

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Horton v. Marsh, 2008 NSSC 224

Date: 20080709
Docket: 57545
Registry: Sydney

Between:

Jason Horton

Applicant

v.

Kim Marsh

Respondent

DECISION

Judge: The Honourable Justice Theresa Forgeron

Heard: May 21, 2008 in Sydney, Nova Scotia

Oral Decision: May 28, 2008

Written Decision: July 9, 2008

Counsel: Mr. David Campbell QC, counsel for Jason Horton
Mr. Alan Stanwick, counsel for Kim Marsh

By the Court:

I. Introduction

[1] Ethan Douglas Marsh is 9 years old. His parents, Kim Marsh and Jason Horton, cannot agree as to whom Ethan should primarily reside pending the trial which is scheduled for October 6, 7 and 8, 2008.

II. Issue

[2] What interim, parenting arrangement is in the best interests of Ethan pending the October hearing?

III. Decision

a) Legislation and Law

[3] Section 18 of the *Maintenance and Custody Act* provides this court with the jurisdiction to make an order respecting custody and access. In granting such an

order, the court must apply the best interests of the child test as stated in s.18 (5)

which provides:

(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. R.S., c. 160, s. 18; 1990, c. 5, s. 107.

[4] Generally speaking, during interim proceedings, it is the status quo which gains preeminence. In **Pye v. Pye** (1992), 112 NSR (2d) 109 (TD) Kelly J.

approved the comments of Daley J. at para 5 which reads in part::

[5] I concur with Grant, J.; in **Stubson v. Stubson** (1991), 105 N.S.R. (2d) 155; 284 A.P.R. 155 (N.S.S.C.,T.D.) that the test in such an application was properly set out in **Webber v. Webber** (1989), 90 N.S.R. (2d) 55; 230 A.P.R.. 55 (F.C.), by Daley, F.C.J. at p. 57:

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...

[5] Similar comments were also echoed by Goodfellow J. in **Foley v. Foley**, 1993 CarswellNS 328 (SC).

[6] The status quo which ordinarily is to be maintained is the status quo which existed without reference to the unilateral conduct of one parent, unless the best interests of the child dictates otherwise. This is reviewed by Wright J. in **Kimpton v. Kimpton** 2002 CarswellOnt. 5030 (SCJ), at para 1, which reads as follows:

1 There is a golden rule which implacably governs motions for interim custody: stability is a primary need for children caught in the throes of matrimonial dispute and the *de facto* custody of children ought not to be disturbed *pendente lite*, unless there is some **compelling** reason why in the interests of the children, the parent having *de facto* custody should be deprived thereof. On this consideration hangs all other considerations. On motions for interim custody the most important factor in considering the best interests of the child has traditionally been the maintenance of the legal *status quo*. This golden rule was enunciated by Senior Master Roger in *Dyment v. Dyment* [1969] 2 O.R. 631 (Ont. Master), (aff'd by Laskin J. A. at p. 748) [[1969] 2 O.R. 748 (Ont. C.A.)] by Laskin J.A. again in *Papp v. Papp* (1969), [1970] 1 O.R. 331 (Ont. C.A.), at pp. 344-5 and by the Nova Scotia Court of Appeal in *Lancaster v. Lancaster* (1992), 38 R.F.L. (3d) 373 (N.S.C.A.). By status quo is meant the primary or legal status quo, not a short lived status quo created to gain tactical advantage. See on this issue *Irwin v. Irwin* (1986), 3 R.F.L. (3d) 403 (Ont. H.C.) and the annotation of J.G. McLeod to *Moggey v. Moggey* (1990), 28 R.F.L. (3d) 416 (Sask. Q.B.).

[7] This law has been repeatedly followed by Nova Scotia courts, and indeed by courts throughout Canada.

b) Position of Ms. Marsh

[8] Ms. Marsh states that Ethan should once again return to her primary care.

Ms. Marsh states that she has been a good mother who has met Ethan's needs. She states that she has provided Ethan with proper nutrition and clean clothes. She confirms that she has met Ethan's educational, medical and social needs. Ms. Marsh is also concerned that Ethan will be negatively affected if he is not returned to her care because she has been Ethan's primary care parent since birth.

[9] Ms. Marsh's interim plan for Ethan is to reside with her father and step mother in their three bedroom home. Ethan will have his own bedroom. She will not be returning to live with Mr. MacLean during the interim. Ms. Marsh and Mr. MacLean are engaging in couple's counseling.

c) Position of Mr. Horton

[10] Mr. Horton states that Ethan should not be returned to Ms. Marsh's primary care because such is no longer in Ethan's best interests. Mr. Horton and his mother

state that Ms. Marsh was neglectful of Ethan, especially in the last year. They cite the number of moves, school changes, hygiene issues, and medical concerns in support of their position.

