

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *S.R. v. D.L.*, 2015 NSSC 345

Date: 2015-11-27

Docket: *Halifax* No. SFHMCA-079207

Registry: Halifax

Between:

S. R.

Applicant

v.

D. L.

Respondent

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

Judge: The Honourable Justice Moira Legere Sers

Heard: October 27th, 28th, & 29th, 2015, in Halifax, Nova Scotia

Written Release: December 3rd, 2015

Counsel: Bryen Mooney for the Applicant
Elizabeth Newton for the Respondent

By the Court:

[1] By application filed February 2013, the Applicant requested a Custody and Access Order and child support.

[2] The parties agreed at their conciliation meeting to child support and Section 7 expenses. The travel issue was resolved by order issued August 6th, 2013.

[3] This leaves the issues of retroactive child support, daycare costs and medical coverage, to and including, the year 2010 to resolve in this hearing.

[4] The mother objected to access taking place at the father's home and added restrictions due to her concern about the father's home.

Interim Order

[5] The August 2013 Consent Order identified the twins, A. and E., born March *, 2010; granted the parents joint custody with primary care to the mother.

[6] The father's parenting schedule was every second Thursday after daycare to Friday morning and every second weekend from Friday after daycare until Monday morning.

[7] Each parent had the right of first refusal should the other parent be unavailable to parent.

[8] The father had access to information from third party services providers.

[9] Both parents had two weeks uninterrupted summer contact and the right to travel outside the province on notice to the other parent.

[10] The parties were unable to finalize their parenting plan.

[11] The parties have agreed on joint custody however, each seek to have primary care of their child.

[12] The mother seeks retroactive child support from 2010 forward and prospective child support.

History

[13] This is a second relationship for both parties. The relationship began in June 2009, after each had separated from their respective partners. They began to cohabit in August 2009.

[14] Their relationship ended in November 2012. It was a very, short term, difficult relationship with many break-ups.

[15] When the relationship began the mother was 38 and the father 46. The parents are now 44 and 52 respectively.

[16] During periods of their cohabitation, between 2009 and 2012, their children lived in their joint care for the first two years of their life.

Sibling attachment

[17] There is a third child, a step sibling of the twins. She is 11 years old and not the subject matter of this proceeding. This child has always been in the primary care of her mother since 2009.

Family Support

[18] After the birth of the twins the mother depended largely on her mother for support. When the parties relationship was problematic the parents did not have many peaceful interactions.

[19] The mother testified that the father was largely absent from the home for the first two years or more of their lives. She testified he was unemployed for much of that time and did not provide financially either.

[20] However, in an April 2013 e-mail to the father, the mother thanked him for all his emotional support around her illness and surgery (2011) and for his “being loving and considerate” with her daughter.

[21] The father advises he began to work with his current employer in 2009 as a casual worker. Given the applicant was on maternity leave this income was insufficient. In the spring of 2010 he found a second job to supplement their income.

[22] He testified that during their short relationship commencing December 2010 when they were together he began contributing \$500 to the home expenses.

[23] On the totality of the evidence it is impossible to determine, during the term of their relationship, when they were together and exactly how long were the separations.

[24] On the evidence provided I am unable to determine how much each of the parties contributed to the household expenses.

[25] The father ended the relationship in November 2010.

[26] He explains his reasons for distancing himself from the mother whenever possible, while trying to maintain contact with his sons.

[27] He believes the mother has a personality disorder. He describes how her angry outbursts escalated to extreme levels. He advises the mother would yell at him for long periods of time. He describes her temper as aggressive.

[28] He testified that he had to protect himself from her extreme mood swings by leaving the home on a number of occasions.

[29] He describes his attempts to cooperate with the mother in order to maintain his contact with his sons.

[30] In March 2011, the mother was being treated for a panic disorder. As a result of her discussions with a pharmacist, her family doctor was contacted and the mother was taken by ambulance to hospital. At one point the father advises she threatened to kill herself. She was afraid she might harm her children.

[31] During this time there were many pressures on the mother arising from the responsibility to care for her oldest child; the birth of twins and her struggle with cancer. Add to this the difficult relationship between the parties and you have a recipe for disaster.

