

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: NB v. JG, 2015 NSSC 324

Date: 2015-11-13

Docket: *Sydney* No. 43938

Registry: Sydney

Between:

NB

Applicant

v.

JG

Respondent

Judge: The Honourable Justice Theresa Forgeron

Heard: April 16, 17, and 21, and September 22, 2015, in Sydney,
Nova Scotia

Decision: November 13, 2015

Counsel: Coline Morrow for NB
JG on her own behalf

By the Court:

Introduction

[1] B's childhood was violated. Not only has this nine year old child known the toxicity which defines the relationship between her parents, she has also been exposed to inappropriate sexual conduct. The seven disturbing, graphic sex tapes, which the child recorded of herself, are overwhelming evidence of this conclusion.

[2] Those in positions of authority have done little to help the child. Protection authorities investigated. They closed their file based on the mother's promise that she would take the child to therapy. The mother's promise was not kept. The police investigated. Their file was also closed in the absence of disclosure.

[3] Not unexpectedly, the troubled child was not able to manage the myriad of emotions she experienced. Unprovoked anger, resentment, defiance, acting out and mood fluctuations became part of the child's coping strategy. The child also encountered other challenges because of a learning disability, school and residential changes, and parental neglect. The child is often late for school, inappropriately dressed and wanting in hygiene.

[4] Within this context, the court must determine a variation application. The court's options are limited because the only two parties involved are the mother and the father. The Minister of Community Services determined that neither parent poses a protection risk to the child. The state is therefore no longer involved. Consequently, this court must choose which parent, despite their weaknesses, will be the better placement for the child, given her circumstances and the law governing such applications.

[5] **Issues**

[6] This court will determine the following issues in this decision:

- Has a material change in the circumstances been proven?
- What principles apply to this variation application?
- What parenting plan is in the best interests of the child?
- What is the appropriate maintenance order?

[7] **Background Information**

[8] The parties' toxic litigation history began a few months after the child's birth. Past parenting and maintenance orders are as follows:

- An interim order, dated January 27, 2006, placed the child in the custody of her mother, with access to the father.
- In February 2006, a permanent order issued providing the mother with custody and the father with access.
- In July 2006, an interim variation order issued which furnished the father with extensive and specified access.
- An amended interim variation order issued in October 2006, which increased the specified access granted to the father.
- In April 2007, an interim *ex parte* order issued which suspended the father's access. This was followed by a consent variation order which reinstated access on a restricted basis.
- A varied consent order issued in January 2009.
- An interim order for child support issued on June 30, 2009.
- A varied consent order issued on May 20, 2010, which expanded the access being exercised by the father.
- In September 2011, a consent variation order issued. Sole custody was vested with the mother and extensive access to the father.
- An *ex parte* order, dated August 31, 2012, prevented the child's removal from the Cape Breton Regional Municipality.
- A September 2012 *ex parte* order granted the father uninterrupted access to the child while the mother was living outside of the area, and upon her return, the access and parenting provisions stated in the order of September 2011 would resume.
- An April 27, 2013 order placed the child in the shared custody of the mother and father in a parallel parenting regime, although

the mother remained the primary care giver. Decision-making authority was divided between the mother and the father.

- An interim *ex parte* order, dated September 20, 2013 dealt with enforcement.

[9] In addition, over the years, various orders involving the mother or the father, or both, have also issued in child protection and criminal law proceedings. There are presently no child protection proceedings outstanding.

[10] The father's current variation application was filed on December 9, 2013; it was precipitated by the mother's failure to follow the April 2013 shared parenting order. The mother refused all access after she discovered the numerous sex tapes that the child had recorded of herself. The sex tapes were made by the child in her bedroom located in her mother's home, while using her sister's game console.

[11] The mother immediately, and correctly, reported the protection concerns to an intake worker employed with the Minister of Community Services. Noelle Halloway-MacDonald, a seasoned intake worker, viewed the videos. She described the graphic nature of the content. Ms. Halloway-MacDonald was visibly distressed when recounting what she viewed.

[12] The agency completed an investigation. The protection authority was unable to substantiate any sexual abuse by either parent. The mother was advised to make an appointment with Child and Adolescent Services to ensure that the child obtained the necessary therapy. The Minister closed its file once a supervisor was informed that an appointment had been scheduled.

