IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: J. E. S. v. A. J. M., 2008 NSSC 302

Date: 20081017
Docket: SFHMCA-31396
October 24, 2008Registry: Halifax

Between:

J. E. S.

Applicant / Respondent

v.

A. J. M.

Respondent / Applicant

Editorial Notice

Identifying information has been removed from this unofficial electronic version of the judgment.

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: September 15, 16 and 17, 2008, in Halifax, Nova Scotia

Written Decision: October 17, 2008

Counsel: Tanya Jones, for the Applicant/Respondent
Andrew Pavey, for the Respondent/Applicant

By the Court:

[1] In August 1999 the Mother commenced a common law relationship with the Father. On October 1, 2002 their son was born. In August 2003 the couple separated and since that time have engaged continuously in disagreements and court actions in respect to their son's care.

[2] The sole and guiding principle to follow when adjudicating custody and access disputes is a determination of what is in the best interest of the child or children. 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.

[3] In this case the Mother and the Father each have provided affidavits and testimony that contradicts what the other has said; they each have very different recollections of past events. When parties and their witnesses have such divergent information about events an analysis of their credibility is critical to any decision to be made. Justice O'Halloran, J.A., speaking on behalf of the British Columbia Court of Appeal, in *Faryna v. Chorny*, 1951 CarswellBC 133 gave this instruction about the assessment of credibility:

> 10. The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The

> test must reasonably subject his (the witness) story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[4] I have also considered direction that appears consistently in decisions before our courts that requires a review of the internal consistency of the evidence, the logic and common sense of the testimony in terms of the circumstances described and the consistency of the evidence as measured against prior statements and against the contrary evidence and the exhibits filed.

[5] I have decided that the child, who is the subject of these proceedings, is to be in his Father's sole custody with access with his Mother as will later be described in this decision.

[6] These court proceedings started on April 20, 2004 when the Father commenced an application and an interim application in which he requested joint custody with specified care arrangements and child support. In his affidavit sworn April 23, 2004 he alleged the following:

- when he and the mother separated they had agreed the mother would take care of their son during the week and the father would provide care on the weekends. They agreed to share holidays and he would pay $300 per month child support.

- there were difficulties in the exercise of his access particularly during transitions. In paragraphs 21 to 25 he described an incident that began with his displeasure as expressed to the mother about the full "Mohawk" haircut the mother had arranged for their son. This caused the mother to decide she would remove their son from the father's vehicle. Eventually to do so "the respondent pulled the car door open wider and jumped in completely backwards in the car over [the child] and she was struggling to get the car seat buckles undone. She was cursing and screaming. The children began screaming hysterically." The father alleged "finally the respondent reached backwards behind herself and pulled [the child] very aggressively by one arm and one leg from the vehicle."

- the child's did not sleep through the night in his mother's home and she would let him "scream it out". This behavior did not occur in the father's home where the child was on a regular schedule.

- the mother did not notify the father of their son's medical appointments, his immunization record nor of any other important information relevant to the child.

- the mother was denying the father access with the child.

[7] While some of the specific allegations contained in this affidavit were not tested by cross-examination nor admitted by the Mother, both parties have admitted there has been substantial conflict between them and that their son has been exposed to this conflict. Both parties have involved the police in their conflict with one another.

[8] On May 18, 2004 an interim hearing was held before Justice Cody. Testimony was given by the Father, the Mother, and the maternal grandmother. Justice Cody granted the parties an order with the following terms:

- The parties were to have joint custody with the child in the primary care of the mother.

- Access was to continue as previously arranged so that the child was to be with his mother from Monday to Friday and with his father from Friday at 5 p.m. until Sunday at 6 p.m. every week.

- The father was to pay child support in the amount of $308 per month and he was to pay 75% of the net child care costs once those had been provided to him by the mother.

- The mother was to have the final say on all important decisions to be made in reference to the child if the parties could not agree.

- The child was not to be removed from HRM without the consent of the other party or court order.

- The matter was adjourned to a pretrial conference to be held August 9, 2004.

[9] At that pretrial conference the parties agreed to reduce the child support to $172 per month and section 7 expenses were suspended until the Mother obtained employment and child care expenses resumed. A settlement conference was scheduled for October 14, 2004 and a two-hour hearing for February 17, 2005.

[10] As a result of the settlement conference the parties did reach an agreement but there was difficulty in issuing the order. The Mother, who had been unrepresented at the settlement conference, requested time to review the order with counsel. She did not believe that it represented her son's best interest.

[11] On February 17, 2005 both the Mother and the Father appeared before Justice Cody. Both were represented. The order issued was in compliance with the settlement agreement. It provided:

- when the mother was not employed full-time or attending school she would care for the child each week from Sunday evening until Friday evening.

- The father would care for the child from Friday on or about 5 pm until Sunday evening on or about 6 pm.

- The father was to have additional weekday parenting time with the child upon giving reasonable notice to the mother of that request.

- When the mother obtained employment which would require the child to have child care more than three days per week, or when the child began school, the parties were to rotate his care in what amounted to an equal care (shared parenting) arrangement with the changeover being a Friday on one rotation and a Wednesday on the other rotation.

- The parties also set out arrangements regarding care during the holidays

- The child was to reside in HRM except as agreed in writing between the parties or by court order.

