issues which need to be resolved to ensure that Aaron's best interests are met. I urge the parties to participate and cooperate fully with the process.

[54] An access review hearing will be scheduled for May 2009 and the time-lines for the filing of affidavits, reports and briefs are as outlined.

[55] Mr. Burke is to draft the order. I wish to thank counsel for their helpful briefs and their professional conduct throughout.

Forgeron, J.