[13] In addition, the police also investigated by interviewing the child on two occasions, as well as interviewing the mother and the father. No charges were laid because the investigation was inconclusive.

[14] During this time, the mother uprooted the child from her home, community and school. The mother changed the child's school without the father's knowledge or permission, despite the fact that the court order assigned the father final educational decision-making authority.

[15] The father now seeks to vary the regular parenting schedule found in the current court order. He wants to be designated as the primary caregiver during the

school week, while providing the mother with access during the weekends. He proposes the continuation of all other parenting provisions of the current order.

[16] For her part, the mother contests the father's application. She wishes to continue with the current order. She also repeatedly asked the court to remain open to a mobility application which she may file at some point in the future.

[17] The hearing was held over four days, those being April 16, 17, and 21 and September 22, 2015. During the course of the proceeding, the following people testified: Constable Dennis MacSween, Noelle Halloway-MacDonald, Jill Crummey, Marjorie Lynn MacLean, Constable Matthew MacNeil, Joyce Morrison, Sandra Virick, Natasha Wall, Carol Lynn MacNeil, Paul Mombourquette, the mother and the father. Submissions were provided on September 22, 2015. The court adjourned for decision.

[18] **Analysis**

[19] **Has a material change in the circumstances been proven?**

[20] Section 37 of the *Maintenance and Custody Act* provides the court with the authority to vary a custody and access order. An application to vary is not an appeal of an original order, nor is it an opportunity to retry a prior proceeding. The existing order must be treated as correct as of the date the order was made. The order can only be varied if a party proves that a material change in the circumstances exists, and as a result of that change, the current order no longer meets the child's best interests: **Gordon v. Goertz**, [1996] 2 S.C.R. 27.

[21] A material change is one which was not foreseen, or could not have been reasonably contemplated by the court who made the original order: **Gordon v. Goertz, supra**. A material change must be more than a temporary or minor change; the change must be a substantial, continuing one, which impacts the child and the ability of the parents to meet the needs of the child. Although **Gordon v. Goertz, supra**, involved proceedings pursuant to the *Divorce Act*, the same legal principles apply to an application made pursuant to the *MCA*: **Rafuse v. Handspiker**, 2001 NSCA 1.

[22] I find that the father has proven that a material change in circumstances has occurred since the making of the last variation order, as confirmed by the following findings of fact:

- The mother unilaterally changed the child's school in contravention of the court order, which order placed final educational decisions in the control of the father.
- Disturbing sex videos were made by the child. The mother did not ensure that the child participated in the therapy that she so urgently needed.

[23] The application to vary is thus properly before the court.

[24] **What principles apply to this variation application?**

[25] All court decisions involving children must be based on their best interests. In determining best interests, the court must have regard to the applicable standard of proof and make credibility determinations. In **C.(R.) v. McDougall**, 2008 SCC 53, Rothstein, J. confirmed that there is only one standard of proof in civil cases, which is proof on a balance of probabilities. The court is instructed to scrutinize the evidence when determining whether it is more likely than not that an alleged event occurred. The evidence, in its totality, must be clear, convincing and cogent to satisfy the balance of probabilities test.

[26] The court must also assess the impact of inconsistencies on questions of credibility and reliability. It is not necessary that every inconsistency be addressed, but rather the court must assess in a general way the arguments advanced by the parties: **C.(R.) v. McDougall**, *supra*, at paras 40, 45, and 49.

[27] In **Baker-Warren v. Denault**, 2009 NSSC 59, as approved in **Hurst v. Gill**, 2011 NSCA 100, this court reviewed factors to be considered when making credibility determinations at paras 18 and 19, which provide as follows:

18 For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" R. c. Gagnon, 2006 SCC 17 (S.C.C.), para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" R. v. M. (R.E.), 2008 SCC 51 (S.C.C.), para. 49.

19 With these caveats in mind, the following are some of the factors which were balanced when the court

- a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: *Novak Estate, Re*, 2008 NSSC 283 (N.S. S.C.);
- b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
- c) Did the witness have a motive to deceive;
- d) Did the witness have the ability to observe the factual matters about which he/she testified;
- e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
- f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: **Faryna v. Chorny** (1951), [1952] 2 D.L.R. 354 (B.C. C.A.);
- g) Was there an internal consistency and logical flow to the evidence;
- h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and
- i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[28] In reaching my decision, I reviewed all of the evidence that was properly before the court by way of exhibits or as elicited while a witness testified. I did not consider factual information that was not provided as part of the evidence. Further, I assigned no weight to the documents which contravened rules of evidence.