[32] Child Protection intervened for a short period of time. The maternal grandmother and the father took care of the children in her absence.

[33] The mother's contact was supervised by her mother and the father of these children.

[34] The most prevalent complaint coming from the mother about the fathers parenting is his lack of involvement. She described her efforts to have him involved in a meaningful way with his sons. However, she also placed many conditions on where and when he could take the children.

[35] The mother says on the one hand that on separation the children did not miss their Dad yet on the other hand in April 6th, 2013, she sent him an e-mail advising him that the children cried inconsolably for him.

[36] The father testified that the mother was very controlling of his parenting time, allowing him limited contact. He advises he abided by her restrictions for fear of losing contact with his children.

[37] The mother has historically imposed restrictions on the father's parenting time, prohibiting him from taking their child to his home. The father accepted these restrictions believing if he did not comply the mother would make it more difficult for him to see his sons.

[38] Once he retained counsel he advised the mother he was not obliged to follow these restrictions.

[39] The mother insisted, for a period of time, that he see the children in public places and in particular, the library. During a May 2013 visit the mother called the police because she did not see the father's car at the library where she expected him to be.

[40] She called the police when he did not return one of the children's school paintings.

[41] The father has a considerable number of cats in his home. The mother has contacted SPCA to have them investigate his treatment of the cats in his home.

[42] She has given him last minute notice of medical appointments.

[43] She moved the children's daycare without notice, rearranged and restricted his parenting time.

[44] While she alleges the home in which the father lives has serious deficiencies, (and it apparently did prior to renovations); her own home is sourced with undrinkable water, requires a new roof, has exposed plumbing and some rotting floorboards.

Allegations

[45] The children have had overnights with their father starting in July 2013.

[46] The mother left the boys with their father from July 16th to the 27th while she was away on conference.

[47] In or about March 2014 one of the children began to exhibiting aggressive behavior at the daycare.

[48] The mother alleges the child made a disclosure suggesting the child had seen or been exposed to inappropriate sexual content.

[49] She contacted the RCMP and Child Protection Services. The child was interviewed.

[50] The Agency interviewed the father and the child separately, and advised the mother they were not pursuing the matter further.

[51] The mother persisted in pursuing these disclosures in July 2014 by bringing the children to one of the daycare teachers and insisting they disclose the same information to this teacher.

[52] The daycare educator testified she saw nothing in the interaction between the children and either parent to cause her concern about the emotional health or physical safety of the children.

[53] Specific to the father, the daycare educator observed the children to be excited to see the father and observed them to have a strong loving close bond.

[54] The children did not express any fear or anxiety about going with their father.

[55] The Agency has advised they will not re-examine these particular disclosures and the police no longer respond to her repeat allegations.

Supervision/Burden of proof

[56] The mother bears the burden of proof to support a supervised parenting schedule.

[57] Initially the mother's evidence indicated that, despite her strong advocacy to have the father take the children and care for them, he consistently in the first years was reluctant to care of them and have them with him for extended periods of time.

[58] I conclude that for the early years the mother did absorb more, if not most, of the child caring responsibilities. This was in part due to their difficult relationship, the number of separations and the father's absence from the home.

[59] It was also in part because the mother limited the manner in which the father could exercise his responsibilities

[60] The most I can conclude on the totality of the evidence is that the mother came to this relationship with far more parenting experience than the father, having herself a child from a previous relationship.

[61] The father entered parenthood late in life and was on a steep learning curve when the twins were younger.

[62] The maternal grandmother offered the mother significant assistance.

[63] The maternal grandmother submitted evidence, that in her opinion, the father did not show an active interest in the day-to-day care during the children's early life as she hoped.

[64] It was not clear to me how much of the grandmother's evidence was based on what her daughter believed as opposed to what she herself witnessed.

[65] The father expresses no reluctance to be involved and appears to have an interest in consistent and predictable parenting time.

[66] There is no evidence he is unable to parent. His work schedule allows him to walk or drive the children to school and home from school, without the need for day care during his parenting time.

[67] Likewise, the mother's employment efforts are such she does not appear to need after school daycare.

