

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Krszwda v. Henderson, 2011 NSSC 193

Date: 2011/05/19

Docket: SFSNMCA: 074414

Registry: Sydney

Between:

Frank Krszwda

Applicant

v.

Jennifer Henderson

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: March 31, and April 1, 2011, in Sydney, Nova Scotia

Written Decision: May 19, 2011

Counsel: Anthony Magliaro, for the applicant
Dave MacIsaac, for the respondent

By the Court:

[1] **Introduction**

[2] Frankie Krszwda and Jennifer Henderson are the parents of two year old, Reilly. Reilly lived in the Sydney area until the beginning of March 2011, when Ms. Henderson moved Reilly's permanent residence to Ontario, without Mr. Krszwda's knowledge or consent. This unilateral move sparked the contested custody dispute that will be decided, on an interim basis, today.

[3] **Issues**

[4] The following issues will be determined in this decision:

- a) What interim, parenting arrangement is in Reilly's best interests?
- b) Who should have custody of Reilly during the interim?
- c) What interim, parenting schedule is in Reilly's best interests?

[5] **Background Information**

[6] Throughout his young life, Reilly flourished because of the love, attention, and direction that was lavished upon him by his mother, father, and paternal grandparents. Reilly was a happy, well adjusted toddler, secure in the stability and love that his parents and extended family provided. This stability was disrupted when Ms. Henderson decided to remain in Ontario with Reilly, while visiting with her father, in February - March, 2011.

[7] On March 3, 2011, Ms. Henderson told Mr. Krszwda that she and Reilly would not be returning to Nova Scotia. Mr. Krszwda immediately voiced his opposition, and asked that Reilly be returned to his care. Ms. Henderson refused. Mr. Krszwda, therefore, commenced legal proceedings.

[8] An ex parte order issued on March 4, 2011. Reilly was placed in the sole custody of his father, and an inter partes court hearing was also scheduled. A further temporary, interim, inter partes order issued on March 23, 2011. The sole custody provisions continued, and liberal, specified access was granted to Ms. Henderson, pending the completion of the interim hearing scheduled for March 31 and April 1, 2011.

[9] The following people testified during the hearing: Frank Krszwda, Stephanie Krszwda, Linda Davis, Frank Krszwda Sr., Mitzi Krszwda, Blair MacIvor, Walter McNeil, Allana Henderson, Jennifer Henderson, Kathy Henderson, and Don Henderson. Although other people submitted affidavits for the interim hearing, their evidence was not considered because they were not present for cross examination. In addition, certain hearsay comments were stricken from some of the affidavits. The matter was adjourned for decision after submissions were reviewed.

[10] **Analysis**

[11] **What interim parenting arrangement is in Reilly's best interests?**

[12] *Position of Mr. Krszwda*

[13] Mr. Krszwda is seeking a sole custody order because of the communication difficulties that presently exist. Mr. Krszwda states that he cannot communicate with Ms. Henderson given the false allegations that have been levied against him, including allegations of physical and emotional abuse, and substance abuse. Mr. Krszwda notes that Ms. Henderson does not want to have direct communication with him. Further, Mr. Krszwda states that Ms. Henderson lacks the ability to place Reilly's best interests in the forefront as evidenced by her recent conduct. For these reasons, Mr. Krszwda states that joint custody is not workable at the interim stage. He seeks interim, sole custody.

[14] *Position of Ms. Henderson*

[15] Ms. Henderson is seeking a joint custody order, although she does not want to have in person communication with Mr. Krszwda. She proposes email and telephone as the communication vehicle to discuss any issues which may arise.

Despite being a proponent of joint custody, Ms. Henderson seeks final decision making authority, in the event consultation does not result in a joint decision.

