

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: MacKenzie v. Beaver, 2006 NSSC 344

Date: 20061116

Docket: SFHMCA28876

Registry: Halifax

Between:

Eric Christopher MacKenzie

Applicant

v.

Erica Dawn Beaver

Respondent

Judge:

The Honourable Justice Mona M. Lynch

Heard:

November 6, 7, 8 & 9, 2006, in Halifax, Nova Scotia

Counsel:

Kathleen Hall, for the Respondent

By the Court:

Background:

[1] Eric MacKenzie and Erica Beaver lived together from 1994 and finally separated in 2004. They had one child, Grace Cynthia Lynn MacKenzie who was born September 25, 1996. The parties separated for most of 2003 and Grace remained in the family home with Eric MacKenzie.

[2] In December 2003, Erica Beaver returned to the family home. On February 23, 2004, Erica Beaver left the family home while Eric MacKenzie was at work. Erica Beaver took Grace with her and moved into an apartment in Halifax. Eric MacKenzie had no prior knowledge that Erica Beaver would be taking Grace with her. On February 25, 2004, Eric MacKenzie made an application for custody pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 (*MCA*). On February 27, 2004, Eric MacKenzie discovered the whereabouts of Erica Beaver and Grace. Eric MacKenzie took Grace from Erica Beaver and put Grace in his car. Police were called and it was agreed that Grace would return to live with Eric MacKenzie on an interim basis.

[3] On March 5, 2004, Erica Beaver, who was unrepresented, consented to Eric MacKenzie having interim care of Grace and Erica Beaver was to have interim access until the matter returned to court. On March 23, 2004, both parties were represented by counsel and it was agreed that Eric MacKenzie would have care of Grace and Erica Beaver would have access with Grace on alternate weekends and one evening a week. A custody and access assessment was ordered and filed with the court on August 12, 2004.

[4] A further interim order of August 4, 2005, granted the parties joint custody of Grace with Erica Beaver having Grace in her care one evening through the week and three consecutive weekends. The order also gave Erica Beaver care of Grace for school holidays and provided time at Christmas, March Break, Easter and Mother's Day. The parties agreed to not speak negatively about the other parent in the presence of Grace. Both parties agreed to attend individual counselling to address their relationship issues. Both parties agreed to attend parenting courses. The parties agreed to a psychological assessment of the child to determine the child's emotional state and this report was filed with the court on November 29, 2005.

[5] The matter was set for a four-day hearing from November 6 - 9, 2006 in relation to custody and child support. Orders of Production were granted for the RCMP and the Halifax Regional Police. Eric MacKenzie was directed to file the affidavits for himself and his witnesses as well as his 2005 Income Tax Return on or before September 23, 2006. Erica Beaver, the respondent, was to file her affidavits and 2005 Income Tax Return on or before October 14, 2006. Eric MacKenzie did not file any affidavits with the court other than the affidavits which were filed for the interim hearings. Erica Beaver filed affidavits for herself and her witnesses on October 31, 2006.

Issue:

[6] What parenting arrangement is in the best interests of Grace Cynthia Lynn MacKenzie?

Analysis:

[7] Eric MacKenzie has applied under s. 18 of the *MCA* for custody of Grace. Erica Beaver opposes his application and seeks custody of Grace. I have to

consider what parenting arrangement is in the best interest of Grace MacKenzie. I must consider what is in her physical, emotional, intellectual and moral well being. I must consider both her immediate needs and what is in her long term best interests physically, emotionally and intellectually.

[8] At the beginning of the hearing on November 6, 2006, Eric MacKenzie indicated to the court that he would be relying on the affidavits that were filed in the interim hearings. He indicated that he had not received the assessment of Grace by Dr. Gerald Hann as he had not paid the \$700.00 toward the cost of the report. He said that he had not contacted the Supreme Court Family Division to ask about the report. The report had been filed with the court on November 29, 2005. Eric MacKenzie was given time to obtain and read the report prior to the commencement of evidence in the hearing.