[29] In the course of this decision, I also made credibility findings. In that regard, I accept the factual evidence provided by Constables Dennis MacSween and

Matthew MacNeil. I also accept the evidence of child protection workers, Noelle Halloway-MacDonald, Sandra Virick, and Natasha Wall. Further, I accept the evidence of the educational professionals who testified, Jill Crummey, Carol Lynn MacNeil, Joyce Morrison and Paul Mombourquette.

[30] In contrast, credibility difficulties permeate the evidence of both the mother and the father. Each has a vested interest in the outcome and a strong motive to deceive. Each found it difficult to make an admission against interest. Each was eager to blame the other and slow to accept responsibility. Both minimized their parenting weaknesses. The court therefore viewed their evidence with skepticism and caution.

[31] The mother's credibility challenges, however, exceeded those of the father. The mother was evasive and untruthful. Some of her answers were contradicted by the documentary evidence. For example, despite the hospital records confirming that the mother was responsible for the failure of the child to attend therapy, the mother continued to blame the father. Further, the mother refused to acknowledge that the child was often late for school, despite the evidence of the educators. In addition, the mother was also evasive when describing her somewhat troubled relationship with her former partner, including the fact that her former partner was incarcerated in a facility out west. These are but a few of the examples which confirm that the mother did not testify in a candid and truthful fashion. Where I must choose between the evidence of the mother and the father, I accept the evidence of the father.

[32] **What parenting plan is in the best interests of the child?**

[33] Section 18(6) of the *MCA* stipulates the factors which the court must consider when making a parenting determination based on the child's best interests. These factors affect the physical, emotional, psychological, educational and general welfare needs of the child. They focus on the ability of each of the parents to meet the child's needs through an analysis of competing parenting plans while examining issues of violence, relationships and the child's wishes. The legislative factors are comparable to those expressed by Goodfellow, J. in **Foley v. Foley**, (1993)124 NSR (2d) 198.

[34] The best interests factors must be assessed in the context of the evidence which was provided by the parties and their witnesses. The court holds no independent investigative function. In this case, there is no evidence that either party sexually abused the child, nor is there evidence that either party exposed the

child to unsuitable, graphic sexual images. To the contrary, the Minister of Community Services, the agency mandated to investigate protection concerns, concluded that the child was not at risk in the care of either parent. Therefore, this decision is predicated on the lack of evidence linking either party to the sexualized behaviour of the child.

Physical Needs

[35] Both parties have the ability to acquire appropriate food, clothing and shelter for the child. Although both struggle financially, each has been able to ensure that the child's basic needs are met.

Emotional and Psychological Needs

[36] The mother has not always been diligent in meeting the emotional and psychological needs of the child, as noted in the following factual findings:

- The child requires therapy to deal with the emotional devastation wrought by her exposure to explicit, unsuitable sexual material. The mother was directed by the Minister's office to seek therapy for the child. The mother acknowledged the child's need for therapy. The mother did not pursue therapy for the child. Records from the Cape Breton District Health Authority indicates that in October 2013, the mother inquired about individual support for herself and the child. The mother reported that the child had been exposed to porn by another youth in the father's home. On February 26, 2014, a follow-up telephone conference was held between the mother and a hospital employee. On March 24, 2014, the child was referred to the intensive community-based treatment team. The assessment process, scheduled to begin on June 18, 2014, did not proceed because the mother failed to attend with the child. The mother did not respond to any rescheduling attempts. The referral was closed. The mother's excuses for failing to fulfill her parental responsibility were far from convincing.
- The mother failed to appreciate the harm that can develop because of the child's failure to obtain the professional therapy that was so urgently required. The mother appears to believe that repression was, and is, a healthy coping mechanism. It is not.
- The mother failed to appreciate the child's need for stability. The mother moved residence, and thereby changed the child's community and school, at

a time when the child was most vulnerable because of the many issues arising from the child's exposure to inappropriate sexual material. Stabilizing features in the child's life were lost, at a time when stability was greatly needed.

