

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** L.M. v. T.M., 2011 NSSC 507

**Date:** 20111222

**Docket:** SFSNMCA071905

**Registry:** Sydney, N.S.

**Between:**

L.M.

Applicant

v.

T.M.

Respondent

**Editorial Notice**

Identifying information has been removed from this electronic version of the judgment.

**Judge:** The Honourable Justice Darryl W. Wilson

**Heard:** December 19, 20, 21, 22, 2011 in Sydney, Nova Scotia

**Oral Decision:** December 22, 2011

**Release of  
Written Reasons:** February 22, 2012

**Counsel:** Carolyn MacAulay, Counsel for the Applicant  
Darlene MacRury, Counsel for the Respondent

**By the Court:**

[1] L.M., the mother and T.M., the father are the parents of two young girls, one of whom attends elementary school and the other daycare. They separated in September, 2010, after ten (10) years of marriage. The mother seeks a sole custody order with supervised access for the father until certain conditions are met. The father seeks a shared-parenting arrangement.

[2] The applications are taken pursuant to the *Maintenance and Custody Act*, R.S.N.S., c. 160, as amended.

[3] Child maintenance is also an issue to be determined depending on the parenting arrangement decided by the Court.

[4] The parties' inability to agree on a parenting arrangement that is in the children's best interest is affected by the father's firmly held belief that both children were sexually abused by the mother's father and that the mother will not protect them from him. The mother's position is that there is no basis for the father's belief and that her father should be able to see his grandchildren.

[5] There are other relevant factors which the court must consider in arriving at a parenting order that is in the children's best interest, but the sexual abuse allegations have polarized the extended families and will have significant affect on the children's welfare if not addressed.

**BACKGROUND**

[6] On July 20, 2010, the mother was at work and both children were in daycare. The father, who had been drinking the night before with a neighbour, decided not to go to work. Around noon, he decided to remove the children from daycare and take them to his parents' cottage. After the father picked the children up, the older child began acting out. According to the father, she had been exhibiting difficult behaviours for awhile. He wanted to find out what was causing her misbehaviours. They returned home and he took her to her bedroom in order to calm her down. He then began talking to her. As she played with her toys, he was talking to her about secrets. She told him that she plays a game with her grandfather. She was holding a "My Little Pony" doll at the time. According to the father, she laid back and put her legs in a spread-eagle position. He asked her if "grandpa touches you playing this game"? She then began rubbing the area behind the hind-legs of the "My

Little Pony”. He then asked her to show him on her body where grandpa touches her and she pointed to her vagina. She didn’t say anything. He told her, “It’s going to be alright” and thanked her for telling him. He then left the room, went downstairs and called a friend, who is a police officer to get advice as to what to do.

[7] He then called his wife at work and told her to come home immediately - he had something to tell her. The mother arrived home fairly quickly and he informed her what their daughter had told him. The mother was in disbelief and according to the father, kept saying, “My father would never do that.” He was equally adamant that her father had done it because their daughter had just told him that he did. The children did not know the mother was home. The father wanted the mother to hear from the child what she told him. They arranged for the mother to stay behind the garage door leading to their kitchen, while the father took the children into the kitchen and asked the older child where she plays games with grandpa. She said she “plays a lot of games at grandpa’s cottage”. The grandmother would be in the kitchen and she and her grandfather would be in the back room where the dollhouse was located. She then said that “grandpa started playing games with C.”. At this time, the mother entered the kitchen through the garage door. According to the father, he then asked the child where the grandfather touched her, and she pointed to the genital area of the “My Little Pony”. According to the mother, the child said: “I tricked you daddy.” During cross-examination the father acknowledged the child said this.

[8] The father informed the mother that the police were already on their way, which further upset her. The father began drinking beer sometime during the day. The police arrived and began their investigation. The mother wanted to inform the police of the recantation but the father would not let her. After the police left, the mother and father continued to argue about what the child said and whether the grandfather was capable of what the father said had happened. The father was insisting that the mother believe him that her father was sexually harming the children, while the mother was having a difficult time believing the allegation and wanted to tell the police about the child’s recantation. The father then assaulted the mother and forcibly lead her out of the home in front of the children. He reported the assault to the police himself and was subsequently charged. One year later he pled guilty to the assault.