[9] Dr. Gerald Hann, a registered psychologist who prepared the psychological assessment of Grace, testified. He testified that he was not asked to prepare a Custody and Access Assessment or a Parental Capacity Assessment; his report was in relation to Grace's psychological functioning. He found that Grace was conflicted between her parents. If she chose to go with one, she disappointed the

other parent. At the time Dr. Hann was preparing his report Grace had not been attending all of the access visits with Erica Beaver. Grace did not provide reasons why she did not want to go with her mother. Dr. Hann was hopeful that the parents would be able to put aside their conflict and co-parent in Grace's best interest. He hoped for a level of mutual respect without conflict and that each parent would support the child's relationship with the other parent.

[10] Dr. Hann recommended:

- (a) joint custody with Grace remaining in the primary care of Eric MacKenzie;
- (b) access every second weekend with Erica Beaver;
- (c) the parents participate in mediation;
- (d) Eric MacKenzie attend individual counselling at Project New Start;
- (e) Erica Beaver pursue individual therapy through groups run at Bryony House;
- (f) both parents become involved in some form of parenting class to address their parenting styles;
- (g) Grace be seen by Dr. Deborah Smith for follow-up on ADHD.

He agreed that Eric MacKenzie had failed to be proactive in Grace seeing her mother, he liked to exert power in the relationship with Erica Beaver, he harboured a great deal of resentment toward Erica Beaver and he consistently put down Erica Beaver in front of Grace.

[11] Dr. Hann was concerned that the recommendations that he made in relation to Eric MacKenzie were not followed and he was concerned that neither party followed through with the follow-up appointment for Grace regarding ADHD.

[12] Dr. Hann testified that the high conflict between the parties leaves Grace in a conflicted position of trying to please both parents. Refusing to attend access visits with Erica Beaver would please her father. Grace indicating that she does not want to attend access may be her telling her father what she thinks he wants to hear. His recommendations to maintain the status quo and reduce the time spent by Grace with Erica Beaver were made in an effort to not disrupt Grace. While status quo was not ideal, he hoped that his recommendations would help guide the parents.

[13] Dr. Hann testified that given the level of conflict between the parties it was remarkable that Grace was not in a lot worse shape, both emotionally and

psychologically. His report indicates that there may be long term consequences to Grace if the level of hostility and conflict between the parents continues. The continued conflict places Grace at significant risk, both emotionally and psychologically.

[14] Joan Newman, the clinical social worker who prepared the custody and access assessment, testified that when she prepared her report she had concerns about Grace's alienation. Her recommendations were:

- (a) Grace's contact with her mother be dramatically increased to every weekend with a view to transfer primary care of Grace to her mother if her mother complied with her other recommendations;
- (b) Grace remain in her father's primary care until Christmas 2004;
- (c) the parties attend mediation;
- (d) both parties pursue independent therapy with the suggestion of the Worth Program run through Bryony House for Erica Beaver and Project New Start for Eric MacKenzie;
- (e) both parties become involved in parenting classes;
- (f) once Grace was in Erica Beaver's primary care, access for Eric MacKenzie be for a minimum of three days per week;

- (g) Eric MacKenzie be responsible for transporting Grace to and from access visits.

Ms. Newman was aware when she made her recommendations that Erica Beaver had been unstable in the recent past.

[15] Joan Newman testified that when she interviewed Grace for her assessment that Grace was longing for her mother. Being caught in the middle of two parents is not healthy for a child. With Grace coming into puberty, Joan Newman felt that same-sex identification was important as was the need for her mother in her life.

[16] Joan Newman described alienation of a child as one parent devaluing the other parent in front of the child; not one instance but a pattern of such behaviour. She found that Grace was very aware of the alienation and was in the tricky position of trying to be loyal to both parents. Sometimes in alienation situations the child will take on the devaluing of the parent. In this case while both parents said bad things about the other, most of the negative information came from Eric MacKenzie about Erica Beaver.