- The parties were to share information pertaining to the educational, medical, social and religious upbringing and well-being of their son. Each was free to consult with professionals providing services to their son. If the professionals required the consent of the other parent that consent was not to be unreasonably withheld

- If the parties could not agree on major issues of importance to their child's well-being, "the matter will be referred at first instance to a mediator appointed by the Supreme Court of Nova Scotia, Family Division". The order did not state what was to happen if mediation was unsuccessful.

- Child support was to continue to be paid by the father to the mother in the amount of $172 per month

- The parents were to pay proportionally toward the net cost of extracurricular activities, medical and dental coverage and childcare expense.

[12] Unfortunately, the order was not clear in respect to the requirement to pay child support in the event the Mother returned to work and the parents were in a shared parenting arrangement. Paragraph 10 (a) states:

> .....The parties agree that they shall pay no child support to the other should the shared parenting arrangement be put into place....

[13] Paragraph 10 (b) states:

> The parties agree that they will not be bound by the strict adherence to the Child Support Guidelines under the shared parenting agreement. [The parties] shall discuss an appropriate amount of child support payable if there is a large disparity in their incomes. If there is no agreement as to what the appropriate child support amount will be, then there is an agreement that the matter will be set down before this Honourable Court for review.

[14] By May 2005 the parties were in conflict about how to implement this order. Each had different interpretations and they were unable to speak reasonably with one another to resolve their differences. The child was present during many of their disputes. On May 11, 2005 the Mother filed an application to vary the

February 17th, 2005 order and she requested a court mediator be appointed. Mediation commenced and the mediator provided a report to the court on March 16, 2006 in which the following appears,

> "Just wanted to indicate, in order to keep your records straight, that this mediation concluded on October 18, 2005, when the clients decided that they did not need anything more, that everything has worked out."

[15] What the parties had worked out was not provided for the court file. In his testimony the Father stated that mediation ended because the Mother would no longer co-operate. The Mother said it ended because she and the Father had reached a satisfactory arrangement. The comment of the mediator supports the Mothers information.

[16] Notwithstanding the intervention of the mediator, conflict continued and on August 10, 2006 the Father filed an application for variation. Upon reading this document it appears to be an application to enforce the shared parenting arrangements of the February 17, 2005 order, to determine what child support was to be paid, to determine what school the child should attend and to permit the Father to make whatever child care arrangements he wished to make when the child was in his care. It is not clear whether this application was ever served on the Mother. On January 12, 2007, she filed an application to vary in which she requested primary care. On June 8, 2007 the Father filed an application to vary in which he requested primary care.

[17] The parties were unable to make joint decisions relating to their son's care. They could not agree on a child care provider. They could not agree about the extracurricular activities he should attend. The Mother would not provide the Father the employment information he requested. They could not agree about the interpretation of the court order. As a result of that conflict it became necessary, on June 15, 2007, for the court to take the unusual step of convening an interim hearing to vary the February 17th , 2005 order to stabilize the situation for the child until an assessment report could be completed and a final variation hearing held. Justice Williams presided at the interim hearing. He varied the order of February 17, 2005 and provided as follows:

- the mother and the father were to share parenting of their son but on a rotation of one week with the mother and the next week with the father with the changeover time to be Friday at 5 PM.

- the mother was responsible for arranging the child's medical and dental appointments and she was to provide two weeks notice of those appointments to the father so that if the child was in his care on the appointment date, he was to take the child to the appointment. Similarly if the child was in the mother's care she was to take the child to the appointment.

- the child was to be enrolled in O. School and was not to be removed to a different school without the father's consent or court order.

- the father was to pay $240 per month child support which was the setoff pursuant to the child support guidelines and those payments were to commence June 30, 2007. However, if the wife obtained employment which would change her income from $14,300 "the monthly amount of child's maintenance shall be adjusted in the month following the month she obtains the employment".

- if the mother was not working during the summer she was to be the first choice for child care when the father was at work during the week when the child was to be in his care. If the mother was working the father could make his own childcare arrangements.

- if the mother was not working during the school year she was to be the first choice for child care when the child was to be in the father's care for the week. If the mother was working she was "primarily to be responsible for making the child care arrangements for [the child] and it is expected [the child] will have one child care provider which both parents shall use and which shall be proximate to the O. School".

- any net child care expenses were to be shared 40% payable by the mother and 60% payable by the father.

- the mother was to provide the father one weeks written notice of any change in her employment status and she was to provide her rate of pay, hours of work, and employment terms including whether the employment was permanent or not.

- neither party was to schedule extracurricular activities unless both agreed in writing.

[18] Justice Williams did order an assessment to evaluate the parenting abilities of the parties as well as to provide a psychological evaluation of each parent and to make recommendations on a parenting arrangement that would meet the best interest of the child.

[19] The shared parenting arrangement did not lessen the conflict between these parties. They appeared incapable of joint decision making and neither was co-operative with requests from the other. The Mother did not provide the required employment information. The Mother did not arrange for a single care giver to be used by each parent. She continued to try to manipulate her work schedule so she could give exclusive care to the child.

[20] The assessment report prepared by the IWK Health Centre for Children, Women and Families recommended that:

- the father have primary care;

- the mother have regular access with the child every other weekend from Friday after school until Monday morning and every Wednesday from after school until Thursday morning with transitions to occur in conjunction with school attendance so as to minimize face-to-face contact between the parents;

- a mediator be appointed to resolve issues relating to child support, school enrollment, extracurricular activities and holiday access;

- all child care arrangements being made by the father;

- the mother participate in individual therapy focusing on the impact her behavior has had on her child and also to enhance her parenting skills relating in particular to child management issues and recognition of the child's needs as separate from her own.