[9] The couple reconciled a few days after the incident and the Provincial Court Undertaking, with the condition that there be no contact between the parents, was varied to allow contact with the mother's expressed prior consent.

[10] The allegation of sexual abuse was reported to the child protection authorities. A joint child interview was conducted by Cst. Steve Nagy and Social Worker, Melissa Nearing. The parents were residing together at the time of the interview. The father alone took the child to the interview. Both Cst. Nagy and Ms. Nearing testified. The interview was conducted according to accepted protocol - both had training in interviewing young children regarding allegations of sexual abuse. They were unable to confirm the allegation as reported by the father, and the child made no disclosures during the interview. The father was not happy with the length of the interview. The grandfather saw his grandchildren during the summer, although the relationship between the father and grandfather was strained.

[11] The parties continued to reside together until early September, 2010. At that time, the father wanted to take the children on a visit to Halifax, prior to the start of the school year. The mother decided she did not want to go. While in Halifax, the father decided that he wanted the older child interviewed by an experienced psychologist because he was still concerned that she had been sexually abused by the grandfather. Without telling the mother, he enlisted the help of his brother to arrange a meeting with a psychologist. He could not do so on short notice. School had started and the father had not returned home with the children. The mother filed an *Ex Parte* application and was granted primary care of the children. The father was ordered to return the children to Sydney forthwith, which he did. At a review hearing, the father repeated his beliefs that the children were sexually abused by the grandfather. An Interim Order was subsequently issued for joint custody, with primary care to the mother, and specified access to the father. The Order contained a provision that the grandfather not have contact with the children pending a further court hearing. Subsequently, the older child was referred to a child psychologist for the purposes of assessing her behaviour, which was a source of concern to the father.

[12] The report of Dr. Julie MacDonald, who testified during the hearing, was filed. The report, which was labelled, "A Behavioural and Emotional Assessment" was requested for an assessment of the child's behavioural and emotional functioning to determine if she was displaying any difficulties in these areas, either as a result of the separation of her parents or for any other reason. While the issue

of sexual abuse was not investigated, Dr. MacDonald indicated that any spontaneous disclosures of abuse would be reported. However, the child did not provide any disclosures and direct questions related to sexual abuse were not asked.

[13] Dr. MacDonald concluded there was no evidence of mental health or developmental disorders. The child presented with mild to moderate behavioural problems, primarily present at home and occasionally in public. She found the child to be strong-willed and both parents indicated they rewarded her misbehaviour through negotiations and that the child was not always compliant with their request. Ms. MacDonald noted that the child's school teachers did not report any areas of concern with respect to the child's behaviour.

[14] Dr. MacDonald recommended both parents participate in an Parenting Group Session or seek parenting support from a professional, with a focus on learning and practising child behavioural management skills. Dr. MacDonald recommended for the parents not to speak ill of each other in the presence of the children and not to ask intrusive questions of the children's visits, and to work towards a co-parenting plan. This report was completed in February, 2011. Subsequent to the filing of this report, the mother met with Dr. MacDonald to obtain parenting advice and support in the area of child management skills. The father chose not to accept this assistance or seek out counselling on parenting issues with any other professional.

[15] In November, 2010, the children were with the father for an overnight visit. It was the second night of the visit and the father noticed a rash on the younger child. He suspected the child had been sexually abused by the grandfather. He took the child to the Emergency Dept. of the hospital where a cream was prescribed. The father alleged that the child had made disclosures to him about the grandfather (who would not have been seeing the child since the court order of September, 2010). A second investigation was undertaken. Cst. Kelly and Child Protection Worker, Noelle Holloway interviewed both children. As a result of their investigation and interviews, they were unable to determine if the children had been sexually abused and there was no disclosure of any kind by either child during the course of the interview. Both parties filed *Ex Parte* applications, with the father seeking to keep the children in his care and the mother seeking to have the children returned to her care. The Court ordered the parties to follow the existing Order issued in September, 2010.

