

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Hewitt v. McGrath, 2010 NSSC 275

**Date:** 20100709

**Docket:** 1201-64509, SFHD-69899

**Registry:** Halifax

**Between:**

Daniel Hewitt

Petitioner

v.

Jennifer McGrath

Respondent

**Judge:** The Honourable Justice Beryl MacDonald

**Heard:** June 22, 2010, in Halifax, Nova Scotia

**Written Decision:** July 9, 2010

**Counsel:** Gordon Kelly, counsel for the Petitioner  
Christopher Robinson, counsel for the Respondent

**By the Court:**

[1] This is an interim proceeding and, as is the case with all proceedings involving children, I must decide what is in the best interest of this particular child. However, the determination of this child's best interest is made understanding that an interim order is intended to be of short duration and is to deal with the immediate problem of where a child should live and what role each of the parents should play until a court has an opportunity to conduct a full investigation into the best interests of the child at a later hearing.

[2] In *Marshall v. Marshall* (1998) Carswell, N.S. 183 (N.S.C.A.) the Court of Appeal gave approval to a finding that it can be considered to be in a child's best interest to continue in the care arrangements put in place prior to the interim application, in other words, to maintain the status quo. The "existing situation", often referred to as the status quo, is generally the parenting arrangement in place while the parents were living together and not any short-term or strategic arrangement made after separation unless those parenting arrangements had previously been agreed upon or had existed for significant periods of time or were otherwise considered to be in the child's best interest.

[3] There are many reasons why the status quo should be maintained. Interim hearings do not provide the quality or volume of evidence that is provided at a final hearing. To change the child's living arrangements on the evidence usually presented during an interim hearing requires clear and convincing evidence that maintaining the child's status quo would not be in the child's best interest.

[4] However it is often difficult to apply the "status quo" analysis in 2010 because of the changing dynamic of Nova Scotia families. The status quo analysis was originally based on a premise that there was an identifiable "primary care" parent who functioned in this capacity during the marriage and after the separation. The status quo analysis found it to be in the best interest of a child to remain in the care of that primary care parent. Today,

usually because both parents are working, parenting is a shared activity and although one parent may be, for example, somewhat more involved with third party service providers, other parenting functions are shared. In such cases both parents have experience preparing meals, dressing the children and ensuring they attend school, taking the children to child care providers and retrieving them from those child care providers. Children may turn to either parent when in need of comfort or when in distress and are equally attached to both. After separation the shared parenting arrangements may be difficult if not impossible to maintain either because of geography or the nature of the parents post separation relationship.

[5] There are few written decisions providing guidance about the factors it may be important to consider when applying the best interest principle to a request for shared parenting. *Farnell v. Farnell* [2002] N.S.J. No. 491, is one of those decisions and in it Justice Goodfellow commented:

[10] “.....Shared custody rarely in my experience works and only seems to where there is present an environment where the children thrive when the children are able to fluidly move from one home to another by reason of parents who are mature in circumstances and reside in such close proximity that the children can go back and forth themselves, continue in the same school, continue with extracurricular activities, church or other activities that they would normally engage in. Such a situation is next to impossible to attain and continue when children live at long distances . . .”

[6] Parents in a shared parenting arrangement must exhibit an ability to cooperate and jointly plan for their children. They must be able to do so on a continuous basis, far more frequently than is expected from parents who have other parenting arrangements. Conflict and the potential for conflict must be at a minimum. Each parent must respect the other and their value systems and methods of discipline should not be substantially dissimilar. They must be able to communicate face to face. They must respond quickly to inquiries from the other parent about issues involving the child, focusing on the child's need not on the parent's issues. Routines in each household should be similar to ensure the child is not confused by or encouraged to become oppositional because of different standards and expectations in each home.

[7] The Mother and the Father began living together in April, 2005. Their child was born in September, 2005. They married in June, 2009 and separated in January 2010. They had a previous period of separation from January to October 2007 at which time they parented the child on a schedule that placed the child in the care of the Mother for two to three days and then in the care of the Father for four to five days. During this separation the Mother had her own apartment.

[8] Prior to the separation in 2010 the Mother had been employed by a company controlled by the Father and by another in which he had an interest. She considers herself to have been constructively dismissed from this employment. The Father suggests she could have continued working for these companies although under a different arrangement. Given the circumstances then existing in the relationship between the Father and the Mother I draw no adverse conclusions against her for any failure to continue with that employment.