[17] Eric MacKenzie's sister and step-mother testified in support of Eric MacKenzie. They reported that Erica Beaver yelled at Grace when the parties were together and they described Eric MacKenzie as laid back. They have had a limited relationship with Erica Beaver for the last two years.

[18] Eric MacKenzie testified that he wants Grace to remain living with him. He regularly helps Grace with her homework. He indicated that the separation between the parties occurred because of the level of violence shown by Erica Beaver toward Grace. Her yelling increased to the point where she threatened physical violence and he asked her to leave the family home. He testified that he had not followed through on any of the recommendations made by Dr. Hann because he did not get the report until November 6, 2006. He feels that he is in a better position financially than Erica Beaver. Grace is settled with him, she has always lived in the home where she lives with him and her school and friends are there. He indicated that he had accommodated a change in the access schedule for a special event for Erica Beaver but his request for a change was refused. She also refused his request to assist with babysitting money and did not take Grace to a dentist appointment that was scheduled during her access time. He is concerned about Erica Beaver's violence should Grace be placed in her care. He would like

more weekend time with Grace as he is unable to have as much free time with her as he would like.

[19] On cross-examination, Eric MacKenzie admitted calling the police on a number of occasions regarding Erica Beaver. He admitted he walked out of the mediation session. When questioned about derogatory comments made about Erica Beaver in front of Grace he indicated that Erica Beaver made derogatory comments about him as well. He indicated he went to Project New Start but it was decided he was not a suitable candidate as he was not beating the hell out of his partner. He did not go to parenting classes as he thought the parent information program at the court was what was required. He did not call the Supreme Court Family Division to get the report of Dr. Hann. He felt that his negative comments about Erica Beaver have pretty much stopped. He distinguished his calls to police about Erica Beaver from Erica Beaver's calls to the police in relation to access. He felt that he called the police on Erica Beaver whereas Erica Beaver called the police on Grace. He was unable to produce his 2005 Income Tax Return.

[20] Helen Beaver, sister to Erica Beaver, testified that she has a close relationship with her sister and they assist each other in caring for each other's

children. They spend time together with their children. She testified that Eric called Erica demeaning names. She also reported occasions of hearing Eric MacKenzie make derogatory comments about Erica Beaver in Grace's presence. She reported a close relationship between Erica and Grace.

[21] Lynn LeBlanc, foster mother of Erica Beaver, testified about her concerns in the relationship between Eric MacKenzie and Erica Beaver. She had concerns about physical abuse by Eric MacKenzie early in the relationship. She spoke to Eric MacKenzie about the effect on Grace of his constant belittling of her mother. When she helped Erica Beaver leave the family home with Grace in February 2004 Eric MacKenzie called both the police and child welfare complaining that she had kidnapped Grace. Eric MacKenzie threatened her that she would never see Grace again and he would ensure that the foster children living with her would be removed from her home. On an occasion when Grace was with them on a family outing in December 2005, as Erica and Grace were dropped off, Eric arrived and began yelling at Erica and gave them the finger. Grace was crying.

[22] Erica Beaver testified that she is emotionally stable and has put her past abusive relationship with Eric MacKenzie behind her. If she gains custody of

Grace she will obtain a two-bedroom apartment in her building. She has been unable to exercise weekday access as she does not have a vehicle. To exercise access she must take a bus from Halifax to Lower Sackville with her toddler.

Around the time that her second child was born Eric MacKenzie began to deny her access with Grace. Eric MacKenzie called child welfare to investigate Erica Beaver on the birth of her second child. Erica Beaver attended an eight-week Positive Parenting Program. She did receive some counselling through Bryony House in 2004 and 2005 for her relationship with Eric MacKenzie. It was apparent during the cross-examination of Erica Beaver by Eric MacKenzie that the two parties have a difficult and a high conflict relationship. Erica Beaver agreed that she had a period of serious instability after her separation from Eric MacKenzie. She lost her job, she lost apartments and she lost forty pounds due to stress. Her phone has been disconnected and she uses a cellular phone.