[16] Conflict between the families continued to escalate. The maternal grandfather initiated a blog in which he attacked the character of the father and the spurious nature of the allegations being made against him. The father continued in his belief that the grandfather had sexually harmed the children. He told the children that he hoped they would never see their grandfather again.

[17] The father said that the maternal grandparents have been too involved in their lives and the care of their children throughout the marriage. He believes the mother's attitude towards him and her position on restricted access is influenced by her parents' negative view of him.

[18] In the Summer of 2011, the father pled guilty to assaulting the mother. He was placed on probation with conditions not to drink and to remain in the jurisdiction of the court. The father did not comply with the conditions of the court order. He left the province to attend a concert in New Brunswick and also travelled to Newfoundland on occasion. He acknowledged drinking with his friend, who is a police officer. In September, 2011, after returning the children to the care of the mother, he attended a party at which time he became very intoxicated. After leaving the party, he became disoriented and broke into a home owned by people he did not know. He went to sleep on a couch in their basement. He was arrested and remained in jail for several days. He was released on conditions to live with his parents and abide by a curfew.

[19] The mother became aware of his arrest but not the circumstances surrounding the arrest. She made application to the court to restrict his access. Prior to the matter coming to court, the mother's attempt to limit the father's access led to a confrontation between the father and the maternal grandmother in the presence of the children, when she was picking the children up from school. As a result of this incident, the maternal grandparents obtained a peace bond against the father. They had attempted to obtain peace bonds on two prior occasions, but were denied.

[20] A hearing in November, 2011, resulted in an Order limiting the father's access to three (3) times a week, to be supervised by the paternal grandparents until the circumstances surrounding his arrest could be more fully explored at a final hearing in December.

[21] The mother also had concerns with the father's ability to care for the children due to his substance use and mental health issues. She stated that throughout their relationship he drank excessively and used marijuana. He was drinking excessively during the week of July 20, 2010, when the assault and alleged disclosure occurred. He took anti-depressant drugs without a prescription. These were pills obtained from his mother. He subsequently obtained a prescription for this medication. He recently acknowledged that he has a drinking problem. He attends AA as a condition of his probation but does not accept the philosophy of that organization. He is seeing a counsellor about his misuse of alcohol and he states that he will not drink again because it is a problem for him. He has sought counselling in the past and will continue to see his counsellor in the future, as needed.

[22] Both parties accuse the other of discussing adult issues in the presence of the children. The mother found a book in the older child's backpack after her visit with the father, which dealt with surviving childhood abuse. The mother is concerned about the impact that the father's conversations with the children and his continued insistence that they have been abused will have on their emotional well-being.

[23] The mother is also concerned about the father's supervision and care of the children. He has unilaterally refused to return the children on two occasions; he has driven erratically with the children in the care; he has used an inside lock in his apartment, which the children could not reach. He has allowed the children to wander halls of his apartment building without supervision and he did not take any follow-up services as recommended by Dr. Julie MacDonald.

[24] Both parents are employed. The mother continues to reside in the family home, although it's acknowledged that the home will have to be sold and the matrimonial debts paid. The father had been residing in his own apartment until required to reside with his parents after being charged with break and enter in September, 2011. He now has his own apartment and is not subject to any curfew.

[25] The father states that the parties shared in the care of the children before separation. He also states that he has cared for the children on an equal basis with the mother since separation without any concern raised about his ability to care for them.

[26] According to the mother, she has always cared for the children. She stayed home after the birth of each child for an extended period of time while she breastfed. The parties have resided in \*, \* and Sydney. The mother did not work while the parties were in \*. Since returning to Sydney about (5) years ago, both parents have been working and both parents have been involved in caring for the children at various times when the other is working. The mother gets the children up in the morning and out to school, while the father, who is at work by the time the children go to school, is able to care for them after school when the mother is working. He also looks after them on Thursday nights and Saturdays when she is required to work. The father sees to their evening meal on these occasions. The mother states that she has been the children's primary caregiver over the years and the parent responsible for enrolling them in activities, seeing to their schoolwork, making and attending medical and dental appointments, selecting daycare providers, etc. According to the mother, the father assists with the care of the children at times when she is unable to be with them because of work commitments. She disputes the father's claim that he has shared in their care on an equal basis.