[9] In this proceeding the Father is seeking to continue a parenting arrangement instituted by the parties shortly after their recent separation. Under this arrangement the child, on a 5 day cycle, is in his care for three days and in the Mother's care for two days. To visualize this schedule I have attached it as Schedule 1. Because I have no evidence about the cycle used by these parents for the 2-3 day/3-4 day parenting plan used during their first separation I do not know if these plans are similar in effect. Under the present plan, in a 30 day period, the child will be in the Father's care for 18 days and in the Mother's care for 12 days, a 6 day difference. The actual pattern of care does not repeat until the 6<sup>th</sup> week. In each of the other 5 weeks the pattern changes weekly.

[10] The Mother is seeking to have the child in her care on a 7 day cycle. In week 1 the child would be in the care of the Mother for 4 days and in the care of the Father for 3 days. In week 2 the child would be in the care of the Father for 4 days and in the care of the Mother for 3 days. The pattern of care would then repeat. Each parent would have the child in his or her care for 15 days out of a 30 day period. That schedule is attached as Schedule 2.

[11] If the Father's schedule was plotted into a 7 day cycle the pattern would also repeat in the 6<sup>th</sup> week. That schedule is attached as Schedule 3.

[12] None of the plans presented contemplate a traditional primary care/access pattern of parenting. They most closely resemble shared parenting. It is doubtful

this child experiences the present parenting arrangement in the same way she would experience both parents providing care in one home while living together. There are transitions from residence to residence not previously required.

[13] The circumstances of the parties separation appear to have resulted in a mutual struggle for power and control centered around the care of the child. I don't think either parent has considered the impact of the present or the proposed parenting schedules on the child. The present schedule was developed and accepted by the Mother because she refused to move into alternate housing offered by the Father. Instead she lived with friends who could not accommodate a schedule that would have placed her daughter in her care more frequently. The alternate housing proposal made by the Father was a proposal he should likely have expected the Mother to reject since he insisted her then "boyfriend" could not live with her. The Wife would not accept this ultimatum. Th Father testified he required this commitment from the Mother in order to protect their child's best interest. He does not trust the Mother's judgement in her choice to expose their child to her present partner with whom she has not yet developed a long standing relationship. In fairness to the Father he knows nothing about this person. However, given the lack of respect each of these parents have for the other, and the way in which the separation occurred, it is difficult to access how the new "partner" might be introduced to the Father. He was not called as a witness at the interim hearing. Had he been a witness his testimony may have greatly assisted this court in determining this issue.

[14] Both the Father and the Mother agree the introduction of the child to a potential parental figure who may not continue in a relationship with the Mother may constitute another "loss" for the child. However the Mother disagrees that her present relationship is unstable or that she will permit her present partner to spend significant time parenting this child. She has been living in her partner's home since April 1, 2010 and has taken the child to this home on the days when the child is to be in her care under the present schedule. The Father is prepared to accept this will continue if his parenting plan is accepted. However, he does not want the Mother to have additional parenting time because this may increase the child's opportunity to be parented by the Mother's partner and thus suffer loss if that relationship breaks down. His concerns may be genuine but unfortunately there is no guarantee that any relationship will stand the test of time. In addition, children today are exposed to multiple care givers many of whom, for example, in day care facilities, may change frequently. We do not make assumptions that a child

recognizes these persons as parental figures and thus suffers a loss when they disappear out of their lives. It may be that they do but this potential does not prevent parents from using these facilities. Whether this child will look upon the Mother's present partner as a parental figure may depend upon how often he will perform the parenting functions. The Mother suggests this will be infrequent. Nevertheless, it may have been preferable if the Mother could have waited for several months before choosing to live with her new partner. Given her financial situation she felt she had no real choice but to accept the residence offered by her present partner.

[15] Although these parents have little respect for one another I have no evidence to suggest their conflict is having an impact upon the child. They are able to agree upon her schooling and her child care provider. I have no evidence to suggest they have divergent parenting styles. The parties appear to agree they are to have joint custody. The primary disagreement appears to be the appropriate time to introduce new partners to the child. However, this child has been exposed to the Mother's new partner and will continue to be in his presence even under the Father's schedule.