[23] Kim Walsh, a former child care provider for Grace, provided evidence of Eric MacKenzie using derogatory names to refer to Erica Beaver and of Erica Beaver yelling at Grace very loudly.

[24] Grace's report card for the school year 2005/2006 was submitted into evidence and shows that her school performance has been slipping.

[25] All of the evidence leaves me with great concerns about Grace's emotional and psychological well-being. She has been in the care of her father for more than two and one half years. That is the only home she has ever known. She attends school in her father's neighbourhood and that is where her friends live. The status quo would certainly favour leaving Grace in the care of her father. Eric MacKenzie has raised concerns about Erica Beaver's parenting and temper. Erica Beaver has raised concerns about Eric MacKenzie's controlling and demeaning behaviour. I have two expert reports - one is recommending primary care to Erica Beaver and the other is recommending primary care to Eric MacKenzie.

[26] Erica Beaver has been stable for almost two years. She has another child with whom Grace has a good relationship. She has the support of her family, in particular her sister and foster mother.

[27] All of the evidence before me shows that Grace is still caught in the middle of high conflict parents. It is no wonder her school work is slipping. I accept the

evidence that most of the negative, derogatory and demeaning comments about the other parent come from Eric MacKenzie in relation to Erica Beaver. I also accept that many of these comments are made in Grace's presence. This is alienating behaviour and it will have an impact on Grace's overall emotional and mental health. She did refuse to attend access visits with her mother and it appears to me that she did so to please her father. Grace reported to the police that it was not she that did not want to attend access with her mother but her father who did not want her to attend access. This is emotionally damaging to Grace.

[28] Eric MacKenzie's controlling behaviour was shown by his calls to police and child welfare in relation to not only Erica Beaver but her family. There is nothing to indicate that he has taken steps to curb his controlling behaviour. Grace's continued exposure to her father's hostility towards her mother and his controlling behaviour can, according to Dr. Hann, have long term consequences for her future relationships.

[29] Dr. Hann's report has been available for almost twelve months. Eric MacKenzie did nothing to obtain the report but objected to being criticized for not following through on the recommendations as he did not know about them. This

position to me is not worthy of consideration. He chose to make no effort to obtain the report. He did not even make a phone call to the Supreme Court Family Division to ask how he could obtain a copy. He knew that there was a report that made recommendations about his daughter and her best interests. Yet he did nothing to obtain it for almost a year. He made a choice to not obtain the report and therefore cannot be excused for not following the recommendations. An interested, competent and child-focussed parent would have obtained the report to ensure they were aware of the recommendations a professional made regarding their child. Eric MacKenzie sticking his head in the sand is not good enough as a parent.

[30] Erica Beaver had the Hann report and recommendations. She acted on some of the recommendations. She attended a parenting program. She attended some counselling. She participated in mediation until Eric MacKenzie terminated the mediation. I am concerned that she did not pursue the follow-up appointment for Grace with Dr. Smith. She says that she thought Eric MacKenzie knew the recommendations and she had no “office hours” access with Grace to arrange medical appointments. She should have tried harder.

[31] Erica Beaver has taken steps to make herself a better person and parent. Eric MacKenzie has not. It was clear from his testimony and questions that Eric MacKenzie feels that the alienating behaviour is equal between the parties. The evidence is that the alienating behaviour is overwhelmingly coming from him. He does not recognize the harm this behaviour is doing to Grace. He has done nothing to obtain assistance in stopping the behaviour.

[32] Grace has been in the care of Eric MacKenzie and she has been placed in the middle of the dispute between the parents during that time. The experts wonder why she is not more damaged. I cannot leave her in the same situation and wait for the expected damage to occur. The current arrangement has placed Grace's emotional and psychological well-being in jeopardy and it must be changed.