[16] *Legislation and Law*

[17] Section 18 of the *Maintenance and Custody Act* provides the court with the jurisdiction to create interim parenting orders. Section 18(4) of the *Act* states that parents are joint guardians, and are equally entitled to the care and custody of a child, unless otherwise provided in the *Guardianship Act*, or ordered by a court of competent jurisdiction. Section 18(5) of the *Maintenance and Custody Act* requires me to apply the best interests of the child test in all parenting decisions.

[18] Joint custody is usually not appropriate where parental relationships are rift with mistrust, disrespect, and poor communication, and where there is little hope that the situation will change: **Roy v. Roy**, 2006 CarswellOnt 2898, (C.A.). This lack of effective communication, however, must be balanced against the realistic expectation, based upon the evidence, that communication between the parties will improve once the litigation has concluded. If there is a reasonable expectation that communication will improve despite the differences, then joint custody may be ordered: **Godfrey-Smith v. Godfrey-Smith** [1997], 165 N.S.R. (2d) 245 (S.C.). Where parental interaction is marked by conflict, high levels of distrust, and disrespect, courts have also embraced the concept of parallel parenting: **Baker-Warren v. Denault** 2009 N.S.S.C. 59.

[19] This is an interim motion. The order which flows from this motion will govern the parenting arrangement until the time of trial. Given the level of conflict, distrust, and inability to communicate, sole custody is the only viable solution, on an interim basis. An order for joint custody or parallel parenting at this stage, will likely create more opportunities for conflict, and impede future communication improvements.

[20] This decision, however, does not rule out the possibility, or indeed probability, that a joint custody order, or parallel parenting plan, will be granted in the future. The recent separation was, and is conflictual; emotions are running high at this stage. With time and professional intervention, I am hopeful that communication will improve so that the parties will be able to parent Reilly together. It is unfortunate that Reilly will be robbed of parental input from one of

his parents during the interim but, in an effort to ensure greater stability and Reilly's best interests, there is no other viable option at this juncture.

[21] Despite this finding, the parties must learn to communicate effectively about Reilly. Reilly has the right, where possible, to benefit from the input, experience, and love that both of his parents can contribute to the decision making process. Seldom will one parent have all of the answers. Both parents have different strengths and perspectives. Reilly should have the benefit of these strengths and perspectives in all important decisions being made about him.

[22] The following provisions will therefore form part of the interim, sole custody order:

- (a) **Communication Between the Parties:** Matters relating to Reilly's health, education, religion, or general welfare will be the subject of timely communication between the parties. All communication will be respectful and child-focussed and will be facilitated by the following:

(i) *Email Communication:* The parties will communicate through email exchanges, unless there is an emergency. All email communication will be compellable for court purposes. Each party will provide the other party with an up-to-date email address where he/she can be reached, and any changes on a timely basis. Each party will maintain internet access and a current email address so communication can be facilitated. Each party will review his/her email once a day, unless health or other commitments make daily access impossible.

(ii) *Telephone and Residential:* The parties will advise each other of his/her residential addresses, telephone numbers, and any changes on a timely basis.

- (b) **Communication with Reilly:** Each party will speak respectfully of the other and of his/her extended family in Reilly's presence. Each party will immediately remove Reilly from the presence of any third party who is speaking disrespectfully of the other, or of his/her extended family.

- (c) **Therapeutic Interventions:** The parties will cooperate and participate in therapeutic interventions for the following purposes:
- (i) to acquire a better understanding of the impact that parental conflict has on children;
 - (ii) to learn skills to ensure that Reilly is not placed in the middle of the parental conflict;
 - (iii) to understand the importance of Reilly having a relationship with both parents, and how each parent can foster a positive relationship between Reilly and the other parent;
 - (iv) to obtain a more balanced and realistic perspective of parenting strengths and weaknesses, with an aim to strengthen parenting ability;
 - (v) to learn skills that will aid in effective, child-focussed communication with the other; and
 - (vi) to learn skills to effectively deal with anger, anxiety, and stress in a healthy fashion.