[21] There were significant concerns raised in the report about the Mother's behaviors and attitudes that, in the opinion of the assessors, impaired her parenting capacities. Those concerns were:

- the use of marijuana (page 11)

- failing to support her son in attaining educational goals (page 22,23)

- paucity of age appropriate structure and routine for the child in her home (page 22,27,28)

- inability to promote a positive relationship between the child and his father due to her "intense focus of denigrating Mr. S. and his family" (page 24,25)

- inability to recognize and prioritize her son's needs over and above her own (page 25)

- her insufficient knowledge and/or use of age appropriate child management practices and her willingness to use corporal punishment (page 24,27)

- her intrusive and enmeshed style of parenting that may serve her own emotional needs but may potentially undermine her son's independence and healthy development. (page 26)

The page references above and in the remainder of this decision are to pages of the assessment report.

[22] Shortly after receiving this assessment report the Mother withdrew her variation application. Her submission before me is that as a result of the assessment she now has insight and is able to avoid conflict with the Father and he with her. They are now co-operating to arrange drop off and pick ups and these

arrangements are working. She wishes to continue the shared parenting arrangements described in the February 17th order and suggests they need not be varied. In addition she suggests that I should give little or no weight to the assessment report. Much of the information relied upon by the assessors is incorrect or incomplete and the assessor was biased towards her.

[23] There still appears to be tension in our legal system about the weight to be given to a court ordered assessment report. These reports often contain information, upon which an assessor has relied in formulating his or her opinion that may be classified as hearsay. Many would suggest assessors' opinions be given little if any weight unless the persons providing the information to the assessors are witnesses in the court proceeding. Others suggest the assessors are independent evaluators who have the skill and training to sort out reliable from unreliable information upon which to base his or her opinion. Their sources do not need to become witnesses in order for the court to give weight to the opinion. In this analysis the party dissatisfied with the opinion would need to do more than complain that the sources of information were not called as witnesses to "attack" the report. That party would need to produce evidence that would convince the court the information received by the assessor was unreliable. Experience in this court suggests the use of this latter analysis when faced with court ordered assessment reports. To do otherwise may provide an inappropriate advantage to the party who wishes to attack the report. That party does not need to disclose his or her trial tactics to the opposing party. The opposing party may know that the report recommendations are not accepted but may not know whether the attack on the report will be based upon some or all of the information relied upon by the assessors. Thus the party supportive of the report will be forced to call as witness all those who provided information to the assessors. This is expensive and time consuming. If little or no weight can be given to an assessors report without those witnesses, the report can be of little use to the court. Time and money will have been wasted. Perhaps in a pre-trial conference the party wishing to attack the report could be required to disclose the basis for that attack. We may have jurisdiction to require this disclosure. Our system is still adversarial although courts across Canada do not apply evidentiary rules in family law cases as strictly as they may be applied to other cases.

[24] For the purpose of this decision I have relied upon the information the Mother gave to the assessor and I accept that the assessor accurately recorded her

responses during their conversations. I have considered the Mother's testimony that some of her responses did not provide "the whole picture" to the assessor and her submission that the assessor only drew only the most negative conclusion from her responses and observations of her interaction with her son. I have considered the Mother's alternate explanations.

[25] I do not find that the assessor was biased in her reporting or in the formulation of her opinion. The responses given by the Mother, that I have accepted as accurate, and the observations made by the assessor, that I have accepted as accurate, do support the opinion expressed in the report.

DRUG USE

[26] The Mother "did not categorize marijuana as a drug". She reported current use of marijuana approximately one or two times per week. She denied ever using it in the house or in her son's presence but later conceded that she sometimes smoked marijuana after he was in bed. Her testimony at the hearing was that she smoked marijuana outside the house. She reported to the assessor "it doesn't affect my parenting at all". She did describe herself as a youth to be a "complete pothead". She has acknowledged in these proceedings that there was a referral made in 2004, by a therapist she was seeing at the time, to child protection authorities because that therapist was concerned about her use of marijuana. The child protection authorities did speak to her but chose not to initiate any proceedings.

[27] In our society many consider marijuana use of no more significance than the responsible consumption of alcohol. Many parents may have a beer or two over several hours on a weekend while caring for their children and would not be considered to place their children at risk as a result. Those who conduct assessments may likely flag this as a concern but it is only a concern to me if there is indication that the parents might abuse the substance so as to render himself or herself unable to attend to the child's care. The mothers use of marijuana, while it is an illegal substance, and provides a questionable role model, is not of sufficient concern in and of itself to satisfy me her parenting is impaired as a result.

LACK of SUPPORT for EDUCATION

[28] It has been alleged that this child, when in his mother's care, frequently attends school late. This was reported by the child's teachers who were not called as witnesses in the proceeding. The assessor assumed this meant late for class. There is some suggestion in the evidence that this may have referred to the time before class began when children have an opportunity to socialize. The mother denies that her son is frequently late although she admits she may often not arrive at the school until just before the bell rings for class. I have decided to ignore this information because it is inconclusive.

[29] The Mother has reported to the assessor that her son "hates school" and that "he would much rather hang out with me". When testifying her comments clearly indicated she did not consider it important for a student in grade primary to complete homework assignments. She was dismissive of the father's emphasis upon the completion of the child's homework. This is a child who is now repeating grade primary. One of the Father's complaints about the mother was that she often failed to provide the child's book bag containing his homework and that on other occasions when he had the homework notebook it was obvious the work had not been completed when the child was in the mother's care. Given the Mother's comments to the assessor and her testimony, I accept the fathers information. I am concerned about the Mothers laissez-faire attitude toward her sons educational needs.