- The mother was unable to assign priority to the needs of the child. The mother was immobilized by the weight of her own personal troubles, including social and economic issues, relationship problems, and the loss of a close family friend. The mother's ongoing inability to focus on the best interests of the child is further exemplified in the mother's evidentiary preoccupation with her desire to relocate from the local area in the future. The mother consistently spoke about her hope that the court would eventually approve a future relocation application, rather than meaningfully addressing the current application and the child's present needs.
- The mother did not meet with school officials to review the psycho-educational assessment which had been completed to discern the child's educational needs, and to address strategies that could be adopted to ensure better outcomes.
- The mother did not attend personal therapy to address the parental conflict as she was obligated to do pursuant to clause 20 of the 2013 court order.

[37] The father appears better poised to meet the emotional and psychological needs of the child as confirmed by the following factual findings:

- Once the father became aware of the sex tapes, he cooperated with police and protection workers.
- The father states that he is committed to the child's participation in therapy and will ensure her attendance. He notes that he has been the parent who has ensured the child's attendance at other medical and dental appointments, including the child's eye appointments.
- The father indicates that he is not responsible for the child's failure to attend therapy in the past. He was not aware of the appointments; he was not invited to participate. There is no evidence to suggest that either the mother, or the hospital, contacted the father about the therapy. The mother's failure to do so was in breach of clauses 15, 16 and 19 of the last court order.

- The father has begun to participate in programming. On January 28, 2015, the father contacted the local health authority to seek assistance with the child's worsening behaviours, including unhappiness, anger and hitting her younger siblings, and the child's failure to appreciate the need for personal hygiene. The father was connected with a 12 week program for strongest families, which commenced on March 31, 2015. This participation is consistent with the father's professed commitment to the child's therapy.
- The father made contact with educational officials to discuss the child's psycho-educational assessment, and met with educators from time to time so that the child's special needs are properly addressed.

[38] The father's plan and ability to meet the child's psychological and emotional needs is superior to that put forth by the mother.

Educational Needs

[39] The child, who was diagnosed with a learning disability, has significant educational needs as detailed in the November 2013 psycho-educational assessment. The child's educational challenges include impairments related to reading, writing, comprehension, cognition, math, memory and processing skills. The assessment recommended that focus be placed on building academic skills and providing compensatory strategies to the child. Many of the recommendations, to improve learning outcomes, require home support.

[40] The mother has not met the child's educational needs. As stated previously, the mother did not even attend the school meeting which was scheduled to review the psycho-educational assessment. Further, Ms. Crummey reported that the child was not completing assigned homework. Various educators reported that the child was often late for school. The mother has the child in her care for most of the school week when the child was late and homework not completed. The teachers and principals who testified also reported that the child was often dressed inappropriately and presented hygiene issues. The mother's preoccupation with her own personal problems, in concert with a lack of organizational skills, impedes the mother's ability to ensure homework is done, the child is properly cleaned and dressed, and the child catches the bus so she is not late for school.

[41] In contrast, the father did attend the meeting during which the assessment was reviewed. The father also attended some parent teacher meetings. The father occasionally contacts the school to address the child's needs. Additionally, the

father is beginning to assist the child with projects and resource work. If granted primary care, he will arrange for a relative, who is a teacher, to tutor the child.

[42] The father has presented an educational plan that is superior to the mother's plan. The child requires a consistent, structured, timely and organized educational routine. The mother is not up to the task. The father appears better suited to this parental responsibility than does the mother.

General Welfare Needs

[43] The child's general welfare needs include those associated with moral development, stability and involvement with recreational and social activities.

[44] Both parties present the same plan for the child's moral and spiritual development. They both agree, and facilitate, the child's participation in religion classes and attendance at Bible Camp. Neither parent is affiliated with the religious denomination, but both agree that the child gains much from her involvement with this faith group.

[45] From a practical perspective, however, the child will learn from the example of her parents. In this regard, both parties must improve their efforts at modeling behaviour that provides an appropriate moral compass for the child to emulate. The child would be well served by having parents who showed honesty, accepted responsibility, and were respectful in their interactions with the child and each other.