[23] **Who should have custody of Reilly during the interim?**

[24] *Position of Mr. Krszwda*

[25] Mr. Krszwda acknowledges that Ms. Henderson was Reilly's primary caregiver because of his employment obligations, but states that he was an involved and loving father. Mr. Krszwda denies that he abused Ms. Henderson. Mr. Krszwda denies abusing alcohol or drugs. Mr. Krszwda states that he is best able to secure the interim needs of Reilly. He can provide the most stability to Reilly at this time. Mr. Krszwda notes that he will remain in the same apartment that was Reilly's home before separation; that his parents will continue to provide child care as they had in the past; and that Reilly's life will continue along the same path that existed before separation.

[26] Mr. Krszwda is also concerned about Ms. Henderson's ability to focus on Reilly's best interests given her recent actions. Mr. Krszwda notes that Ms. Henderson made significant decisions based upon her own needs, and to the detriment of Reilly. He states that nothing has occurred which shows that Ms. Henderson will change her priorities in the near future.

[27] *Position of Ms. Henderson*

[28] Ms. Henderson seeks primary care of Reilly because she loves him, and was his primary caregiver before separation. She states that she almost exclusively met all of Reilly's emotional, medical, health, social, and recreational needs. Ms. Henderson states that Mr. Krszwda is unable to effectively parent Reilly because he is violent, and abuses alcohol and drugs. Ms. Henderson notes that during the recent temporary, interim period, Reilly has, in effect, been primarily parented by Mr. Krszwda's mother, and not Mr. Krszwda.

[29] Although, Ms. Henderson originally asked the court to allow her to move Reilly's permanent residence to Ontario, she has since changed that position. Ms. Henderson now seeks to maintain Reilly's permanent residence in the Sydney area. Her proposal includes access to Mr. Krszwda and his parents. She also wants to enrol Reilly in daycare so that he can interact with other children.

[30] Ms. Henderson states that the status quo favours her because she is the parent to whom Reilly is most emotionally connected. Ms. Henderson plans to reside with her grandmother until she can secure alternate accommodations. Ms. Henderson also plans to start looking for work, and will complete her medical transcription course.

[31] *Law*

[32] During interim proceedings, the status quo gains pre-eminence. This is confirmed in **Marshall v. Marshall** (1998), 168 N.S.R. (2d) 48 (C.A.), wherein Roscoe, J.A. approved Daley, J.F.C. summary of the law in **Webber v. Webber** (1989), 90 N.S.R. (2d) 55 (F.C.), at page 57:

Given the focus on the welfare of the child at this point, the test to be applied on an application for an interim custody order is: what temporary living arrangements are the least disruptive, most supportive and most protective for the

child. In short, the status quo of the child, the living arrangements with which the child is most familiar, should be maintained as closely as possible. With this in mind, the following questions require consideration.

1. Where and with whom is the child residing at this time?
2. Where and with whom has the child been residing in the immediate past? If the residence of the child is different than in #1, why and what were the considerations for the change in residence?
3. The short-term needs of the child including:
 - (a) age, educational and/or preschool needs;
 - (b) basic needs and any special needs;
 - (c) the relationship of the child with the competing parties;
 - (d) the daily routine of the child.
4. Is the current residence of the child a suitable temporary residence for the child taking into consideration the short-term needs of the child and:
 - (a) the person(s) with whom the child would be residing;
 - (b) the physical surrounding including the type of living and sleeping arrangements, closeness to the immediate community and health;
 - (c) proximity to the preschool or school facility at which the child usually attends;
 - (d) availability of access to the child by the noncustodial parent and/or family members.
5. Is the child in danger of physical, emotional or psychological harm if the child were left temporarily in the care of the present custodian and in the present home. (emphasis added)

[33] In **Horton v. Marsh**, 2008 N.S.S.C. 224, this court reviewed the meaning of status quo at para 6 as follows:

The status quo which ordinarily is to be maintained is the status quo which existed without reference to the unilateral conduct of one parent, unless the best interests of the

child dictates otherwise. This is reviewed by Wright J. in **Kimpton v. Kimpton**, 2002 CarswellOnt 5030 (Ont. S.C.J.), at para 1, which reads as follows:

There is a golden rule which implacably governs motions for interim custody: stability is a primary need for children caught in the throes of matrimonial dispute and the de facto custody of children ought not to be disturbed pendente lite, unless there is some compelling reason why in the interests of the children, the parent having de facto custody should be deprived thereof. On this consideration hangs all other considerations. On motions for interim custody the most important factor in considering the best interests of the child has traditionally been the maintenance of the legal status quo. ...

[34] The status quo must be analysed through the best interests prism to determine what temporary living arrangements are the least disruptive, most supportive, and most protective of Reilly.

[35] I have considered the law, evidence, and submissions of the parties. I have assigned the burden of proof to Mr. Krszwda, because he seeks to displace the primary care parent during the interim period. Mr. Krszwda must discharge the civil burden of proof based upon a balance of probabilities in conformity with **C.(R.) v. McDougall** 2008 S.C.C. 53, per Rothstein J. Credibility factors which I have considered are outlined in **Baker-Warren v. Denault**, *supra*, at paras 18 to 21.

[36] I have determined that it is in the best interests of Reilly to be placed in the interim sole custody of Mr. Krszwda. I make this decision for the following reasons:

- (a) Ms. Henderson did not give priority to Reilly's interests; she attempted to further her own interests. Ms. Henderson's decision to move Reilly to Ontario is a stark reminder of how Reilly's interests were readily discounted by Ms. Henderson.
- (b) Ms. Henderson failed to appreciate the devastating consequences that would flow to Reilly because of her decision to move to Ontario. She gave little thought about the negative effects that such a move would have on the relationship which Reilly enjoyed with his father, paternal grandparents, and other extended family members. Ms. Henderson

placed her own needs above Reilly's needs. Ms. Henderson continued to advocate for an early move to Ontario until the most recent hearing. Ms. Henderson's decision to remain in the local area has more to do with her understanding of the status quo principle, than with any real insight into the emotional needs of Reilly.

- (c) Ms. Henderson's decision to move Reilly to Ontario was made unilaterally, and with minimal planning. Ms. Henderson had no job, no independent residence, and limited plans. The move was made without consulting Mr. Krszwda. The move was made because Ms. Henderson felt it was right for her.
- (d) Ms. Henderson fails to appreciate the importance of the relationship between Reilly and his father. This will impact negatively on Reilly. Reilly requires parents who will foster maximum contact with the other parent. Ms. Henderson will not. An example of this problem is seen in Ms. Henderson's letter of March 2, 2011 which stated the following:

As you are aware of by now I have decided to provide for Reilly by having my residence permanently in Ontario. I am mindful for the best interest of Reilly in having contact with you as his father. I am more than happy for you to exercise access to Reilly when he becomes old enough to travel unaccompanied. In the meantime I am willing to set up regular visits with Reilly on a Web Cam through the web so you can see and talk with him, please let me know dates and times that would suit you.

- (e) Ms. Henderson consistently minimized the important role that Mr. Krszwda played, and continues to play in Reilly's life. Ms. Henderson described Mr. Krszwda as being an indifferent, uninvolved, and somewhat selfish parent. I do not accept her evidence on these points. To the contrary, I accept the evidence of Mr. Krszwda and his parents. I also accept the evidence of other witnesses, including Ms. Davis, Ms. Mitzi Krszwda, Mr. MacIver, and Mr. MacNeil. Although these witnesses had less frequent contact with Mr. Krszwda, they nonetheless assist in confirming Mr.

Krszwda's positive and nurturing parenting of his son. This is consistent with the evidence of Mr. Krszwda and his parents. In addition, even Ms. Henderson's mother confirmed that Mr. Krszwda was a loving father who enjoyed playing with his son.