STRUCTURE and ROUTINE

[30] The Mother admitted to the assessor that she does not maintain a consistent structure regarding bedtime, and that occasionally the child stays up as late as 10 p.m. In her testimony the Mother clarified that this would only happen on weekends and not during week nights. She did not say this to the assessor and the assessor did not ask her if this was her weekday as well as weekend pattern. However, common sense would suggest a parent in such a situation would respond by telling an assessor that during the week the child is in bed by a certain hour but that requirement is relaxed on weekends. Given that the Mother did not say this I find it quite understandable that the assessor would use this information to formulate an opinion that the mother does not provide the child with a regularly scheduled bed time - that she sends the child to bed as she pleases. I do not accept the Mother's last minute reformulation of the information she gave to the assessor about her son's bedtime. Although her counsel attempted to portray his client as

naive and inexperienced that is not my assessment. She is quick and intelligent enough to develop alternate explanations, deflect responsibility and rationalize. The entirety of the evidence suggests she has never taken any personal responsibility for what has happened to her in her life, nor does she now.

[31] The mother informed the assessor there were no rules in her home and that her son "does whatever he wants to do". She suggested he knows what "he's not allowed to do". Then she further added "if there's no rules, there's none to break". When asked how she would deal with any misbehavior as her son got older she stated, "He could leave. I don't deal with stuff like that. I would call his dad. He could come deal with it. That's what dads are for." Her testimony did not satisfy me that this response was inaccurately stated. I accept that she has a very permissive parenting style that may negatively impact upon her son's behavioral development.

[32] The Mother admitted she does not know how the Father parents or disciplines. As a result she is unable to insure consistency between the homes. Some inconsistency is understandable but it is evident that this child is exposed to very different parenting styles and disciplinary action. The mother admits that she has a tendency to give into the child instead of setting limits and she does so to avoid confrontation. I accept the assessor's opinion that overindulgence and appeasement may create a potential for serious behavioral problems developing in the future. I also accept the assessors opinion that the lack of consistency in discipline and parental parenting styles can produce conflict between the parents when discussing what is in the child's best interest as well as create confusion for the child.

[33] In the Father's home the child is encouraged to complete homework, the Father respects the child's need to achieve even in grade primary and the child has a regular bedtime and clear behaviourial limits.

PROMOTION of RELATIONSHIPS

[34] Statements the Mother has made support the suggestion that much of her conflict with the Father does not arise because of his treatment of her nor from her efforts to protect her son from his poor parenting but from unresolved personal issues in her relationship with him. Her first significant relationship was with the

Father. She stated that during her relationship both he and she could be violent but she denied coercive controlling violence and denied being fearful of Mr. S. adding "I never got beat". She admitted that on one occasion she gave him a black eye. However, in other comments to the assessor and in her affidavits she has suggested he was physically violent.

[35] The father denies perpetrating the level of violence reported by the mother. He reported to the assessor that she was quick tempered. He stated, "she'd freak, hit you." He then told of the incident when their argument escalated to the point that the Mother punched him in the face and as a result he was left with a black eye. The Father, while acknowledging physical altercations of pushing and shoving between he and the Mother, denied striking her. He has admitted he has, in the past, grabbed her in an attempt to restrain her from harming him. He does admit there were numerous verbal altercations between them.

[36] The Mother informed the assessor she and the Father separated following an incident of violence which she described as "the last time he drug me down the hallway " . However, she reports that the Father remained civil following the breakup even helping her move. Although she suspected he was "using hard drugs" for several weeks following the breakup and at that time had little contact with the child, she then reported that eventually the father was looking after the child on every weekend adding that "it was a good arrangement for me, I got to go out on the weekends". Although she had alleged the father had perpetrated violence upon her she informed the assessor that she had recently asked the father to move out west with her. She suggested that she and the father could find jobs and share residence together although she denied she had a desire to reunite with the father.

[37] The structure of the Mother's information and the way in which it was delivered severely undermined the Mother presentation of herself as a victim of the Father's violence. The dynamic of their relationship did lead to physical alterations but this is not the Father's pattern in relationships. There is no evidence of any violence in his relationship with his present partner. They have been living together for approximately 4 years and both report their relationship to be stable and happy.

[38] Most telling about the comments made by the Mother is her suggestion that the conflict between she and the father began when he entered into a new relationship. Up until then the father had been caring for the child on weekends - a good arrangement for the mother because, as noted earlier in this decision, she was able to go out on the weekend. She informed the assessor that when "he started dating the woman upstairs - things went to shit after that. He was not able to make decisions. She wants him to have full custody. She's a bitch. I think she's bipolar".

[39] I accept the assessor's opinion that the Mother continues to be "highly emotionally invested in her relationship with the Father and it is probable that she has not yet grieved the loss of that relationship". (page 29) I also accept her opinion that "given her own probable unresolved and observably intense emotions, there are serious questions about her ability to foster the child having a positive relationship with the father and his family. The mother's strong focus on her own needs and emotions has meant that she has little insight into the harmful impact of her behaviors on [her son], as she remains highly externally focused on her negative feelings toward [the father and his present partner]". (page 29)

RECOGNIZING the CHILD'S NEEDS

[40] In her discussions with the assessor the Mother "expressed that she does not feel that the current custody and access arrangement (week-on, week-off arrangement) is meeting [the child's] needs and best interests. She explained she feels that [the child] has to endure too many transitions and changes in residence." (page 21)

[41] However now, when the opinion of the assessor is that the child should be in the Father's primary care, the Mother argues shared parenting is in the child's best interest. What has changed her opinion? If shared parenting continues the child will have the same number of transitions the Mother earlier complained about. I have determined it is her need which drives her quest for shared parenting, not the child's best interest.

