

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Young v. McVey, 2011 NSSC 78

Date: 2011/02/21

Docket: 74207

Registry: Sydney

Between:

James Young

Applicant

v.

Elyse McVey

Respondent

Revised Decision: The text of the original decision has been corrected according to the erratum dated February 24, 2011. The text of the erratum is appended to this decision

Judge: The Honourable Justice Theresa M. Forgeron

Heard: February 18, 2011, in Sydney, Nova Scotia

Written Decision: February 21, 2011

Counsel: James Young, on his own behalf
Elyse McVey, on her own behalf

By the Court:

[1] **Introduction**

[2] Mr. Young and Ms. McVey dearly love their two children, Logan and Haley. Logan, who is three, and Haley, who is one, are described as wonderful and engaging children. They have a strong bond with each of their parents. Logan, however, exhibits developmental problems, including limited speech, tantrums, significant independent play, and a lack of eye contact. He is scheduled to be assessed for an autistic spectrum disorder. Haley does not appear to have any special needs.

[3] Although both parents were heavily involved with the daily child care tasks, Ms. McVey was nonetheless the primary care giver of the children. Mr. Young was the primary wage earner. In addition, Mr. Young's sister, Ms. MacLeod, is also very devoted to Logan and Haley. She visited frequently, and always accompanied the children and Ms. McVey to their medical appointments.

[4] The parties separated this month. Mr. Young remained in the family home. Ms. McVey moved to a two bedroom apartment. The children were to reside primarily with Ms. McVey. The move proceeded with the consent, and with the assistance of Mr. Young.

[5] The separation did not, however, proceed as smoothly as hoped. As a result of concerns about alcohol and drug use, Mr. Young filed an emergency motion with the court. Although the court refused to proceed on an ex parte basis, the motion was nonetheless deemed an emergency. The motion for interim custody proceeded on an inter partes basis, with abbreviated notice, on February 18, 2011. The court heard the evidence of the parties, Mr. West, Ms. Donovan, Ms. MacKinnon, and Ms. MacLeod. The oral decision was adjourned until today's date.

[6] **Issues**

[7] The court will determine the following issues in this decision:

1. Who should have interim primary care of the children at this time?
2. What is the appropriate parenting arrangement at this time?

[8] **Analysis**

[9] **Who should have interim primary care of the children at this time?**

[10] Mr. Young seeks interim custody of the children because he is concerned about Ms. McVey's ability to parent the children safely due to her alcohol and drug use, and untreated ADHD. Mr. Young wants Ms. McVey to get professional help so that she will stop using drugs and alcohol, and develop safer coping strategies. Mr. Young also seeks drug and alcohol testing to confirm that Ms. McVey is abstaining.

[11] Ms. McVey seeks interim custody because she has always been the primary care giver of the children. She feels that it is best for the children to continue in her primary care. She states that she is an excellent mother. She says that she does not consume alcohol or drugs in the presence of the children. She is not concerned about her drug and alcohol use. She advises that she will stop using alcohol and drugs. Further, Ms. McVey questions Mr. Young's motivation; she is concerned that he is retaliating because she ended their relationship.

[12] The law governing interim parenting issues was reviewed by this court in **Horton v. Marsh**, 2008 NSSC 224 (N.S. S.C.) at paras 3 to 6, which provide as follows:

3 Section 18 of the *Maintenance and Custody Act* provides this court with the jurisdiction to make an order respecting custody and access. In granting such an order, the court must apply the best interests of the child test as stated in s.18 (5) which provides:

(5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration. R.S., c. 160, s. 18; 1990, c. 5, s. 107.

4 Generally speaking, during interim proceedings, it is the status quo which gains preeminence. In **Pyne v. Pyne** (1992), 112 N.S.R. (2d) 109 (N.S. T.D.) Kelly J. approved the comments of Daley J. at para 5 which reads in part::

[5] I concur with Grant, J.; in **Stubson v. Stubson** (1991), 105 N.S.R. (2d) 155, 284 A.P.R. 155 (N.S.S.C.,T.D.) that the test in such an application was properly set out in **Webber v. Webber** (1989), 90 N.S.R. (2d) 55; 230 A.P.R.. 55 (F.C.), by Daley, F.C.J. at p. 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...