- (f) I do not accept Ms. Henderson's comments that Mr. Krszwda was physically and verbally abusive to her. These allegations were not proven on a balance of probabilities. I find Mr. Krszwda to be credible. I accept his evidence. Ms. Henderson's evidence was not credible. There were inconsistencies noted. For example, Ms. Henderson only claimed "verbal abuse" to her mother; yet her claim expanded to physical abuse when it became strategically necessary to do so. Further, Ms. Henderson's attempt to use an argument that occurred about 10 years ago as proof of an abusive relationship also failed. In addition, Ms. Alana Henderson's evidence that Mr. Krszwda was angry because he was asked to drive her to town to do errands does not prove abuse. To the contrary, it shows that Mr. Krszwda did drive Ms. Henderson for her errands because he was asked, even when it did not suit Mr. Krszwda's own plans. Finally, the argument which Mr. Krszwda had with his mother was not abusive. Disagreements and arguments do not necessarily translate into abuse. Mr. Krszwda is not violent or abusive. I have no doubt that he and Ms. Henderson had disagreements, from time to time, but such did not cross the line to become abuse. Ms. Henderson's strategic attempt to designate Mr. Krszwda as violent fails.
- (g) I do not accept Ms. Henderson's allegations that Mr. Krszwda abused alcohol or drugs. Mr. Krszwda did, on occasion, smoke marijuana. This is an illegal act, and has absolutely no place in any appropriate parenting regime. It is not acceptable. However, the occasional use of marijuana does not an addict make. Marijuana and alcohol usage did not negatively affect Mr. Krszwda's life. He has been steadily employed with the same company for several years. He does not miss work. He also provides appropriate care for his son. Mr. Krszwda meets his responsibilities. I am not concerned that drug use or alcohol abuse are relevant factors in this case. I accept the consistent evidence to the contrary. I also accept that Mr. Krszwda will not engage in this

type of behaviour again. Any further drug usage will be viewed negatively.

- (h) Mr. Krszwda's plan is the most supportive of Reilly because it provides more stability and less disruption to Reilly's life during this interim period. Under Mr. Krszwda's plan, Reilly will live in the same apartment that was his home before separation. Mr. Krszwda's parents will continue to provide child care and other support as they did prior to separation. Reilly's daily routine under Mr. Krszwda's plan will mirror, insofar as possible, that which existed before separation.
- (i) Ms. Henderson's plan is more disruptive to Reilly during the interim. Ms. Henderson's current residence was not home to Reilly before. Ms. Henderson also plans to enroll Reilly in a day care so that he can interact with other children. There are sufficient changes in Reilly's life at present; he does not need the added burden of adjusting to day care. Further, day care is not the only forum available to provide Reilly with exposure to other children.
- (j) Ms. Henderson invited the court to make a negative inference because Reilly was spending time with his paternal grandparents. She alleged that they were acting as defacto parents. I disagree with this characterization. The paternal grandparents were secondary care givers as noted in the evidence, and as shown by the fact that Reilly even had his own bedroom and toys in their home. The paternal grandparents have been a consistent and positive influence on Reilly since he was born. Further, I find that the paternal grandparents have not assumed the parental role after separation. They are positive supports.
- (k) Mr. Krszwda, although not the primary care parent before separation, was an active and involved co-parent. He has the ability to meet the day to day needs of Reilly, including his emotional needs. Mr. Krszwda has acted in Reilly's best interests for the most part, and has placed Reilly's interests before his own interests.

[37] It is in Reilly's best interests to be placed in the interim custody of Mr. Krszwda during the interim period, even though Mr. Krszwda was not the primary care parent.