[42] Because the Mother has not been prepared to accept day care as appropriate for the child, and because she insists that he be in her care when the Father is working the Mother is unable to sustain full time employment and she must frequently change employment. This requires repeated changes to places where the

child will be transferred from one parents' care to the other. The Mother has refused to consider fixed alternatives because that will interfere with what she wants. In the meantime what her son needs is ignored. A shared parenting arrangement should have fixed transitions both in time and place so everyone will know what to expect and be able to arrange his or her life accordingly. Given the parties present circumstances it would be impossible for me to designate a fixed time or place for these transitions if they were to continue to share parenting. The school might be an obvious choice but I do not know whether the Mother's employment would enable her to go to the school for this purpose. That is not what is presently happening and I have no reason to believe these parities could, on their own, in the future, decide upon a fixed transition location.

[43] The Mother has been quite vocal in her condemnation of the Father and his present partner. She provides this information so readily and so frequently that I accept the Father's evidence that she has done so in the presence of the child. However, there is indication in the evidence that the Father and his partner have also made unflattering comments about the Mother in the child's presence. It is the assessors' opinion that the Father now understands that this behaviour can cause psychological harm to his son. The assessor was not satisfied the Mother had gained this insight. I agree. The Mother still has a personal need to describe the Father's parenting unfavorably even though she, in fact, knows nothing about his parenting. There is no evidence before me that there are significant concerns in respect to the Father's parenting capacity that suggest it would not be in the child's best interest to be in his primary care. As a result the Mother's portrayal of the Father and his partner is driven by her own emotional need to denigrate them. This creates a risk that she will not be able to change her behaviour and will continue to make negative comments about the Father and his partner in the presence of the child or directly to the child. She may attempt to undermine the child's affection for the Father and his partner.

CHILD MANAGEMENT PRACTICES

[44] The mother informed the assessor that "spanking is okay to a certain extent" adding that if kids to not receive a "smack on the ass" they "don't have the same respect". She suggested that children should have some fear of doing wrong. (page 8) She informed the assessor that she did have some difficulty managing her son's behaviours and that she has spanked him. She understands that others do not

appear to have the same difficulties and stated, “He’s a complete angel - well behaved and well mannered child in public, unless he’s with me.” (page 27)

[45] In the Mother’s home the assessor observed that, “[The Mother] made ineffectual attempts to redirect [the child], however he continued to ignore her. At one point [the Mother] became stern after [the child] threw a pillow, and [the child] began running through the house, [the Mother] chased after him. She proceeded to hold him by the upper arm and told him to stop throwing things. They then engaged in an activity together”. The Mother suggested this episode displayed she was able to take control and redirect the child. She also suggested his behaviour that day was not typical. He was tired because he just came home from school and he was faced with the unusual situation of being observed by a stranger. Given that the Mother has acknowledged difficulty in managing her son’s behaviours I am satisfied that what was observed by the assessor is likely a common occurrence in the Mother’s home. The child was not quickly redirected but had to be chased through the home. He was defying his mother. What will happen when he gets older? Will his disobedience cause her to use harsher punishment? The assessor has “serious concern about the potential for physical harm” to the child. (page 28)

[46] I accept that the mother is not presently using significant physical punishment as a disciplinary tool . However, her permissive parenting style and her frustration with behaviour she cannot control may cause her in the future to lash out at her son as she has with others in her life when they do not do as she requests.

INTRUSIVE, ENMESHED PARENTING STYLE

[47] The Mother is reluctant to allow others to provide care for her son. She has few friends and spends her free time with her son. This may be seen as commendable and it would be if by doing so she was assisting her son. In this case the evidence indicates that she has a possessive relationship with him. She suggests he would rather be with her than at school. He sleeps in her bed. Many children crawl into their parent’s bed at night seeking comfort. This is a natural phenomenon and is not a concern when it meets the child’s need. However, this child does not seek to sleep in his Father’s bed. This raises the concern that by crawling into his Mother’s bed he is meeting her need not his.

[48] The assessor is of the opinion that, "This dynamic is potentially concerning from the perspective of possibly placing pressure on the child to act as his Mother's social support, a role which is beyond his emotional or developmental capabilities, and does not prioritize his own social, developmental and emotional needs." (page 27)

[49] I am satisfied that the Mother does not view her son as a separate individual who needs to develop independence, learn how to control his behaviours and develop positive relationships with others. She needs to care for her son to give meaning and focus to her life. This is not a healthy situation for him.

[50] The Father is not a perfect parent but perfection is not required. None of the deficiencies apparent in the Mother's parenting were evident in the Father's parenting. The primary area of concern was his continuing conflict with the Mother.

