

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: A.D.B. v. D.E., 2007 NSSC 182

Date: 20070620

Docket: SFHF-004672, SFHMCA-31083

Registry: Halifax

Between:

B. (A. D.)

Petitioner

v.

E. (D.)

Respondent

Revised Decision: The original decision has been corrected according to the erratum released on January 27, 2010. The text of the erratum is appended to this revised decision.

Judge: The Honourable Justice Beryl MacDonald

Heard: April 10, 11 and 26, 2007, in Halifax, Nova Scotia

Written Decision: June 20, 2007

Counsel: Linda Tippett-Leary, for the Applicant
David Grant, for the Respondent

By the Court:

[1] To provide privacy to the parties, I will in this decision refer to the Applicant as the Mother and to the Respondent as the Father.

[2] This proceeding involves two variation applications filed by the Mother who is seeking custody of her two children, a son who is now 16 years old and a daughter who is 8. These children are presently in the joint custody of the Mother and the Father pursuant to consent orders issued pursuant to the Maintenance and Custody Act. They are in the primary care of the Father. He is not the son's biological father but entered into a relationship with the Mother when her son was quite young. The son knows his biological father who has chosen not to be involved in this proceeding. The Mother commenced these applications in September 2005. Unfortunately the passage of so much time since that date appears to have negatively impacted upon her relationship with her son who has resisted her efforts to spend time with him.

[3] One of the reasons for the delay in bringing this matter to a hearing was to permit the preparation of a custody and access assessment by Wendy Green. The reports for both children are dated July 24, 2006. Ms. Green recommended that the Mother have primary care of her daughter with specified access with the Father and the son remain in the Father's care.

[4] The sole and guiding principle to follow when adjudicating custody and access disputes is to determine what is in the best interest of the child or children involved. Several cases provide guidance to the court in applying this principle: See for instance *Foley v. Foley* (1993) 124 N.S.R. (2d) 198 (N.S.S.C); *Abdo v. Abdo* (1993) 126 N.S.R. (2d) 1 (N.S.C.A). Particularly useful is the comment in *Dixon v. Hinsley* (2001), 22 R.F.L. (5th) 55 (Ont. C.J.), at p. 72:

"The best interests" of the child is regarded as an all embracing concept. It encompasses the physical, emotional, intellectual and moral well-being of the child. The court must look not only at the child's day to day needs but also to his or her longer term growth and development."

What is in the child's best interests must be examined from the perspective of the child's need with an examination of the ability and willingness of each parent to meet those needs. Each parent's plan for the child must be examined carefully in

light of the child's needs. Custody is not always awarded to the parent who has "cooked the most meals, driven the most miles, attended the most concerts or cheered the loudest at their achievement..." (*Gillis v. Gillis* (1995), 145 N.S.R. (2d) 241 (N.S. S.C.) at p. 259.

[5] The Mother has suffered from a history of sexual abuse in childhood and early adolescence. She considers her parents to have been emotionally and physically abusive of her eventually leading to her running away from home at the age of 19. She entered into a number of relationships with men who were abusive as well. When the Mother met the Father he was a recovering drug addict with four years "clean time". He was very involved in Narcotics Anonymous. The Mother admired his speaking ability and his self assuredness. The Mother alleges that the Father eventually was abusive towards her and this contributed to her descent into severe depression including episodes which would lead to her cutting herself. She did realize she needed help and she sought out counseling in November 2002 from the services provided by the Capital Health District and eventually by the Community Health Team providing services to residents of Cole Harbour and Eastern HRM. Her therapist gave evidence during this hearing. Initially the Mother wanted the Father to participate with her in counselling to resolve the marital difficulties they were having and to educate him about the effect of depression on her life. The Father clearly did not understand what the Mother was going through and he was unsympathetic to her plight. Eventually the Mother decided that if she was going to regain her mental health she would need to leave the Father. When she made this decision the Mother had no employment, no immediate likelihood of employment, no savings and she had nowhere to live. However, the Mother was aware of Byrony House and she sought shelter there having left her children in the Father's care. She had little choice. The Father has not forgiven the Mother for leaving the home. In his opinion she abandoned the family. I am satisfied that he has done little to ease the children's sense of abandonment or to explain why their mother needed to obtain counseling and recover from her depression. The father is a stern and unforgiving man and this aspect of his personality was evident in these proceedings.