[38] **What interim, parenting schedule is in Reilly's best interests?**

[39] Despite the fact that sole custody was provided to Mr. Krszwda, it is in Reilly's best interests to have liberal contact with both parents. The interim parenting schedule will reflect the time that each party has available to parent Reilly given their current circumstances. Reilly does not attend school, and therefore, there is no premium on weekend days. Further, the exchange times have been adjusted to meet Reilly's needs; Reilly did not cope well with the early morning exchanges. Reilly also needs time with his paternal grandparents. I have only made special arrangements for Christmas and summer access because I anticipate that the final order will be concluded by next year.

[40] The interim, parenting schedule that is in Reilly's best interests is as follows:

(a) **Regular Schedule:** Ms. Henderson will exercise access to Reilly from every Monday at noon until Thursday at 4:00 p.m. Mr. Krszwda will have Reilly in his care for the remainder of the week.

(b) **Summer Vacation:** Each of the parties will have ten consecutive days with Reilly during the summer for vacation purposes. This provision replaces the regular schedule for these ten days. Mr. Krszwda will provide Ms. Henderson with notice of the ten days that he will choose no later than June 15, 2011. Ms. Henderson will provide Mr. Krszwda with notice of the ten days that she will choose no later than July 1, 2011. Each party will provide the other party with details of travel arrangements made for Reilly, including particulars where Reilly will be staying and contact numbers. The party exercising vacation time will initiate a call to the other party every night at 7:00 pm (Nova Scotia time) so Reilly can speak to the other parent while on vacation.

(c) **Christmas Schedule:** Mr. Krszwda will have Reilly in his custody all day on December 24 until 3:00 pm on December 25. Ms. Henderson will

have Reilly in her care from 3:00 pm on December 25 until December 27, at which time the parties will revert back to the regular schedule.

(d) **Exchanges:** Neither party will engage in any conflict during exchanges. The exchanges will continue to take place at the home of the paternal grandparents, with their continued consent. Mr. Krszwda's parents, with their consent, will transport Reilly to Ms. Henderson's residence at the beginning of access. Ms. Henderson, or a person acceptable to the paternal grandparents, will transport Reilly to the paternal grandparents' home at the conclusion of access.

(e) **Changes to Schedule:** The parties are free to make such adjustments to this interim, parenting plan that they deem in Reilly's best interests, provided such agreements are placed in writing and signed by both parties.

(f) **Removal from Nova Scotia:** Both parties are free to take Reilly outside Nova Scotia for vacation purposes. Reilly's permanent residence will not be changed without court order.

(g) **Illegal Substances:** Neither party will use street drugs, nor illegal substances, including marijuana. Neither party will permit Reilly to be in the presence of any third party using street drugs or illegal substances. Given his consent, Mr. Krszwda will make himself available for one drug/alcohol screen as arranged, and paid for, by Ms. Henderson, through her counsel. The testing can either be hair or urine testing. The date of the testing will be at a time and place convenient to Mr. Krszwda, and will not interfere with his summer vacation.

(h) **Telephone Access:** The party who has care of Reilly will initiate a telephone call to the other party every night at 7:00 pm so Reilly can speak to the other parent.

(i) **Access To Professional Records and Information:** Each party has the right to communicate with all professionals involved with Reilly, and each has the right to obtain information and documentation respecting Reilly from all medical professionals, educators, and all social welfare professionals without the prior consent of the other party.

[41] **Conclusion**

[42] Mr. Krszwda is granted interim, sole custody of Riley because of the current level of conflict. Both parties are required to participate in therapy to learn various skills so that they, hopefully, will be capable of co-parenting Reilly in the future. At present, Mr. Krszwda's parenting plan is most protective of Reilly during the interim for a variety of factors which have been canvassed in this decision. This interim arrangement is in Reilly's best interests. A liberal access regime was created to ensure that Reilly is able to maintain meaningful relationships with both of his parents.

[43] Mr. Magliaro is directed to draft the order, and forward to Mr. MacIsaac for his consent. Counsel are also thanked for their professional and thorough representations of their clients during this volatile process.

Forgeron J. SCNSFD