[51] The Father and the Mother do not deny their child will be harmed by being exposed to their conflict. In order to decide whether their conflict has disappeared or been significantly reduced I need to understand why it occurred. If the precipitating factors are removed then it is likely conflict will be decreased or eliminated. In searching for the "causes" of this level of conflict much has been learned. In *Jackson v. Jackson* 2008 CarswellOnt 654, Murray J. quoted extensively from research literature to inform the parents about the harm conflict can inflict on children. He also attempted to explain why high conflict occurs in some families by quoting from "*High-conflict Separation and Divorce: Options for Consideration"* , a paper prepared for the Department of Justice, Canada, by Glen A. Gilmore in which the following appears:

> "At the external level are unholy alliances and coalitions– the dispute can be solidified by the support of friends, kin and helping professionals. These unholy alliances and coalitions included extended kin involvement and tribal warfare, when the extended family (such as the spouses parents) took it upon themselves to right the wrongs of the separation; coalitions with helping professionals, in which alliances with therapists and counsellors fueled the fight; and involvement with the legal process where, for example, adversarial attorneys take on the case and engage in tactical warfare with each other. Interactional elements include the legacy of a destructive marital relationship, in which each spouse while married had come to view the other in limited, negative terms; and traumatic or

> ambivalent separations in which the ex-spouses view each other in a polarized negative light or seem to maintain an idealized image of the other and are engaged in a never ending search for ways of holding together their shattered dreams. Intra psychic elements include the conflict as a defense against a narcissistic insult, where the central reason for the dispute is to salvage injured self-esteem or more primitive narcissistic grandiosity; a defense against experiencing a sense of loss, to ward off the emptiness that came from relinquishing each other; a need to ward off helplessness brought about by the desertion of the other spouse; and disputes that were a defense against the parents guilt over feeling that they could have tried harder to save the marriage. The majority of parents in this study presented traits of character pathology, some clearly having personality disorders. In these cases, the motivation for the dispute and derived more from their enduring personality characteristics, such as a need to fight, then from the experience of separation or the needs of the child. The children in these families took on a magnified importance because their parents got a great deal of emotional support and companionship from them."

[52] The level and cost of conflict is not necessarily based on the issues or on the amount of money involved. If any of the above described elements are driving conflict, expectations that there can be cooperative or shared parenting may be naïve. It is very difficult for individuals to uproot ingrained interpersonal negativity or change personality characteristics. To do so often requires extensive personal therapy. Mr. Gillmor speaks of traits of character pathology and personality disorders. These often refer to what are known as the Cluster B personality disorders as identified in the DSM-IV-TR. Among the Cluster B personality disorders are:

- the narcissist - who has extreme preoccupation with the self, a disdain for others, and a preoccupation with being treated in a superior fashion

- the histrionic - who is emotionally intense and suffers from mood swings, fears of abandonment, and who sometimes can fabricate events

(As summarized in "High Conflict People" Bill Eddy, Janis Publications Inc. 2006) The description of these disorders highlights their most obvious characteristics.

[53] In the assessment report prepared for this hearing Dr. Lowell Blood, psychologist reported on page 32:

> [The Mother] demonstrated an elevated score on the Histrionic and Narcissistic scales on the MCMI-III. An elevation on the scales can be associated with the response style exhibited by [the Mother] and can also be found in essentially normal individuals. Therefore, such elevations must be interpreted with caution.

[54] To interpret the elevation on the scale with caution means that the assessor must have something more than the test result to accept the proposition that the mother's responses and behaviors may be influenced by characteristics of narcissism and histrionics. Dr. Blood did find "evidence from her history and from the interview conducted to support the presence of some histrionic and narcissistic personality traits." These would not necessarily impede her social relations but "She is likely to evidence impulsiveness and shortsightedness in her actions. She is likely to impress as charming and clever to casual acquaintances. Those that know her well are more likely to see a demanding and manipulative side...." This is Dr. Blood's description of what one might find in the life of a person who has some histrionic and narcissistic personality traits. This is what his training as a psychologist has taught him. Whether the mother is in fact impulsive, and shortsighted, demanding and manipulative, is for this court to determine. If such a finding is made it supports the analysis that there are personality traits operative in the mother's response to life that may argue against co-operative or shared parenting. Many try to minimize the finding in an assessment that an individual has a "personality trait" . If operative within a person's personality structure these traits can have negative implications on one's capacity to share parenting and possibly even on one's ability to appropriately parent. In this case the testimony of the Mother, the affidavits she has filed, and her responses to the assessor satisfy me that she is impulsive, shortsighted, demanding and manipulative.

[55] The father's MCMI-III test analysis resulted in a valid administration. Although his response style had a tendency towards non-disclosure there was no evidence to disclose significant pathology. Thus there was nothing in the test results that would suggest issues relating to personality problems. However, his way of reacting to the mother, her requests and communication style, may have contributed to the conflict and without an understanding of this dynamic he may continue to find himself in conflict with the mother. His evidence is that the lack of recent conflict is due to his decision not to question or confront the mother about anything, He just does what she asks. I accept his evidence. This is not an example of the parties "co-operation" nor does it satisfy me that they will be able to avoid conflict in the future.

[56] The fact that parents have been in conflict does not necessarily mean that an order for joint custody is inappropriate. In *Gillis v. Gillis* (1995) CarswellNS 517 the court determined that conflict between parents does not necessarily mean they cannot be awarded joint custody if there is sufficient indication of their ability to place the needs of the child before personal needs and to cooperate on issues of vital importance to the child. The role of the court is not to determine which parent is better but to decide which plan for the child's care will best meet the child's developmental, educational, health and social needs. Although a shared custody arrangement may require more contact between parents than does a joint custodial arrangement, I consider the same principles to apply.