[68] The children will clearly benefit from predictability and substantive contact with each of their parents.

[69] Each parent must ensure they are properly supervised. If child care is required for the purpose of maintaining employment or for longer absences they shall seek assistance from the other, if available.

[70] If not, appropriate arrangements must be made regarding childcare as agreed between the parents.

[71] I am satisfied after hearing the evidence that the mother has not provided sufficient proof to justify any restrictions requested or impose supervision on the father's parenting time.

Sibling contact

[72] The mothers' older child and the twins are attached and have a history together. It is important to recognize and preserve that attachment.

[73] I am also satisfied that although the mother seeks to further involve the father, I find her willingness to facilitate contact is based on whether the parents are getting along at the time. Without court order or consistent agreement this tends to sabotage the fathers' independent relationship with the children.

[74] While the father has been prepared to compromise, to the detriment of his relationship with the children, the mother is not prepared to agree and will not compromise unless required to do so by court order.

Joint Custody

[75] I have considered the factors outlined in the *Maintenance And Custody Act* including the degree of willingness of the parties to facilitate contact with the other parent. I have also considered the limited evidence of physical environment, what each parent offers to their children, time available to parent, the support of their family among other factors.

[76] I have considered continuity of care, sibling contact and attachment.

[77] Other than the child protection file I have no expert witnesses.

[78] To support and preserve what each parent offers to these children I grant both parents joint and shared custody of the children. This demands meaningful consultation and cooperation on major issues.

[79] In this instance, I grant shared custody to equalize the parent's authority regarding the children and preserve for each parent, their ability to be responsible for the care of their children.

[80] The parents are to consult on all major issues relating to the children including, but not limited to, the physical, emotional, educational and spiritual development of the children.

[81] In the event there is no agreement after reasonable consultation, the parents must consult with the professional, be they teachers for school related issues, medical authorities if a medical issue, to better inform themselves and reach consensus.

[82] No parent has final decision making authority.

Day to day decision making

[83] Each parent shall be responsible for the day-to-day decision making while the child is in their care.

Information Exchange

[84] They are to keep each other apprised of any medical issues, advise, consult and agree in advance, regarding major consultations with a specialist.

Emergencies

[85] In the event of emergency, the parent who has the children in their care shall ensure the children receive immediate assistance and as soon as practicable thereafter, inform the other parent.

[86] The mother is to ensure the doctors and educational therapists involved in the children's care have contact information concerning both parents in their files.

[87] Likewise should the father need to take the children to a medical appointment, he shall ensure the medical file contains the contact numbers for the mother.

Extracurricular activities

[88] The parties are to agree in advance of the registration and scheduling of extracurricular activities.

School District

[89] The parents agree to keep the child in their current schooldistrict.

Religious observance

[90] The father has agreed to allow the children to be with their mother on the Jewish high holidays if she has advised him one month in advance and they have agreed on alternate make-up days.

[91] Other than those major holidays, the father may address the children's religious upbringing on his weekends in a manner consistent with his tradition. He is not obliged to comply with the mother's tradition other than as agreed upon. I have considered the direction of the Supreme Court of Canada in *Young v Young*. 1993 CanL1134.

Holidays

[92] The parents shall share all major holidays including March break, Easter, Christmas and summer vacation.

[93] Beginning in odd numbered years, including this year, the father shall have the children in his care from end of school to until 3:00 p.m. Christmas day when they shall be returned to their mothers care for the balance of the vacation.

[94] In even numbered years the mother shall have the children from the end of school to 3:00 p.m. Christmas day.

[95] The parties shall ensure the holiday is divided equally including Easter and March break.

[96] In even numbered years the mother will have overnight Easter Saturday to Sunday noon. In odd numbered years the father will have overnight Easter Saturday to Sunday noon.

[97] The children shall be with each parent overnight on their respective birthdays and Mother and Father's day.

[98] The parent shall be entitled to equal time during the summer months as agreed upon in writing, in advance. In the event they're unable to agree on the summer schedule week about is the default schedule.