5 Similar comments were also echoed by Goodfellow J. in **Foley v. Foley**, 1993 CarswellNS 328 (N.S. S.C.).

6 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. ...

[13] Both parties love Logan and Haley. Both parties have regularly engaged in the day-to-day nurturing tasks that are an implicit part of parenting. Ms. McVey, however, has been the primary care giver of the children. Mr. Young was an involved co-parent, but not the primary care giver because of employment obligations. This finding does not end the analysis. I must now determine whether the best interests of Logan and Haley are served by being placed in the primary care of Ms. McVey or Mr. Young.

[14] I have considered the evidence, with the exception of hearsay comments. I have applied the law. I have assigned the burden of proof to Mr. Young as he

seeks to displace the primary care parent during the interim period. Mr. Young must discharge the civil burden of proof, based on a balance of probabilities.

[15] Mr. Young has met the burden that is upon him. He has proven that it is not in the best interests of Logan and Haley to remain in the care of Ms. McVey. He has proven that it is in the best interests of the children to be placed in his primary care. The following factual findings support my decision:

- a) Ms. McVey is abusing alcohol and drugs. She is self-medicating. She abuses alcohol and drugs to cope with her anxiety and stress. Ms. McVey does not recognize that substance abuse poses a significant risk of harm to the children. She sees nothing wrong with her behaviour. She does not recognize the need to find healthier and safer coping strategies.
- b) Ms. McVey minimizes her drug and alcohol abuse. She does not accept responsibility for her actions, but rather attempts to deflect the blame to Mr. Young. This is troubling. Lasting lifestyle changes seldom occur without the assumption of responsibility.
- c) Ms. McVey is not receiving the professional help that she requires for ADHD. She has been diagnosed with this disorder for many years, and has not been consistent with professional therapy, despite having access to a private health plan.
- d) Ms. McVey also leaves the children unattended for five minute periods while she goes out of the home to smoke. The children are not supervised during these smoke breaks. Even when visiting with Ms. MacKinnon, the children were left unsupervised, while Ms. McVey and Ms. MacKinnon went out of the house to smoke together. The children were not in their beds or playpens while being left unsupervised.
- e) It appears that Logan has special needs. Parenting a special needs child requires more than love. It requires consistency, strength, stability, and structure. This type of parenting cannot be found in a person who abuses alcohol and drugs for stress and anxiety relief.

- f) Mr. Young is competent and capable as a parent. He can meet the emotional, physical, financial, social, medical, and recreational needs of the children. He has the support of family and friends who will also be available to provide child care when he is working.
- g) Mr. Young continues to occupy the family residence. This will also provide stability to the children as it is familiar to them.
- h) Although Mr. Young is not without fault, he is nonetheless in a better position to provide the stable, structured, and consistent parenting that both children require. His ability to parent is not compromised by drug and alcohol abuse. Mr. Young will, however, require counselling to deal with issues surrounding the separation and issues of control.

[16] I therefore grant Mr. Young's application. He will have primary care of Logan and Haley at this time, but subject to the terms and conditions to be provided in the parenting plan.

[17] **What is the appropriate interim, parenting arrangement at this time?**

[18] The interim, parenting plan is crafted in the best interests of the children to meet their current and unique needs. This parenting plan is meant to be a temporary order. This will be subject to further review, on an interim basis, to allow the parties time to secure counsel. It is not the final order. The focus of an interim parenting arrangement is not the focus of a final order: **Marshall v. Marshall** [1998] N.S.J. No. 172 (C.A.). The parenting plan is as follows:

1. *Interim Primary Care*
 - 1.1 Mr. Young will have interim primary care of Logan and Haley. He will have care of the children at all times not stated in clause 2, including on Easter Saturday until Easter Sunday at 2:00 pm.
 - 1.2 Mr. Young will participate in counselling to resolve issues arising from the parties' separation; to learn better communication skills in post separation circumstances; and to resolve issues of control.

