

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Taylor v. Kennedy, 2010 NSSC 401

Date: 20101108

Docket: SFHMCA 063455

Registry: Halifax

Between:

Shauna Taylor

Applicant

v.

John Kennedy

Respondent

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

September 30, 2010 in Halifax, Nova Scotia

Counsel:

Kent McNally for applicant Shauna Taylor
Louis Matorin for respondent John Kennedy

By the Court:

[1] The parties lived in a common-law relationship from August 2002 to November 2007. There is one child of the relationship, E.R.K., born October 8, 2003.

[2] There was a parenting agreement predating the consent order, dated **October 2, 2009**. Paragraph seven of this agreement states:

7. Neither Mr. Kennedy nor Ms. Taylor shall make a major decision without prior agreement of the other parent. Examples of a major decision include but are not limited to, such matters as: provision of [the child's] childcare; [the child's] school; [the child's] health care providers; [the child's] medical and dental treatment; and choice of [the child's] extracurricular activities.

[3] Subsequently, the parties have been operating under an **Interim Consent Order issued July 9, 2009**.

[4] When the father was unemployed, the parties agreed their child would spend alternating weeks with each parent, moving between homes each Sunday at 6:30 p.m..

[5] When the father was employed, his parenting time was one evening each week from 5:30 p.m. to 7:30 p.m. and in addition, each Wednesday from 6:00 p.m. to 7:30 p.m. every second Wednesday while Emma was in soccer and three of four weekends each month from Friday at 7:00 p.m. to 7:30 a.m. Monday morning.

[6] The order is fairly extensive, setting out their agreement regarding the fundamental underpinnings of their parenting strategy with both parents being significantly involved in this child's life.

[7] The father was to pay maintenance to the mother of \$423.00 per month. At the time he was working and his share of child care was 54%.

[8] The Court made no determination as to custody of the child in that interim order.

[9] Paragraph 10 of the order is particularly important. It reads as follows:

10. [The child's] residence shall continue to be within the Halifax Regional Municipality and each party is prohibited from changing [The child's] residence to a location outside Halifax Regional Municipality without the written consent of the other partner or by order of this Honourable Court.

[10] The father believes the mother moved in May 2010 from Dartmouth to Sackville. Some time after this the mother registered the child in school in Sackville for the September 2010 year. No notice of this was given to the father. He did not consent.

[11] The mother filed a **Notice of Motion which was set for August 26, 2010**. The mother sought an "Order directing that the child attend Smokey Drive Elementary School, in Lower Sackville, effective September, 2010".

[12] This motion was heard on September 30, 2010. The issue before me was restricted solely to a determination as to which school the child should attend.

History

[13] The parties operated as a couple from August 2002 to November 2007 when they decided to separate. They came to Halifax, living in north-end Dartmouth in September 2007. They lived together until January 2007 to allow the father two months to obtain employment and to assist their child in adjusting to the separation.

[14] The mother then moved to Primrose Street, Dartmouth, leaving the child with her father for a week while she settled in the apartment.

[15] A weekly parenting rotation followed. If the father was working, the child remained with her mother Monday to Friday and every weekend with her father.

[16] The father has had the child with him on occasions for as long as three weeks. There is no suggestion that there is any impairment regarding his parenting ability.

[17] The child was enrolled full-time at Victoria Children's Centre. The mother worked at home for an internet marketing company and the father outside the home.

The child was eventually enrolled in French Immersion in the Dartmouth area and she continues to attend that school today.

[18] The parties had numerous difficulties in their relationship. The mother accused the father of financial irresponsibility and spending their money on marijuana. She accused him of being controlling. He advises he no longer uses soft drugs.

[19] She absorbed the largest part of the financial responsibility throughout.

[20] On January 1, 2008, the mother moved with the child to a location close by their former premises to keep their child enrolled in her school. In February the father began a new job.

[21] The couple decided they would have joint custody and the child would spend a week on and a week off with each parent. Wednesday was to be considered an open visitation for the parent that did not currently have the child in their care.

[22] In February 2009 the father was evicted from his apartment. At that time the mother was in another relationship and the child was staying with her. The father went to Newfoundland from February 20 to March 10, 2009.

[23] The parties continued to talk unsuccessfully about resolution of the issues.

[24] The mother acknowledges that they lived close by one another to attempt to maximize the child's time with each of the parents. However, for much of that year the child lived with the mother, given the father's difficult financial circumstances.

[25] The mother remained in the Dartmouth area to be close to her school and the father relocated to a boarding house in the area.

French Immersion

[26] The parents recently made a decision to take their child out of French Immersion and place her in an English program. The child was experiencing difficulty. While originally the mother wanted the child to remain in French Immersion, she changed her opinion and argued to have her removed and move to Sackville to a school close by her new residence.