[46] The father's parenting plan offers the child more stability than does the mother's plan. The father owns his home. He resides there in a stable relationship with his partner and their child. The paternal grandfather lives next door. The father appreciates that the child needs stability of home and school. The father correctly noted that the child lost friends when she moved schools and community. The father was concerned that the child was no longer being invited to birthday parties as she had been in the past. The father is also committed to having the child participate in extracurricular activities as a means of developing the child's social network and confidence.

[47] In contrast, the mother's plan did not provide the child with the level of stability that the child requires. The mother frequently moves, causing the child to undergo social and educational upheavals. The mother has an on-and-off relationship with a man, who is currently incarcerated. That relationship was

violent in the past. Further, the mother has not encouraged the child's participation in extracurricular activities because of a lack of finances, although she does have the child participate in many, healthy unstructured activities.

[48] The father is better able to meet the social welfare needs of the child. Although neither party is a paragon of virtue, the father better appreciates the need for stability, structure, routine and social involvement as compared to the mother.

Violence

[49] The parties had a violent relationship in the past. Services were undertaken to remove this concern, as well as substance abuse issues. There is no recent evidence of violence between the parties. There is evidence, however, that the mother was involved in a violent relationship with her ex-boyfriend, who is currently incarcerated.

[50] A violent relationship is never in a child's best interests. Violence perverts a healthy family life. A child who is exposed to violence learns that violence is an acceptable way to resolve disputes. It is not. A child who is exposed to violence learns that violence is an acceptable way to express love. It is not. A child who is exposed to violence will lose confidence and self-esteem. This child, indeed all children, deserves much more. Both parties must ensure that their homes are peaceful, respectful and free of violence.

Relationship with Family Members and Extended Family Members

[51] The child has strong relationships with her siblings, her maternal grandmother and paternal grandfather. These relationships will continue under the parenting plan that is granted. Neither party has a superior plan in relation to this factor.

Maintenance of Child's Relationship with Other Parent

[52] The father and the mother are following the parenting schedule contained in the last court order. The father is participating in the strong families course offered by the Cape Breton District Health Authority. The mother indicates a willingness to likewise participate in counseling, although she has not taken steps to do so. The father's plan is marginally stronger than the mother's plan in respect of this factor.

The Child's Wishes

[53] I have no independent evidence of the child's wishes. This factor is neutral.

Summary

[54] I accept that the child loves each of her parents, and that they love her in return. Familial love, however, does not necessarily transform a poor parent child relationship into a thriving one. In this case, the mother has not always acted in the child's best interests. The mother fails to appreciate and act upon the emotional, psychological, educational and social welfare needs of the child. The mother's parenting is inconsistent and at times, neglectful.

[55] The father's parenting is somewhat better than that offered by the mother. The father has taken steps towards safeguarding the emotional, psychological, educational and social welfare needs of the child. The father will also ensure the child's attendance at therapy. The mother did not.

[56] The father's parenting plan is in the child's best interests. I therefore grant the variation application sought by the father in respect of the regular schedule as contained in clause 2 of the last court order. This clause is vacated and replaced with the following provision:

2. Regular Access

The child will be in the physical care of the mother every Friday at 5:00 p.m. until Sunday at 2:00 p.m. The child will be in the physical care of the father every Sunday at 2:00 pm until Friday at 5:00 p.m.

[57] Further, clause 10 is likewise vacated and replaced with the following provision:

10. Educational Decisions

The father will solely determine major educational decisions affecting the child, including the choice of schools and educational programming.

[58] In all other respects, the parenting provisions of the last court order are affirmed.

[59] What is the appropriate maintenance order?

[60] Given that the father is now the primary care provider, his obligation to pay child support to the mother terminates effective November 15, 2015. The mother has no income, other than assistance. No child support is ordered in the circumstances. The mother is required, however, to notify the father, in writing, in the event of changes in her income. The mother must also supply the father with a copy of her annual income tax return.

Conclusion

[61] Having proved the existence of a material change in the circumstances, the father's variation application is granted. The child is placed in the primary care of the father, with regular access to the mother. The father's maintenance obligation ceases. The mother is not required to pay child support to the father given her income.

[62] Counsel for the father will draft the order. Costs were not sought and none are ordered.

Forgeron, J.