2. *Interim Access*

- 2.1 Ms. McVey will have liberal access to the children, to include the times when Mr. Young is working, and every Wednesday at 9:00 a.m. until Friday at 6:00 p.m.
- 2.2 Ms. McVey will have the children from Easter Sunday at 2:00 p.m. until Easter Monday at 6:00 p.m.
- 2.3 Mr. Young will provide Ms. McVey with a copy of his employment schedule as soon as it is available. In the event Ms. McVey is unable or unwilling to care for the children during any of the times when Mr. Young is working, she will advise him, or the access facilitator, forthwith of this decision.
- 2.4 Ms. McVey will not exercise access in the event she has consumed any alcohol or non-prescribed medication. The access facilitator will refuse access in the event Ms. McVey is under the influence of alcohol or non-prescribed medication.
- 2.5 Ms. McVey will participate in the following services:
 - a) Psychiatric therapy to acquire skills to effectively manage ADHD symptoms, and to follow the recommendations of the psychiatrist in respect of medication and treatment;
 - b) Counselling services to assist in the resolution of personal issues, addictions, and issues arising from the parties' separation; and to learn better communication skills in post separation circumstances;
 - c) Regular drug screens when arranged by the Minister of Community Services, through the local children's aid office; and
 - d) Services from the Minister of Community Services, through the local children's aid office, to learn the importance of supervision of young children and the impact of alcohol and drugs on children. The court will notify the Minister of these

provisions by providing a copy of the decision and order to the local agency.

3. *Children's Medical Needs*

- 3.1 Both parties will attend all medical, psychological, and professional appointments of the children, where possible. In particular, both parties will attend the appointments related to Logan's diagnosis and treatment so that each will acquire the knowledge and skills that are required to ensure best outcomes for Logan.
- 3.2 Each party will supply the other party with timely, written notification of all medical and medical- related appointments for the children.
- 3.3 Each party will cooperate and follow the reasonable directions of all health professionals involved in the care of the children. Each party will be respectful of the other while attending the medical appointments of the children.
- 3.4 Each party will consult with the other on health matters affecting the children. In the event a decision is required, and a joint decision is not possible after meaningful and timely consultation, Mr. Young will have final decision-making authority.

4. *Communication*

- 4.1 The parties will appoint a third party to act as an access facilitator to transfer the children for access. The access facilitator will be Mr. or Mrs. MacLeod, or such other third party as is acceptable to the parties. The access facilitator may refuse access in the event Ms. McVey is under the influence of alcohol or non-prescribed medication.
- 4.2 Important information about the children's health, education, and general welfare will be communicated between the parties. In the event either party is unable to communicate directly, information is to be placed in writing, in a journal to be purchased by Mr. Young. The

journal will be exchanged through the access facilitator. All communication will be respectful and child-focussed.

- 4.3 Neither party will speak disrespectfully about the other party in the presence of the children, or within the hearing distance of the children.
- 4.4 Both parties will cooperate and participate in a parental capacity assessment with a psychological component. The psychologist conducting the assessment will be provided with a copy of this decision and order. The parties will supply proof of their incomes forthwith to the Parental Capacity Assessment Coordinator, with the Family Division of the Supreme Court. The assessment will be filed with the court by August 1, 2011.

5. *Pip and Conciliation*

- 5.1 The parties will attend the Parent Information Program and Conciliation as scheduled.

6. *Future Dates*

- 6.1 The date assignment conference is scheduled for Monday, March 28, 2011 with an interim hearing scheduled for Wednesday, April 20, 2011 at 10:00 a.m until 12:00 p.m.
- 6.2 The trial is scheduled for Tuesday, September 20, Wednesday, September 21, and Thursday, September 22, 2011 with a date assignment conference on August 29, 2011 at 1:45 p.m.

[19] **Conclusion**

[20] Mr. Young will have primary care during the interim. This temporary order will include liberal access to Ms. McVey, but subject to her abstaining from alcohol and non-prescribed medication, and subject to services being enlisted. A parental capacity assessment is also ordered given the clinical issues which have been identified. The interim and final hearing dates are as provided.

Forgeron, J.
(NSSCFD)

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ERRATUM

Paragraph 16: The name “Riley” is removed and substituted with the name “Haley”.