[27] The father resisted moving her from French Immersion until very late although they both now agree that she is not functioning well and have, as of the date of the hearing, instructed the principal to move her into the English program.

[28] This agreement did not come smoothly or in a timely fashion. The child's well-being was not addressed in a timely fashion because both parents were wrapped up in their own issues and she was caught in the middle of this dispute.

[29] Both parties decided after considerable discussion that the difficulties the child was experiencing with the French Immersion, together with their current difficulties, placed too much stress on the child. They agreed to move the child out of French Immersion.

[30] The parties were waiting for the Court to make a decision before they authorized removing the child from French Immersion to English. They were encouraged by the Court to do that immediately, in advance of a decision on which school the child would attend, given the stress the child is experiencing.

Relocation

[31] The mother and her new partner purchased a home in Lower Sackville. She wants their daughter to go to Smokey Drive Elementary. Thus for the week when the child is with the father, he would have to bring her to school in Sackville and then return to Dartmouth to his course. She has not offered to take over this function. His only other option would be to substantially change his parenting time.

[32] The mother and her partner have one vehicle. The changes in the child's schedule require the child to get up at 6:30 a.m. (rather than 7:00 a.m. - paragraph 56, Affidavit filed June 11, 2009) so that she and her mother can be dropped at the school at 7:35 a.m..

[33] At this time the mother stays with her until there is supervision at the school at 8:00 a.m. (instead of being driven to care giver at 7:55 a.m. for an 8:35 a.m. bus). After leaving the child at the school under supervision, the mother then walks one kilometre to her work.

[34] The child would then stay after school until the mother's partner picked her up at school at 5:00 p.m., returning home for 5:40 p.m. (instead of going to her care giver at 2:50 p.m. for a 4:50 p.m. pick up by mother and home at 5:00 p.m.).

[35] The child's daily schedule is longer by 1 hour and 10 minutes approximately. The inconvenience rests largely with the mother and how she now has to coordinate her work transportation and the child's school as a result of the move.

[36] Due to the move during the father's week, the child spends a very long day arriving at school early (before a supervisor is present) staying with her mother and then staying in an after school program until the mother's partner can come and pick up the mother and child and return to Sackville. The mother works in an area not far from the child's school in Dartmouth.

[37] The father has offered to have the child come to his home on the mother's week both before and after school and the mother has declined this offer.

[38] If the Court orders the child enrolled in the Sackville school, logistically, this would be much easier for the mother to cope with moving back and forth to work, leaving the child in the Sackville area close to a school in the area.

[39] This is a child who is clearly significantly attached to both parents.

[40] The parties have had difficulties consulting with one another: the mother accusing the father of being controlling and verbally aggressive with her, demeaning her in the presence of the child; the father indicating that the mother makes unilateral decisions, including registering the child in French Immersion initially without discussing this registration with him, choosing a doctor and a counsellor for the child without consultation and the move to Sackville, which has resulted in the necessity of this court application.

[41] The father has a legitimate concern that his right to be consulted is not respected. However, his response to these unilateral decisions has not been positive or helpful in achieving a consensus. His approach as described by the mother is brash and defensive.

[42] The father now deals with issues regarding the child through the mother's partner. He is instructed to call the partner's cell phone number when looking to speak

to the mother about certain issues relating to the child. That has not been helpful either. Their ability to reach a consensus appears to have deteriorated with the mother's new relationship.

[43] Notwithstanding that the parties currently have a week on - week off parenting strategy, the father indicates he pays the full child support amount plus \$94.00 for child care during the weeks that the child is with him. He paid for the summer camps and 100% of her after school care. He did not always do so and in fact left much of the initial post separation expenses to the mother.

[44] It is clear that the mother has been considerate of the father during the periods of time when he has been unemployed. He has, however, portrayed his situation to be worse than it was in that while he was not earning a consistent wage; she was in a similar financial situation. During those periods of time, she absorbed the bulk of the child care responsibility.

[45] Essentially, the mother's claim is that now that she and her partner have moved and purchased a home, the child should be enrolled in a school in their new neighbourhood.

[46] The mother and her partner were concerned about the level of violence in the community in North End Dartmouth. They believe they have a home in a more peaceful community. They argue it is inconvenient for them to have the child continue in her current school.

[47] The father has offered to have the child return to his home before and after school. He is currently in an education program and has advised that he can provide the necessary child care himself to ensure that this alleviates some of the mother's difficulty for the week the child is at her mother's.

[48] The father proposes that the child be dropped off at his place at 7:35 a.m., he will bring her to school at 8:15 a.m. and after school he will pick her up at 3:45 p.m.. She will stay at his place until picked up by the mother. That is his plan.