[6] The Father has repeatedly called the Mother a "pathological liar". He suggests she has essentially "hoodwinked" all of the professionals who have been assisting her recover from her depression and find a new life for herself. He no doubt makes these allegations against her because he is offended by what she has said about him. She has told those working with her and this court that he has

abused her both physically and mentally. She has said he was actively involved for a period of time in a marijuana grow operation. The premise of the Father's case is that I must make a finding in respect to the marijuana grow operation and if I conclude that he is innocent of this charge that I must find the mother to be the liar he has suggested she is. If this finding were made he then expects the children to remain in his care because their Mother is not a fit and proper person to raise them to adulthood. The Father went so far as to insist that the son be a witness on his behalf even though this was discouraged by both Justice Legere-Sears and myself. Their son missed two days of school waiting in this courthouse before he gave his evidence which took less than a minute. He denied that his father ever had a marijuana grow operation or that he abused his Mother. He was obviously uncomfortable and his statements offered little to these proceedings. What he said was already recorded in Wendy Green's assessment report. The Mother did not question this is what the son told Ms. Green. Putting this young man on the stand added nothing to these proceedings other than to show the length to which the Father would go to discredit the Mother. By insisting on the son as a witness the Father needlessly involved him in this proceeding. This young man was no doubt feeling abandoned by the Mother and he has been living with a Father who would do nothing to explain otherwise. The son's need to align himself with the Father would be considerable and I believe this therefore makes his evidence unreliable. The Mother said the Father had a grow-op and used marijuana for medicinal purposes. This was one of the points of argument during their relationship. Whether the Father did so or not is irrelevant to this particular proceeding. I would not decide the custody of these children solely based upon whether or not the Father at one time in his past engaged in this illegal activity. There is no evidence before me indicating that he is presently engaged in any such activity. He appeared to have reacted quite properly when his son was found with marijuana at his school. It is the Father's lack of understanding and compassion, his harshness, his desire to be proven right above all costs, and his lack positive comments about the Mother that is of more concern to me. The Mother has spoken positively about the Father and is capable of forgiveness.

[7] The Mother is presently enrolled in community college taking courses in Human Services so that she might be employed in places such as Byrany House to work with women recovering from abusive relationships, struggling with mental illnesses, and needing assistance to build up their self-esteem. She has completed one year of this two year program. The second year is to be completed at the

community college in Kentville. This will require her to move from her present residence.

[8] After the Mother left the household the Father eventually became involved with another woman who had, by the time of this hearing, also left the Father. She provided information to child protection services in Windsor Nova Scotia suggesting among other things that the daughter slept with Father while both were nude. The social worker assigned to this file gave evidence in this proceeding. She reported that the daughter did confirm that she had slept in the nude with her dad although the Father denied this. The daughter explained she did this when she had nightmares. The social worker informed the Father that this was inappropriate if it had occurred as the daughter said it did. The Mother in these proceedings has testified she does not consider the Father to have any potential for child abuse and it is not her wish to in any way prevent the Father from having regular contact with his daughter by way of access. However, this does raise questions about the Father's judgment. The father has also suggested that the partner who reported him did so as a result of some collusion with the Mother, an allegation I do not accept and I find the evidence to be to the contrary.

[9] The Father also tried to make much of a dispute both parties now have with the Department of Social Services relating to overpayments made at the time the parties were not living together. Once again the Father attempted to have this court agree with his version of what occurred in placing the entire responsibility for the "fraud" upon the Mother. Others are examining this matter in detail and the Mother has accepted some responsibility for what has occurred. The Father has not. These individuals are poor and while that does not excuse whatever has happened the evidence before me suggests that more of these checks were signed by the Mother and handed over to the Father than were kept by her for her own use. Her two children were in the care of the Father and she had no means to provide them with financial support. I do not consider these events to in any way disentitle her from parenting her children.

[10] The son informed Ms. Wendy Green that he wanted to continue to live with his Father. He had just experienced one move prior to these proceedings and he did not want to undergo another move. He explained that he was currently not interested in visiting with his Mother. Ms. Green commented

“it appears that the Mother has made significant improvements in her life and that she would be a positive influence in her son’s life. It is possible that her son is emotionally aligned with the Father and that he is not being truthful about the care he is receiving.”

[11] The son did tell the assessor that

“ he will decide to spend time with his mother in the future, he is just unsure when. He does not want his mother to stop being available, or to stop asking him if she would like him to visit with her.”

[12] Finally the assessor reports

“he (the son) appears to be currently assessing the level of consistency and stability in his mother’s life and it is necessary for him to have some power and control in this decision making process with respect to his relationship with his mother.”

[13] While I am extremely concerned about the son’s ability to develop a healthy relationship with his Mother while under the influence of the Father, given his age and in these particular circumstances, I have determined he will remain in the primary care of the Father but in the joint custodial care of the Father and the Mother. The Father shall provide the mother regular information about their son’s schooling, health care, and about other important information in their son’s life. He is not to impede the opportunity for the son to speak with his Mother on the telephone and both parties shall regularly provide the other with telephone numbers, addresses and other necessary contact information. The assessor has requested that neither party share any part of her assessment with the son and I will repeat that requirement. He is not a prize to be fought over but a young man who needs the love and attention of both of his parents and it is my sincere hope that the Father will accept this and encourage the development of a relationship between the son and his Mother. Not to do so will only harm the son in the long term.