[57] In *Rivers v. Rivers* (1994), 130 N.S.R. (2d),219 (N.S.S.C.) Justice Stewart set out four questions to be examined when determining whether sole or joint custody is appropriate:

> [48] (a) A very basic question would be has each parent maintained a meaningful relationship with their children and does each possess parenting capabilities that are adequate to meet their children's needs?
>
> (b) Will the parents be able to make decisions together about the children? Are they able to co-parent despite any conflict on a personal level between themselves? Can they separate feelings for each other to focus upon the children's need for a relationship with both parents? Can they separate their personal relationships from the parent/child relationship?
>
> (c) Will the children be involved in the conflict between the parents in a detrimental manner?
>
> (d) Will the proposed joint custody or arrangement cause disruption and discontinuity to the children's developmental needs?

[58] The court in *Godfrey-Smith v. Godfrey-Smith* (1997), 165 N.S.R. (2d), 245 (N.S.S.C.) at paragraph 7 noted that the parents had in the early months of their separation displayed, ".... a healthy amount of cooperation as far as the children were concerned." The Court then stated:

> [17] It is painfully obvious to me that these parties in recent months have demonstrated a depressing lack of cooperation. This has resulted in the

> vitiation of virtually all direct communication between them. They do not meet face-to-face. They do not talk on the phone. Their e-mails are curt at best. They use their children as messengers and then wonder why things get lost in the translation.
>
> [20] It seems to me that when facing a contested application for joint custody a court should make a distinction between the parties' inability to communicate as opposed to the parties' unwillingness to communicate. To do so it will be necessary to explore their relationship with both pre- and post-separation with a view to determining how they have historically handled parenting issues.
>
> [22] Thus, the parties relationship at the time of the divorce may be of less significance than the relationship during the marriage; it being expected that conflict precipitated by litigation will likely abate in time.

[59] The little evidence I have about the relationship between the Mother and the Father prior to their separation is that it too was marked by conflict. Certainly there is no evidence that this couple were ever able to co-operatively parent except for the brief time when the Father provided all the weekend care and the Mother the weekday care. This was prior to the Father entering into a new relationship. I have no confidence that conflict will eventually be reduced between this couple without therapeutic intervention which they likely cannot afford. If they can access this service they should. However, it is pointless for me to require them to do so when I do not know if they can obtain these services. As a result shared parenting arrangement is not in this child's best interest.

[60] Where there is conflict and a lack of cooperation a shared parenting plan may be inappropriate but a parallel parenting plan within a joint custody order may be used to maintain maximum contact between parents and children while preventing opportunity for conflict and avoiding the necessity for parental cooperation. However, these plans must be extremely detailed and precise. To achieve that detail and preciseness the living circumstances of the parents must be stable and predictable. While the Father's circumstances appear stable the Mother's do not. Her work schedule can vary significantly. In addition I do not have a parallel parenting plan before me nor could I develop one in these circumstances. These plans require significant input from the parties and must provide workable mechanisms for communication, exchange of information,

transportation, parent participation in school activities and so on. None of this is before me in any format that would permit the development of such a plan.

[61] The Mother's parenting weaknesses require that the child be in the primary care of the Father. The parents inability to properly communicate with one another, and the potential for conflict between them, negates a joint custody arrangement. The Father will have sole custody. The Father has requested that the child attend L. School. To attend this school the child will travel on a bus with the Father's partner's children. A different school will be a change for this child and my preference would be to keep him in his present school. On the other hand it is still early in the school year and the course of study in grade primary will not be significantly different from his previous school. Because the child is in the Father's sole custodial care, the choice of a school would normally be his to determine. I will not interfere with his choice.

[62] The Father must inform the Mother about significant issues affecting the child's health, education, social and intellectual development. He is to provide her with copies of the child's school progress reports, and information about school events and recreational activities that may be attended by parents. While I am concerned about the possibility of continuing conflict between these parents they must communicate. I am not convinced that I must resort to ordering them to do so in a particular manner. If they have access to the internet and can use e-mail, they might prefer this method of communication. It provides a written record of what was said. If they cannot use this resource, telephone contact may be preferable to face to face communication. Reports and other written material can be mailed. If the Father is worried that the Mother will deny receipt of this information perhaps he should use registered or certified mail. The child should not be used as a go between or transfer agent.

REGULAR PARENTING SCHEDULE

[63] This child does need to have a continuing relationship with his Mother although he will be exposed to many of her parenting weaknesses when he is with her. She should attempt to overcome these weaknesses by attend parenting courses and personal therapy if she can access these services. However, in the meantime her son must have a relationship with her. Her deficiencies are not so significant to require that she attend parenting courses or personal therapy before

exercising access. Nevertheless I am concerned that weekday access will cause problems with her son's schooling. This being the case I am left with weekends. This child has been with his Mother in a shared parenting arrangement for some time. I am not satisfied that it is in his best interest to be in her care only every second weekend. As a result he is to be in her care the first, second and forth weekend of every month from some time after school on Friday until Sunday at 4:30 p.m. when he is to be returned to his Father's home. In order to set the time and place for the Friday pick up I will need to know the school the child will be attending and whether the Mother can pick up the child from his school or whether she will pick him up from a caregiver's home or the Father's home. Counsel for the parties are to provide the information needed so that the Friday pick up date and place can be inserted into the order to be drafted following this decision. I realize the transition place or places may not be neutral. When a transition takes place at the Father or Mother's home there should be little requirement for conversation or contact between them. The child can be awaiting the parent's arrival, leave the house when the parent appears, and get into her or his vehicle. On return he should be able to exit her or his vehicle and return to the residence without assistance. The evidence before me suggests the Father has been responsible for most of the transportation. If the Mother can do so he should be relieved of this responsibility. However, the child must have time to be with his Mother and if she does not have a vehicle or access to a vehicle the Father must continue to be responsible for transportation.