[49] The father was accepted into a one-year program for occupational health and safety at the Nova Scotia Community College ("NSCC"). Classes commenced on September 6, 2010. He has entered this with considerable research, given that his previous occupation did not produce a reliable income.

[50] In March 2010, he applied for extended employment insurance and training incentive and was approved on August 12, 2010. This training has the potential of putting him in a position of regular employment.

[51] The father will receive a total of \$22,605.00 in financial assistance toward his training costs and \$350.00 per week in Federal Employment Insurance for 38 weeks from September 1, 2010 until May 28, 2011, for a total of \$13,300.00. He receives from the Nova Scotia Department of Labour and Workforce Development \$9,305.00: \$7,300.00 is paid directly to NSCC for tuition, \$55.00 is paid directly to NSCC for school fees; \$1000.00 for books; \$50 every second week for childcare during the weeks that the child is with him.

[52] The father has also offered to reassess the child's schooling in June of 2010. It is clear that it will have to be reassessed at that point in time and it is also clear that the father's long-term employability may well result in a move, although he is reluctant to admit that.

[53] Consent of the parties was not obtained prior to the mother's decision to move to Lower Sackville, a considerable distance from the father's residence. It is reasonable to conclude that such a move would create significant difficulties in a shared-parenting relationship. Discussion should have taken place in advance.

[54] Unfortunately the father then enrolled the child in a number of activities and, at the Court's direction, reconsidered this decision. The father did this without contacting the mother.

[55] Now the child is in one activity at his home and the mother is free to enrol the child in one activity at her home.

[56] Some of the historical difficulties between the parties occurred because of the father's behaviour in taking the child to Newfoundland for a visit and not being open and frank about his date of return. While there, he contacted child protection about concern his mother had respecting a statement made by the child.

[57] Child Protection investigated and were satisfied that no child protection concerns existed. They observed positive and appropriate interaction occurred

between the father and child. Their contact with the mother by phone further satisfied them that the parenting was appropriate and they recommended closing the file.

[58] Other difficulties include the father's financial circumstances and the impact that had on his living circumstances and the allegations of soft drug use.

[59] The father admits he used marijuana in the past although indicates in his Affidavit filed June 18, 2009 that he has not used marijuana for the three months previous to his affidavit. He rarely drinks.

[60] Clearly there was a time when these two parties could work out the differences between them. As each of their lives took an independent turn, the logistics of a shared-parenting arrangement have become more difficult.

[61] Equally clearly the child has spent significant amounts of time with each of her parents. The father's financial and employment history has not been so stable that it would allow him to have certainty with respect to income and residence. This course will be finished in the Spring of 2011 at or around the same time as the school year will finish. He has decided, by choosing to take this reeducation program, to move into something with more certainty and greater long-term possibilities

Future Mobility

[62] The father has been reluctant to acknowledge that, upon completion of his education program, his employment prospects may indeed require a change of residence. If he is to put himself in a position of being properly employed in order to support his child, he will need to carefully consider any and all employment opportunities. It cannot be anticipated or expected that he will remain in close proximity to the downtown Dartmouth area and north-end Dartmouth for the rest of his working career.

[63] The mother's current and immediate past has offered more financial stability to the child than the father's and this new move is a positive move in that it provides the child with a home and a community.

[64] I know very little of the father's home.

[65] The difficulty with this move is that this decision, along with other decisions in this joint, shared-parenting arrangement, was undertaken by the mother without advance notice or consultation and without obtaining the agreement that has been dictated between the parties as necessary before the move.

[66] This defies the parties' agreement regarding consultation and consensus. If supported, the order and their prior agreement become meaningless.

[67] It is difficult to determine whether the mother's decision not to communicate directly with the father arises out of his manner of dealing with her or whether it arises out of her wish to move on in her life. Her decisions do not account for the need to consult the father on major decisions. She has placed her partner between her and the father. That is problematic in this case.

[68] This is a shared-parenting arrangement. To maximize its effectiveness, the parties must talk civilly and respectfully to one another without third-party intervention. Once it becomes necessary to have a third-party present, the possibility of collaboration and cooperation diminishes significantly.

[69] At the same time the father participated in the breakdown of communication and cooperation when he took his child to Newfoundland and failed to be open and honest about his reason for delaying his return with the child. This was an arbitrary decision.

[70] Keeping information from a parent as the father did in this instance and as the mother has done in the past is not in accordance with the spirit and intent of a joint or shared-parenting arrangement. This unilateral behaviour feeds misunderstanding and fear. It has the very real potential of triggering the gradual disintegration of the trust between the parents.