[11] During the interim, Mr. Horton proposes that he and Ethan will reside with his parents in their four bedroom home in St. Peters. Mr. Horton states that Ethan is well-settled in school and in St. Peters. He has made arrangements with the dentist to correct the dental problems. Ethan enjoys participating in extracurricular activities and is attending church on a regular basis.

[12] Mr. Horton acknowledges that Ms. Marsh has been Ethan's primary care parent since birth until March 2008. Mr. Horton states that he choose to remove Ethan from Ms. Marsh's care in March 2008 out of love and concern for Ethan. This was not a decision lightly made, but rather a decision which was necessitated in Ethan's best interests. Mr. Horton's removal of Ethan was triggered by a conversation which he had with Ms. Marsh's mother, the contents of which were given no weight nor consideration by me, as the alleged comments are hearsay.

d) Findings of Fact and Decision

[13] Prior to March 2008, Ms. Marsh was the primary care giver of Ethan; Mr. Horton was an involved co-parent, but not primary care giver. However, the analysis does not end with such a finding. I must determine if the best interests of Ethan supports the continuation of the status quo which existed before the unilateral conduct of Mr. Horton in March 2008.

[14] I have considered the affidavits, with the exception of the hearsay comments. I have listened intently to the cross examination of the witnesses. I have weighed the submissions of counsel. I have placed the burden of proof upon Mr. Horton as he seeks to displace the status quo. It is the civil burden of proof based on a balance of probabilities.

[15] In reaching my decision, I make the following findings of fact:

- i) Ms. Marsh was Ethan's primary care parent from birth until March 2008;
- ii) Mr. Horton unilaterally changed the status quo in March 2008 without the knowledge, consent or permission of Ms. Marsh;

- iii) Mr. Horton, although not a primary care parent, was nonetheless an active and involved father in Ethan's life, especially during the period when all parties resided in Halifax;
- iv) Ms. Marsh and Mr. Horton love Ethan and Ethan loves both of his parents;
- v) Mr. Horton's parents were also actively involved in Ethan's life since birth. Ethan had frequent visits and extended stays at the paternal grandparent's home during his life. The paternal grandparents have a positive and loving influence on Ethan;
- vi) Ms. Marsh, Mr. Horton and Mr. Horton's mother had a cooperative relationship before March 2008. Phone calls, visits and discussions about Ethan were readily accommodated, for the most part. There was some turbulence when Ms. Marsh learned that Mr. Horton was to move in with his girl friend. However, usually accommodation and communication were the hall marks of the relationships amongst Ms. Marsh, Mr. Horton and Mr. Horton's mother;
- vii) Ms. Marsh neglected Ethan's dental health when she was the primary care giver. Ethan required a significant number of fillings and extractions and also required two appliances. Mr. Horton has made arrangements to have the dental work completed since March 2008;
- viii) Ms. Marsh allowed Ethan's provincial medical coverage to lapse in 2002. This means that Ethan has in effect not been eligible to access health services in Nova Scotia since 2002. Mr. Horton made arrangements to reinstate Ethan's coverage through Nova Scotia Medical Services Insurance in April 2008;
- ix) Since 2007, Ethan changed residences frequently while in Ms. Marsh's care. In January 2007, Ethan and Ms. Marsh moved from Halifax to Dartmouth. Two months later, they moved in with Mr.

Horton for a few days. They then moved to Margaree until the beginning of January 2008 when they moved in with Ms. Marsh's boyfriend, Mr. MacLean;

- x) Ethan has changed schools frequently since 2007. He attended Oxford school in Halifax until the spring of 2007. He was moved mid-term from Oxford school to Cape Breton Highlands Regional School. He was then moved mid-term in January 2008 to Jubilee School in Sydney Mines. Ethan was next moved to East Richmond Educational Center after March break 2008;
- xi) Both parents were involved in Ethan's education while Ethan attended school in Halifax. Mr. Horton was not involved when Ethan attended school in Margaree and Sydney Mines. Ethan's school records were provided for the two months that Ethan attended Jubilee School. He missed 3.5 out of 12 days in January and 3 out of 14 days in February. The teacher indicated in the school report card that "Ethan does not often complete homework or assignments." This statement appears in contradiction to Ms. Marsh's assertion that she always helped Ethan with his homework. I accept the concerns as outlined in the school report card as accurate. The rest of the report card discloses that Ethan struggles with school work, although he is noted to be a pleasant child who is eager to learn;
- xii) Ethan participates in extracurricular activities while living with his father, including community swimming, spectator sports and is attending church regularly. Ethan was not participating in extracurricular activities while in his mother's care in 2008, although Ethan was enrolled in activities in Margaree;
- xiii) Ms. Marsh struggles with hygiene related issues. I accept the evidence of Mr. Horton and his mother that Ethan was dirty and unkempt. I accept the evidence of Mr. Horton and his mother that Ms. Marsh's housekeeping skills were of significant concern especially given the cat urine problems which were described. I accept that

neither Mr. Horton, nor his mother discussed these issues with Ms. Marsh as neither wished to disrupt their relationship with Ethan and that each was concerned about possible repercussions if such issues were approached directly; and

- xiv) Ethan has not suffered any emotional or physical side effects while in the care of his father and while living in his paternal grandparent's home. To the contrary, I find that Ethan's life has stabilized. Ethan is happy, healthy and well-cared for in his father's care. His educational, health and social needs are being addressed in a child-focused and exemplary manner at this time.