[99] Each parent is entitled to two weeks non-consecutive, uninterrupted, block vacation time each summer. When the children are older the parents may agree to lift the condition of non-consecutive dependant on the children's facility to be away from either parent for a 14 day period.

First Option

[100] The mother shall have first option in odd numbered years and the father in even numbered years.

[101] For the parent with first option, they shall advise the other in writing on or before May 1st of each year as to their choice of vacation time.

[102] Within one week of being advised, the parent who does not have first option that year shall advise the other parent in writing of their selected vacation time.

Schedule of parenting time

[103] The children are to be in the father's care every second weekend from Friday after school to Monday return to school.

[104] During the weeks preceding his weekend, the children shall be in his care from Tuesday after school to Wednesday return to school in the morning.

[105] During the weeks after the children are in his weekend care the children shall be in the father's care on the Wednesday overnight to the Thursday return to school.

[106] This schedule ensures that the children have contact with each parent during each week and uninterrupted weekend time.

[107] Each parent shall have right of first refusal should they be unavailable to provide care for his children.

[108] This should keep them from being involved in the conflict between the parents.

Long weekends

[109] If a parent has the children on their weekend and it is a long weekend or in-service day, they shall have the extended day.

40%

[110] I have calculated the time spent with each parent monthly, including the equal share of holiday time and extra days inclusive of long weekends, Father's day birthday etc. and determined it to equal at least 40% percent in accordance with the child support guidelines.

[111] The parties may agree on changes to this schedule or additional times or exchanges of times, providing it is in writing and consented in advance. If no agreement exists the default schedule is as set out in this order.

Mobility

[112] The children are not to be relocated from their current residence or school district without advance written consent of both parents.

[113] The parties may arrange for travel outside the Province or the country, provided they do so within their parenting time or such alternated schedule as agreed upon in advance, in writing.

[114] They shall provide to the other all details about their location and access numbers to ensure the other parent has access to them in the event of emergency.

[115] They shall advise of trip details, arrival and departure times and itinerary in advance, in writing.

[116] They shall cooperate in applying for necessary passports and provide the documentary consent to travel as requested.

Financial arrangements

[117] The father is a musician. Although he has traditionally earned his income from the music industry, he obtained employment that has provided the home with some improved financial stability.

[118] The mother is unemployed and at times self- employed. She was ill in 2011 and took time to recover.

[119] There is some evidence that she continues on disability income.

[120] The mother admits that commencing in December 2010, the father began monthly payments of \$500.

[121] Her evidence indicates that he varied his payments to \$493 monthly plus a contribution to child care in November 2013, continuing each month until September 2014, when he varied the amount again to \$549.25 monthly.

[122] Finally, in September 2014, he varied his payments to \$520.

[123] Child care expenses were paid separately as agreed, adjusted and topped up on an ad hoc basis.

[124] The mother testified that the father missed some months and made the payments up later. She believes there are still a few months owing but has no record of payments made or missed.

[125] Her main complaint seems to be that he is not paying on a timely basis, making her planning difficult.

[126] I reject the mother's request for retroactive child support and Section 7 expenses. They agreed on childcare after separation and when required, the father topped these payments up.

[127] The mother has not provided proof that a debt or underpayment actually exists.

[128] I have reviewed the actual income history as provided and note that there have been overpayments and underpayments for December 2010 to November 2015.

Year	Income	Payment schedule	Table
2010	24,550	500	355.24
2011	18,800	500	273.80
2012	28,942	500	422.45
2013(10 months)	37,136	500	532.77
2013(2months)		493	532.77
2014(8months)	36,687.14	493	526.93
2014(4months)		549.25	526.93
2015(8months)	36,929.88	549.25	530.09
2015(3months)		520	530.09

Table child support

[129] I have made this calculation on actual verified income, minus union dues, in the years in which he paid these dues.

[130] When living together the Respondent started paying the Applicant \$500 per month towards living expenses. He continued this payment after the separation until the application was file. The amount was adjusted to the table amount.

[131] From December 2010, to and including October 2013, he paid \$500 per month. During this time when an obligation existed his income would have yielded payments of \$355.24 for 2010; \$273.80 for 2011; \$422.45 for 2012 and \$532.77 for 2013.