[33] It is in the best interests of Grace that she be placed in the primary care of Erica Beaver.

Conclusion

[34] Beginning on the last day of school before Christmas 2006, the parenting arrangement for Grace shall be:

- (a) The parties shall have joint custody of Grace;
- (b) Grace shall be in the primary care of Erica Beaver;
- (c) Eric MacKenzie shall have Grace in his care every second weekend from Friday at 5:00 p.m. until Sunday at 5:00 p.m. and such other times as agreed upon by the parties. If Eric MacKenzie's weekend with Grace falls on a holiday weekend, parenting time will be extended to include the holiday from 5:00 p.m. Thursday if the holiday falls on a Friday and to 5:00 p.m. Monday if the holiday falls on a Monday;
- (d) Christmas parenting time shall be from December 22 at 5:00 p.m. to December 26 at 12:00 noon for one parent and from December 26 at 12:00 noon to January 2 at 5:00 p.m. for the other parent. This schedule shall alternate yearly with Erica Beaver having Grace with her starting December 22, 2006 and Eric MacKenzie having Grace starting December 26, 2006;
- (e) The parents shall alternate having Grace in their care during the school March Break, with Eric MacKenzie having Grace in his care for the March Break 2007;

- (f) The parents shall alternate having Grace in their care during the Easter Holiday from Holy Thursday at 5:00 p.m. until Easter Monday at 5:00 p.m. with Erica Beaver having Grace in her care for Easter 2007;
- (g) If Father's Day falls on a weekend which Eric MacKenzie does not otherwise have Grace in his care, he shall have Grace in his care on Father's Day from 10:00 a.m. until 5:00 p.m.;
- (h) Eric MacKenzie shall have Grace in his care for four weeks during the school summer break. He is to advise Erica Beaver in writing on or before May 1st of each year as to which weeks he is requesting Grace be in his care during the summer. In the event of disagreement Erica Beaver will have the final decision-making power in relation to summer access.

[35] Eric MacKenzie shall be responsible for picking up and dropping off Grace for all of his parenting time with Grace.

[36] Both parties shall have the right to contact the child's teachers, doctors, or any other professionals involved with the child;

[37] The parties shall consult on all major decisions regarding Grace's health, education and overall well-being. In the event of a disagreement between the parties, Erica Beaver shall have the final decision-making power. Day to day decisions regarding Grace shall be made by the parent in whose care she is at the time.

[38] Neither parent will speak negatively about the other in Grace's presence.

[39] Neither parent shall use Grace to transmit messages to the other parent.

[40] Neither parent shall speak about adult matters in Grace's presence.

[41] All communication between the parents with regard to Grace shall be done through a parenting book which will be provided to Eric MacKenzie by Erica Beaver at the beginning of his parenting time with Grace and shall be returned to Erica Beaver by Eric MacKenzie at the end his parenting time. The parenting book will be used to inform the other parent about information regarding Grace including but not limited to any medication she is taking and instructions for administering the medication, any school or home work that needs to be completed

and any other information regarding Grace's health, education or overall well-being. This book is to be used in a respectful manner to provide information regarding Grace and shall not be used to make negative comments about the other parent.

[42] Eric MacKenzie shall attend a parenting course during the next six months and shall provide the certificate of completion of the course to Erica Beaver and shall file a copy of the certificate with the Supreme Court Family Division.

[43] Eric MacKenzie shall attend individual counselling at Project New Start during the next six months. He shall provide written verification of completion of the counselling from Project New Start to Erica Beaver and shall file a copy with the Supreme Court Family Division.

[44] Erica Beaver shall attend the Worth Program through Bryony House during the next six months and shall provide written verification of completion of the program to Eric MacKenzie and shall file a copy with the Supreme Court Family Division.

[45] Counsel for Eric Beaver shall prepare the order.

J.