[14] The parties daughter has had regular contact with her Mother although it has not been as frequent as her Mother might wish. Not all of this has occurred as a result of any deliberate obstruction by the Father although he has not always been as cooperative as he might have been. Poverty is an issue affecting the availability of transportation for both of these parents. It is easy to order that a parent should

have a child in his or her care every second weekend with sharing of holidays but we have no control over the parents ability to exercise those opportunities. This will continue to be a problem as long as these parents have inadequate financial resources.

[15] The parties' daughter does have some speech hesitation for which she had been seen by speech therapist when she was four years old. The Mother is concerned about the present inattention to this problem. The Father minimizes this difficulty and does not feel it requires further intervention. As is so often the case the daughter is aware of the conflict between her parents. She wants a positive relationship with each of her parents. She has been used as a "messenger" by both parents and this must cease. The Mother and the Father will need to communicate directly with one another. I am satisfied they are capable of doing so and that they have done so in the past. The Father has stated that he understands his daughter does need to have time with her mother and he has himself facilitated this. While he never understood or acknowledged the Mother's emotional turmoil, his denigration of her primarily began when she made this application for primary care of her children. This must stop. If he cannot be cooperative as is expected, the mother may need to return to request other remedies.

[16] In her assessment Ms. Green states

"the Father appears to struggle with truly appreciating the daughter's needs and seems to minimize the potential emotional psychological impact on her of her experiences and/or surroundings. He pays little attention to detail for the daughter and it seems her environment at the home of the Mother will likely have a greater and more positive influence on her development. The Mother appears to have a natural ability for nurturing and cherishing which are key elements in allowing young women to become capable young women."

[17] The evidence presented in this hearing confirms these impressions and I am satisfied that the daughter should be in the primary care of her mother. I also consider it to be in the best interest of the daughter to be in the primary care of her mother because I am satisfied the Mother will facilitate and encourage a continuing relationship between her daughter and the Father. I am not satisfied that the Father would be as supportive of the daughter's relationship with the Mother. I realize the Mother will need to move from her present residence and obtain housing in

Kentville while providing a residence for her daughter. I accept that she is a responsible mother and will be able to assist her daughter with the adjustments necessitated by this move. She is a child who has moved several times in her life and she is not so attached to her present community so as to make another move against her best interest.

[18] The daughter does have a positive relationship with her Father which must be maintained. While I can do nothing to solve the transportation problems these parties will experience it will be their responsibility to work together to ensure that the daughter will, as often as possible, be able to be in her Father's care at the times I will outline. She should be in his care every second weekend from Friday after school until Sunday at whatever hour is appropriate given the transportation issues I have raised. Holidays are to be shared and if there is any difficulty in how that sharing should occur I will hear further submissions from the parties and I retain jurisdiction to rule further on this issue to avoid future conflict. As I have ordered in respect to her brother, the report of the assessor is not to be shared with the daughter in anyway.

[19] As a result of this decision the son and the daughter are to remain in the joint custodial care of the Mother and the Father. The son shall be in the primary care of the Father and the daughter in the primary care of the Mother beginning at the end of her school year. The Father shall have his daughter in his care every second weekend from Friday until Sunday beginning the third weekend after the daughter has been placed in the Mother's care. The exact time the child is to be in the Father's care on Friday and returned to the Mother's care on Sunday will need to be determined by agreement of the parties taking into account the availability of transportation and whether the request is during the school year. The Mother and the Father shall keep each other informed of significant events in the lives of their children while they are in their care and they shall consult one another about major decisions to be made involving their health, education, social development, and general welfare. They shall provide copies to the other of school reports and any other documentary reports either receives concerning the children. They shall have the right to speak with and obtain information from the children's teachers, physicians, counsellors, and any other persons providing services to the child. The Wife shall have regular telephone access with the son who shall be given the opportunity, with no obstruction by the Father, to speak with his mother when she calls. The same shall apply to telephone access between the Father and the daughter. To insure there is no potential for abuse, or concern in that respect, two

calls per week during which conversation has occurred, however brief, are sufficient access in this regard. It may take several calls to the home in order to achieve this access if children are unavailable, or if no one is at home.

[20] I request that the Mother's counsel prepare the order incorporating the terms of this decision.

Beryl MacDonald, J.

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Counsel: Linda Tippett-Leary, for the Applicant
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Erratum

[1] Delete the section of paragraph 4 which reads:

Particularly useful is the discussion about this principle found in *Dixon v. Hinsley* (2001) 22 R.F.L. (5th) 55 (O.N.T. C.J), p. 72:

the “best interests” of the child is regarded as an all embracing concept. It encompasses the physical, emotional, intellectual, and moral well being of the child. The court must look not only at the child’s day to day needs but also to his or her longer term growth and development ... What is in the child’s best interests must be examined from the perspective of the child’s need with an examination of the ability and willingness of each parent to meet those needs. Each parent’s plan for the child must be examined carefully in light of the child’s needs. Custody is not always awarded to the parent who has “cooked the most meals, driven the most miles, attended the most concerts or cheered the loudest of their achievement.

[2] Replace that section with:

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