[132] In November 2013 he altered his payments to \$493 when he should have paid \$532.77 and \$526.93 in 2014.

[133] In September 2014, he paid \$549.25 when he should have paid \$526.93 and in 2014, he should have paid \$530.09 when he altered his payment to \$520.

[134] I have adjusted the payments to account for the changes when made.

[135] Depending on the date from which one begins to calculate, there can be an overpayment of base amount from December 2010 to November 2015, in the amount of \$4,032.32 and an underpayment for the same period of \$708.95 leaving a total overpayment of \$3,323.37, if one assumes all month's payments are complete.

[136] If one starts later in December 2012 there is a significantly smaller underpayment of table amount.

Section 7 child care and medical premiums

[137] The Applicant is seeking a retroactive contribution to child care costs and health care premiums back to 2011.

[138] She combines what she alleges is an underpayment of all costs, claiming there is \$6,387.96 owing.

[139] Part of the calculations she provides (2047.60) relate to a period of time before the final separation in November 2012. Thus for part of the time the parties lived together.

[140] There is evidence that the parties agreed on a day care amount and the Respondent paid as agreed.

[141] It is also unclear to me whether all daycare was necessary.

[142] Considering the factors outlined in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra* [2006]2 S.C.R.231, 2006 SCC 37 ; I conclude that the attempt to reach back is not well founded in fact.

[143] The parties were in constant discussion about costs, they had an agreement of sorts , the respondent paid or topped up his day care contribution when asked. There is no evidence of blameworthy conduct.

[144] For periods of time within the retroactive period claimed he also paid health care premiums.

[145] I dismiss the request to reassess child support, child care and health premium contributions absent a factually accurate foundation and certainty regarding what was paid.

[146] There are now very minimal child care expenses required until if and when the Applicant returns to employment.

[147] Given the Respondent's current income, his parenting schedule, his obligation to pay support at a set off amount and the applicant's low income which affects the set off amount, I decline to set an amount or order repayment.

Prospective Child support

[148] This is effectively a shared parenting arrangement.

[149] I note for future purposes the mother was out of the work force in 2011, and for a period after that, legitimately, to address her illness surgery and therapy. There is some evidence to suggest her treatments ended in 2012.

[150] The mother advises she has commenced several non-profit businesses and organizations.

[151] She recommenced her self-employment pursuits sometime in mid-2013. She has authored a book. She admits that the total of these pursuits produces little income.

[152] Aside from these pursuits, she remains unemployed and in receipt of disability benefits.

[153] The children started school in September 2015. Each parent testified that for the most part, no childcare is needed except when the mother is away on business, which does not appear to be very often.

[154] The mother and father both have an obligation to provide financially for the children. I have no evidence on which I can conclude the mother is unable to work except that her income comes from disability. I am unable to conclude how long this will continue.

[155] She may experience a reduction in any assistance she receives with this new parenting plan.

[156] Using her current income to determine a set off results in the bulk of the child support coming from the father.

[157] The set off amount in accordance with his projected 2015 income, is \$440 per month, made in bi-monthly payments \$220, twice per month.

[158] In considering the means and circumstances of the parties and the effect of this shared arrangement on the parties I acknowledge that the costs associated with more parenting time for the Respondent will be increased. On his income this will be difficult. The Applicant will have reduced income and less parenting time .

[159] In addition, he will bear 75% of the after tax and after subsidy costs of any daycare **that is required to assist the mother to pursue employment.**

[160] The mother must provide proof of necessary Section 7 expenses regarding **necessary daycare**, the cost of uninsured medical expenses on a monthly basis and he shall contribute the same within five days of receipt of proof.

[161] The father shall retain the children on his medical plan for as long as he is employed.

[162] If he is no longer able to maintain this insurance, on the month following the termination of his employment, he shall provide to the mother 50% of the expense she incurs under her plan for the children's coverage continuing until the month he is able to reinstate this employment insurance.

[163] If not disabled, the mother is required to seek employment to address her obligations for support.

[164] The regular enforcement and recalculation clauses shall be included.

[165] Counsel for the father shall draft the order.

Moira Legere Sers, J.