[71] Since the parties have been involved in litigation, the father has arbitrarily enrolled the child in extracurricular activities, likely to cement the child's position in the Dartmouth community. This was done without regard to the child's needs. Likely the child was over-scheduled in activities on top of having a very difficult time in school.

[72] In addition, there is evidence that the parties' telephone conversations have deteriorated such that the father gives ultimatums if there is not agreement on any

planned activities or on the child's attendance at an activity or with one of the parents or if his rights as a joint parent are not respected.

[73] Both parties have contributed to the deterioration in communication which does not argue well for a long-term shared parenting, joint custody arrangement.

[74] Mobility is going to have to be discussed sooner rather than later. In all likelihood the child is going to have to move schools. A determination on the merits will have to take place if the parents cannot agree on a move to Sackville that also allows the parents to maximize the child's time with the father.

[75] This is a time of transition: an education year for the father and move for the mother. The triggering point for this will be at the end of the school year or when the father obtains employment elsewhere. Then the parties are going to have to determine where this child is going to live and go to school on a regular basis.

[76] There are clear benefits to the child going to school in Sackville, close to home. As long as the mother's relationship is a stable one, this provides the child with the benefit of some stability. The mother can plan a day for the child that is less onerous in terms of daycare, after school care, etc.

[77] However, the mother ought to have meaningful consultation with the father prior to making any significant moves with respect to the child. Her actions lead me to conclude she does not have a clear understanding of what joint custody is and what her rights and responsibilities relating to that are.

[78] The father's position is not likely going to be sustained simply by insisting on the child's attendance at this school for long periods of time. However, **he does have a right to be consulted and be a part of the decision-making with respect to the major issues relating to this child**, particularly since he has been significantly involved.

[79] To maintain his status as a joint/shared custodial parent, he will have to exercise consistent adherence to a schedule and approach disputes that need to be resolved more focussed on the child's interest than on his own, much the same as the mother will have to do. Their current problem is how to resolve differences of opinion. The mother makes a decision and acts unilaterally and the father becomes threatened and reacts in that manner.

[80] The interim proposal by the father that the child can be dropped off at his place before going to school; that he will ensure that she is brought to school; he will ensure she is picked up after school, is likely the best interim solution pending the end of this year.

[81] This is subject to the father being in an appropriate residence and not a boarding home and is also subject to an **absolute prohibition** on illegal drug use.

[82] The father must also be available for the child on a regular basis as he has promised. A series of unknown and unapproved babysitters is not acceptable in this case. Should the father be unavailable, the next preferred option would be to have the mother arrange the daycare, as she has done, in her own area and reconsider this interim decision.

[83] To be clear, there must be consistency in the father's presence and availability as he professed to be to maximize this year of opportunity for him to have this kind of contact with the child.

[84] The child's progress will likely be an important consideration. While the mother works where she is, the child is likely to be subject to long days whether she is with the mother or the father and thus, in the short term and on an interim basis, it makes sense to put her with a parent as much as possible while that parent is available.

[85] This is a unique year in which the father will be available because he is studying and thus he can maximize his presence providing his living accommodations are appropriate for the child's benefit. To finish out the year, bringing the child to the father's place in the mornings and picking the child up after school, providing the father is available to be present himself, makes the best sense in the short run.

[86] In the long run, the decision to move is going to have to be faced and the parties are going to have to discuss maintaining each parent as a significant presence to the child while at the same time recognizing the child is entitled to live in proximity to her school environment and entitled to stability and to the best that these parents can provide her emotionally, physically and financially. Keeping her in downtown Dartmouth is not necessarily a long-term decision. The decision will have to reflect on her best interests.

[87] Therefore, the child will remain in her current school for the current year, with the recognition that this is a decision that is delaying the inevitable, which is a discussion as to which school she should attend in September of 2011.

[88] Clearly the parties are going to have to look at their current financial child support guidelines given the change in circumstances in the father's income.

[89] Both parents shall be entitled to information from third-party service providers and each parent shall give to the other the right of first refusal should they not be available during their parenting time.

[90] The other terms and conditions of their order relating to parenting are not to be disturbed by this finding.

[91] I am including by reference and in written form paragraphs 4, 5, 6, 7, 10, 11 and 19 of the order of July 9, 2009 remain unchanged.

[92] I am not varying paragraph 12 on as it deals with child support.

[93] However, there is obviously a change in circumstances that has been verified and the parties shall make an appointment forthwith and attend conciliation to resolve the child support issue.

[94] This matter may be set down now by the parties to ensure the long-term decision regarding the child's schooling will be completed before September 2011. It may be pre-trialed before the end of the father's school year. Knowing where the parents will be living is an essential ingredient to making a long-term decision.

[95] Counsel for the mother shall prepare the order.

Legere Sers, J.

November 8, 2010
Halifax, Nova Scotia