

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** Pudsey v. Pudsey, 2011 NSSC 444

**Date:** 20111122  
**Docket:** 1204-004616  
SKD 054107  
**Registry:** Kentville

**Between:**

Christopher Blair Pudsey Applicant

and

Pamela Lynn Pudsey Respondent

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DECISION

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**Judge:** The Honourable Justice Gerald R. P. Moir

**Heard:** November 17 and 22, 2011

**Written Decision:** Oral decision transcribed, edited, and signed on  
December 1, 2011

**Counsel:** R. Michael MacKenzie, for applicant

Nicole J. Mahoney, for respondent

**Moir, J. (Orally):**

[1] Mr. and Mrs. Pudsey separated eight years ago and divorced a few years later. They have two children, Kitrick who is ten and Kacey who is eight.

[2] The relief judgment provides for joint custody. Ms. Pudsey has primary care, and the children have lived with her in Kentville since birth. The relief judgment provides for substantial weekend access, two weeks of summer access, and various holiday access by Mr. Pudsey. He now lives in Windsor and works in Halifax.

[3] Mr. Pudsey applies for a variation. He would have primary care and Ms. Pudsey would have access under provisions similar to those that now apply to Mr. Pudsey. In effect, the roles would be reversed. Mr. Pudsey proposes that this start on January 1, 2012.

[4] Neither side will be happy with my decision. I have decided to adjourn the hearing until next May or June to see whether the issues of absenteeism from school and deprivation of access can be satisfactorily resolved, primarily by Ms.

Pudsey. Even if progress is made on those two issues, I will be open to granting the application. The issues would have to be "satisfactorily resolved."

[5] I will cause the decision to be transcribed so we have something to refer to when the application resumes.

[6] I have studied four affidavits provided by Mr. Pudsey and two from Ms. Pudsey. I listened to the cross-examination of both. I studied the assessment prepared by Ms. Karen Friskney following her testing of Kitrick Pudsey in late 2009 and early 2010. I heard the evidence of the children's family physician, Dr. William Doran.

[7] Justice Warner ordered a custody and access assessment. It was prepared by Dr. Douglas Symons, and I also had the advantage of hearing Dr. Symons when he was examined by Mr. MacKenzie and by Ms. Mahoney. His report provides a very valuable tool for a judge who must determine a difficult question. I have confidence in his work, his report, and his testimony.

[8] I am most grateful for the care and balance evidenced in, and the intelligibility of, the custody and access assessment.

[9] I find that, with the exceptions I am about to discuss, Kitrick Pudsey and Kacey Pudsey have been brought up with such care that they are happy, healthy, and well socialized children. The exceptions are these:

1. Both have moderate to severe asthma.
2. Kitrick Pudsey has some challenges to learning that are not so severe as to seriously impede his intellectual progress, as long as he gets a little help.
3. Both children miss far too much school.
4. Kacey Pudsey has far too little access to her father despite his willingness not only to permit access, but also to provide it in an attractive environment under good conditions.

[10] The asthma is now being treated by a drug reserved for third level responses. There is reason to believe the children will have less impediments in future.

[11] Thanks only to Ms. Pudsey's recent recognition that Kitrick Pudsey needs help with learning, he has resource teaching available to him at school, he has a tutor, and he is being assessed further.

[12] The problem of absenteeism from school is very serious. Many school days are missed. When they come to school the children often arrive late, or have to leave early. I find that the primary reason for this is Ms. Pudsey's failure to get the children to school. I find that asthma is seldom, if ever, a justification for missing school days or coming late. Booking appointments for the children during school hours is no excuse, given the other times they are missing.

[13] Obviously, this deprivation, which is of Ms. Pudsey's making, is going to have a worse effect on the children as they grow older. Obviously, this deprivation is especially bad for a child with learning challenges.

[14] Ms. Pudsey says she is now serious about reversing the problem. Her history on that score gives little hope that she will follow through on her present promises.

[15] Kacey Pudsey is deprived of her father. There is a risk that Kitrick Pudsey will also see less of his father than is good for him. I find that Ms. Pudsey has deliberately impeded access, and that she is only beginning to recognize the consequences of her behaviour.

[16] Statute law, case law to which Mr. MacKenzie referred, and common sense tell us that a child is being deprived when a divorced parent impedes access to the other divorced parent who offers acceptable conditions for being with the child.

[17] Motives of Ms. Pudsey in this regard do not matter. The fact is that she conveys, particularly to Kacey, her desire that the children remain with her. She does so through words, which could be as mild as "I miss you", but may often be taken to mean "I am lonely" or "I am sad". She does so non-verbally, such as by crying or using a voice that sounds like she is about to cry.

[18] An intelligent parent can get a normal child to school. An intelligent divorced parent can get a normal child to visit with the other parent under good conditions. Both are important to the child's immediate happiness and to their long-term development. In this case, they are crucially important.

[19] Of the two deprivations, impeding access to the father is the worse.

[20] Both parents offer decent homes in which the children can be well cared for with exposure to important people, such as the friends who visit at Ms. Pudsey's and the step-mother and sometimes a step-brother at Mr. Pudsey's. I take the present happiness, health, and socialization of the children as evidence of Ms. Pudsey's competence (the absenteeism and deprivation of access aside). I take the plan proposed by Mr. Pudsey (although details remain to be worked out) and the home life he describes as evidence of his competence to provide a good environment for the children.

[21] I am satisfied that Mr. Pudsey would get the children to school and would see to it that they spend plenty of access time with their mother. So, the two deprivations can be brought to an end by granting Mr. Pudsey's application.

[22] However, the children have been in Ms. Pudsey's primary care since Kitrick was two and Kacey was an infant. Kentville, with its neighbourhood, school, friends, and other attributes is home. Windsor is not. Mr. Pudsey has not always been available for full access.

[23] In my assessment, a move from Kentville to Windsor is necessary, if that is the only way to fix the problems of school absenteeism and deprivation of time with the father. Otherwise, it is not worth the cost. I confess to being worried that whichever way I go may cause the greater damage to one or both of these children.

[24] I have therefore decided to make an interim order and adjourn the hearing to next May or June. At that time, I will accept in evidence a report from any school official at Kings County Academy about school attendance of the children between now and then. I will also accept affidavits, or other evidence, about any missed access. The parties may provide me with further evidence about schooling, counselling, and physical health of the children as well as their custody plan if it is more refined by then.

[25] When we resume, I will make a final decision about whether the children will live under the primary care of their mother or their father. If the decision is for a move to Windsor, that will provide the whole summer for adjustments.

[26] As for the temporary order, the time is now to increase access of the children to the father. I am open to ordering that March break serve that purpose and to determine any outstanding issue about Christmas access. The order should require that Mr. Pudsey and his daughter receive counselling to assist their communications. Ms. Pudsey must seek referral for counselling and take any parenting course available.

[27] I note that the present order does not just provide that access may be avoided for sickness. It provides that, if such happens, access time is to be made up. I see no reason for any such provision. Health is Mr. Pudsey's concern when the children are with him. The temporary order may address that. Access is not to be deprived, unless Mr. Pudsey consents.

[28] I am open to an order that would include other terms for enforcement of access and any other terms beyond that that counsel may advise.

[29] I want to thank both counsel for the presentation of the case and for their submissions and to apologize that I am placing an additional burden upon them.

[30] I am prepared to do whatever I can to keep the rest of this proceeding as efficient as possible. Counsel may contact my office if there is anything they feel I can do to help streamline, or make more efficient, the final determination of this application.

J.