[16] There was a time when it was believed it was in a child's best interest to have stability in the child's life both in respect to residence and routine. Stability of residence has now often been rejected because parents want to share parenting to maximize his or her contact with the child. The theory appears to be that children do not develop and maintain a proper attachment to a parent unless there is frequent contact. Unfortunately, the complexities implicit in the studies supporting this theory are ignored. Problems of parental conflict, geography, financial means, housing availability, and the child's personality are often overlooked. In an idealized world parents would live next door to one another so the child could easily go back and forth. We do not live in a idealized world. Also overlooked are studies that suggest the quality of the relationship developed between the parent and child when they are together may be more important than frequency of contact. Under these circumstances all a decision maker can reasonably do is balance all known factors in an effort to picture the kind of life the child will live under the various plans of care proposed and, at the very least, provide the child some semblance of routine as the child travels back and forth if a shared parenting arrangement is to be maintained. The parents should make arrangements about exchanges of clothing, toys, significant objects, messages about upcoming events etc. that will not involve the child. The child should not be tasked with this

responsibility to the point of taking suitcases to school, for example. While the status quo parenting of this child was a shared arrangement, the parenting plan after separation was not agreed upon and I am not satisfied it has existed long enough to have established a “status quo” nor do I consider it to be in this child’s best interest. Because the care arrangements change so frequently it is very difficult to plan around this schedule. In addition the Mother does not often have the child in her care for a full weekend. Although she does work on weekends it appears she has some choice over those work assignments.

[17] The 2/3 day arrangement on a 7 day cycle would also repeat on the 6<sup>th</sup> week. It also presents planning challenges. The plan put forward by the mother repeats in the 3<sup>rd</sup> week and I do not consider the extra 6 days the child would be in her mother’s care to be against the child’s interest in any way. This is predicated upon the mother actually providing significant parenting for the child on this schedule. If because of work commitments she will be working the majority of the time when the child is to be in her care, then this schedule would not be appropriate. Her work schedule indicates a flexibility that should prevent this. The Mother’s testimony is she would be providing the majority of the parenting under her plan although her partner and possibly her mother will provide some assistance for short periods of time. I consider her plan to be in the child’s best interest.

[18] The Mother has requested that the parenting plan change once the child attends school in September to an alternating full week shared parenting arrangement. Neither parent lives close to this school. The parents will be required to transport her daily to and from. The Father has made no submissions about this plan. I am not satisfied I have sufficient information before me to make that decision for the parties now and I leave it for a final hearing when more evidence about the child and her needs can be explored including whether shared parenting is in her long term best interest.

[19] The parties have made no detailed submissions about holidays and therefore it is impossible to develop a plan for those holidays. Perhaps it may be best to allow them to fall within the present schedule without accommodation. Perhaps there should be a planned sharing and the regular schedule rearranged to accommodate holidays when necessary. The parties need to sit down with a calendar and work through various possibilities so an appropriate choice may be made. I retain jurisdiction to make a decision about holidays if the parties cannot

come to an agreement and a final hearing is too far in the future to resolve that issue.

[20] I have heard no submissions about costs. Costs, if any, to be awarded will be a consideration for the final hearing.

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Beryl MacDonald, J.S.C.

SCHEDULE 1 5 day cycle - Day 1 Sunday F = 18, M = 12 (30 day period) 6 <sup>th</sup> week repeats							
Week #	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1	F	F	F	M	M	F	F
2	F	M	M	F	F	F	M
3	M	F	F	F	M	M	F
4	F	F	M	M	F	F	F
5	M	M 30 <sup>th</sup> day	F	F	F	M	M
6	F	F	F	M	M	F	F
7	F	M	M	F	F	F	M
8	M	F	F	F	M	M	F
9	F	F	M	M	F	F	F
10	M	M	F	F	F	M	M
11	F	F	F	M	M	F	F
12	F	M	M	F	F	F	M

SCHEDULE 2 7 day cycle M = 12, F = 18 (30 day period) 6 <sup>th</sup> week repeats							
Week #	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1	F	F	M	M	F	F	F
2	M	M	F	F	F	M	M
3	F	F	F	M	M	F	F
4	F	M	M	F	F	F	M
5	M	F 30 <sup>th</sup> day	F	F	M	M	F
6	F	F	M	M	F	F	F
7							
8							
9							
10							
11							
12							