[16] I have therefore determined that Mr. Horton has met the burden which is upon him. I find that this is one of the rare occasions when the status quo should be disrupted and the child should continue in the primary care of his father at this time as such is in the best interests of Ethan.

[17] I find, on the evidence which was provided at this interim stage, that Ms. Marsh has not been able to meet Ethan's need. She neglected Ethan's health. His dental care was completely lacking. The number of extractions and fillings were not of a quantity that a parent would ordinarily overlook. Ethan's health card had expired in 2002.

[18] Ms. Marsh neglected Ethan's educational needs. His homework and assignments were seldom completed while at Jubilee school. If Ms. Marsh was working with Ethan as she stated, his homework and assignments would have been completed.

[19] Ms. Marsh did not supervise Ethan's hygiene. His hair and clothes were unkempt and dirty. Mr. Horton ensures this does not occur.

[20] It appears that Ms. Marsh, as she herself acknowledged, moved too quickly in her relationship with Mr. MacLean. For whatever reason, she was unable to provide appropriate nurture to Ethan during the recent past. Ms. Marsh appears to have personal issues which must be resolved before she can effectively parent Ethan. Although Mr. Horton's self-help methods are not condoned, it is nonetheless in Ethan's best interests to remain in Mr. Horton's primary care. However, given the past ability of the parties to communicate in matters involving Ethan it is appropriate that the order confirm that the parenting scheme will be one of joint custody.

e) Term of the Interim Parenting Schedule

[21] The interim, parenting schedule will therefore provide as follows:

- i) Mr. Horton and Ms. Marsh will share joint custody of Ethan Douglas Marsh born September 15, 1998. Mr. Horton will solicit Ms. Marsh's opinion on issues involving the health, education, and general welfare of Ethan. If after meaningful consultation, the parties are unable to reach agreement, Mr. Horton will have final decision-making authority.
- ii) Mr. Horton and Ms. Marsh will keep each other informed of important matters affecting the health, education and general welfare of Ethan while he is in the care of the other of them. Such information shall be relayed between the parties personally or via written communication. Ethan shall not be used as a messenger.
- iii) Mr. Horton and Ms. Marsh have the right to attend parent teacher meetings, and medical and dental appointments which concern Ethan. Each party has the right to obtain educational and medical information concerning Ethan from third party professionals involved in Ethan's care without the authorization of the other of them.
- iv) Mr. Horton will have Ethan in his primary care at all times not specifically stated in paragraphs v and vi herein.
- v) During the school year, Ms. Marsh will have Ethan in her care every Friday after school until Saturday at 7:00 pm. In addition, should Ms. Marsh attend the St. Peter's area, she will have reasonable access, at reasonable times upon reasonable notice to Mr. Horton to be exercised in the St. Peter's area.

- vi) During July and August, Ms. Marsh will have Ethan in her care for twelve days each month. In the event the parties are unable to reach agreement as to the exact dates for the July and August access visits, Ms. Marsh will have Ethan from July 1 at 2:00pm until July 7 at 2:00 pm and from July 15th at 2:00 pm until July 21st at 2:00pm; and from August 1st at 2:00 pm until August 7th at 2:00 pm and from August 15th at 2:00 pm until August 21st at 2:00 pm. The parties will revert to the regular school schedule stated in paragraph v on September 1st.
- vii) Ms. Marsh will be responsible for traveling to St. Peter's to pick up Ethan for the commencement of all access visits. Mr. Horton will be responsible for traveling to Sydney Mines to retrieve Ethan at the conclusion of all access visits.
- viii) Both parties will have reasonable telephone access to Ethan while he is in the care of the other party.
- ix) Neither party will speak negatively of the other in the presence of Ethan or within the hearing distance of Ethan.
- x) Both parties will forthwith register and attend the parent information program.
- xi) During the interim, and subject to summer holidays, Ethan will reside in St. Peters with Mr. Horton in his parent's home, and Ethan will reside in Sydney Mines at Ms. Marsh's father's home.

IV. Conclusion

[22] The application of Mr. Horton for interim, primary care of Ethan is granted subject to the specified parenting terms which have been reviewed. Mr. Campbell will draft the order and forward it to Mr. Stanwick for his signature. If any difficulties arise concerning the wording of the order, counsel should contact my assistant to schedule a brief hearing.

[23] I thank counsel for their professional and thorough representations.

Justice Theresa M. Forgeron