[64] If there is a fifth weekend in any month, the child shall be with his Father. At all times the Mother must ensure that the child returns to the Father's home with his book bag, clothing and school materials.

HOLIDAY PARENTING SCHEDULE

[65] The regular parenting schedule is to be adjusted to accommodate the holiday parenting schedule. For example, if a holiday falls on a weekend when the child would otherwise be in the care of the Mother but the holiday parenting schedule requires the child to be in the care of the Father, the child shall be in the care of the Father. If according to the regular parenting schedule the child is to be in the care of the Father the weekend following the holiday, the child is to be in the care of the Father that weekend in keeping with the regular schedule.

[66] If the weekends of Thanksgiving, Victoria Day, Labour Day, or July 1st, fall on a weekend when the child is in the Mother's care she shall care for the child until Monday at 4:30 when he shall be returned to his Father's care.

[67] In even numbered years the child shall be in the care of his Father on Christmas Eve and Christmas day until 3:00 p.m. at which time he shall be in the care of his Mother until 6:30 p.m. on Boxing Day when he is to be returned to the care of his Father. In even numbered years the child shall be in the care of his Mother on Christmas Eve from 3:00 p.m. until Christmas Day at 5:00 p.m. at which time he is to be returned to his Father's care.

[68] In even numbered years the child shall be in the care of his Mother for the Easter Holiday beginning on Thursday until the child is to be returned to his Father's care on Monday at 4:30 p.m. In order to set the time and place for the Thursday transition I will need the same information I have requested in paragraph 63 of this decision. In odd numbered years the child shall be in his Father's care for the Easter Holiday.

SUMMER PARENTING TIME

[69] The regular parenting schedule is to be adjusted, if necessary, to accommodate the summer parenting schedule in the same way as described in paragraph 65 of this decision. The Mother shall have the child in her care for one week in July and one week in August from Sunday at 4:30 p.m. until the following Sunday at 4:30 p.m. The week chosen by the Mother shall not include a weekend when the child is to be in his Father's care according to the regular parenting schedule if the child will be in the Father's care for only one weekend that month. The Mother is to inform the Father of the week she has requested for July and August on or before June 15th.

[70] The Father shall have one week in July and one week in August when the child shall be in his care from Sunday at 4:30 p.m. until the following Sunday at 4:30 p.m. He may take one of the Mother's weekends for this purpose but he must give her one of his weekends in the month in return. The Father is to inform the Mother of the week he has chosen for July and August on or before June 30th .

[71] The Father may agree to provide additional access time, or to change access time provided to the Mother, but his agreement must be in writing by way of e-mail confirmation or other written documentation to confirm what was arranged between the parents.

[72] I retain jurisdiction to resolve any access questions not addressed in this decision.

[73] The Mother's Statement of Income suggests an annual income of $14,061. Her 2007 annual income was $16,479. She has changed employment on many occasions and as a result it is difficult to accurately predict her income. She should be able to work more because she no longer has weekday child care responsibilities. For the purpose of table guideline support her income is determined to be $15,000. She shall pay table guideline child support in the amount of $121.00 per month commencing November 1st, 2008. I am not satisfied that she has the means on this income and reviewing her expenses to contribute to Section 7 expenses.

[74] The Father is seeking forgiveness of arrears in his payment of child support. No specific calculations were presented to be by either party. The Mother seeks payment of those arrears. The intent of the previous court order was unclear. It suggested neither would pay child support to the other if they were in a shared parenting arrangement. This was the situation for much of the time. However, the order also contemplated a set off once the Mother's annual income was determined. Justice Williams did reduce his payment in July 2007 based on this set off. The evidence is unclear about when the arrears accumulated. The Father has not provided sufficient evidence to convince me that the arrears should be forgiven. They remain to be paid to the Mother.

[75] Neither party has spoken about issue of costs. If costs are requested written submissions are to be provided to this court by the Father, with a copy to the Mother within 20 days of his receipt of this decision. The Mother's submissions are to be provided, to this court with a copy to the Father, within 10 days of the receipt of the Father's submissions. If the Mother has raised an issue in her submissions not considered in the Father's submissions he may file a further submission addressing those issues within five days of receiving the Mother's submissions.

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Beryl MacDonald, J.

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: J. E. S. v. A. J. M., 2008 NSSC 302

Date: 20081017
Docket: SFHMCA-31396
Registry: Halifax

Between:

J. E. S.

Applicant / Respondent

v.

A. J. M.

Respondent / Applicant

Revised Decision:	The text of the original decision has been corrected according to the attached erratum dated January 27, 2010.
Judge:	The Honourable Justice Beryl MacDonald
Heard:	September 15, 16 and 17, 2008, in Halifax, Nova Scotia
Written Decision:	October 17, 2008
Counsel:	Tanya Jones, for the Applicant/Respondent Andrew Pavey, for the Respondent/Applicant

Erratum

[1] Delete the section of paragraph 2 which reads:

> Particularly useful is the discussion about this principle found in *Dixon v. Hinsley* (2001) 22 R.F.L. (5th) 55 (ONT. 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:

> 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.