[27] The child protection authorities have not found anything wanting in the mother's parenting abilities. The father has not been pleased with child protection's investigations and failures to act. The father has taken a lie detector test and believes that the mother and her father should take a lie detector test in order to disprove the allegations of sexual abuse. The father insists that should he obtain custody of the children, he will take them for further assessment by an appropriate child psychologist. He insists that the grandfather not have any contact with either child in the future. He would prefer to have sole custody of the children, but realizes that is not possible and, therefore, thinks it's best that custody be shared.

### **CONCLUSION - SEXUAL ABUSE ALLEGATIONS**

[28] Having considered the evidence, I find that the father has not established on a balance of probabilities that the children have been sexually abused by the maternal grandfather. In weighing the evidence to determine whether the children have been sexually abused, I conclude that the circumstances surrounding the disclosure were dubious. The older child was misbehaving as she has done in the past, and the father felt the need to determine the cause of the misbehaviour. The

father seemed to be more upset by the child's misbehaviour than the mother or others, such as the child's teacher. The father was talking to the child about secrets. The father had a history of conflict with the grandfather. The statements made by the child were not spontaneous. There was no disclosure from any disinterested witnesses. The father was asking the child questions, which suggested an answer. There was very little detail provided by the child. The child subsequently recanted the disclosure. The child was interviewed on a couple of occasions by experienced police and child welfare authorities without any indication of sexual abuse or any further disclosures. There was no physical evidence that would support the father's position. In November, 2010, the father misconstrued the younger child's diaper rash for sexual abuse by the grandfather after the children had been in his care for two (2) nights and the grandfather not having contact with the children for two (2) months. The mother did not interfere with the father's referral of the child's disclosure to the police and child protection authorities. She allowed the father to take the older child to the first interview on his own. She did not inform the police of the older child's recantation as insisted by the father. Only the father has observed the children exhibit sexualized behaviour. The children appeared to be comfortable when they were being questioned by the police and child protection authorities. There is no credible evidence to indicate the grandfather has harmed the children.

[29] The father's insistence that the children were sexually abused by the grandfather will continue as a source of future conflict between the parties. Despite the father's concern that the mother would not protect the children, I am satisfied that she is a caring and concerned parent who will protect her children from harm. She has legitimate concerns that the children's emotional health is being affected by the father's insistence that they were sexually abused by the grandfather. The father's interpretation of the older child's reactions when questioned about playing games with the grandfather is subject to conclusions other than sexual abuse. The children are not displaying any signs of trauma from sexual abuse. The father's insistence on subjecting them to further interviews and assessments is not in their best interest.

### **CONCLUSION - BEST INTERESTS OF THE CHILDREN**

[30] The applications were taken pursuant to the *Maintenance and Custody Act*, R.S.N.S. c. 160 as amended, which directs that the welfare of the child is the paramount consideration when determining matters involving custody and access of children.

[31] MacIntyre J., of the Supreme Court of Canada in the case of **King v. Low** (1985), 44 R.F.L. (2d) 113 S.C.C., stated:

**I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult.**

[32] Counsel for the mother referred the court to the decision of Goodfellow, J. in **Foley v. Foley** (1983), 124 N.S.R. (2d) 198, wherein he discussed many factors the court may consider in making custodial determinations. Counsel for the mother referred the court to a number of cases where courts have approved shared custody and/or parallel parenting plans in high conflict situations.

[33] I have considered the evidence of the witnesses and the submissions of counsel and I find it is in the children's best interest that the mother be given sole decision making authority on child care matters and that they live primarily with her. My conclusion is based on the following factors:

(1) The children have not been sexually abused as alleged by the father for reasons already stated. There is a real risk of harm to the children if the father exposes them to further interviews and assessments based solely on his belief they were abused without other credible evidence to support his concerns.

(2) The mother is a fit and proper parent who has not done anything to dis-entitle her from parenting her children. Her evidence, which I accept, establishes that she has been the children's primary care-provider since birth. Besides providing daily care, she has been the parent primarily responsible for organizing and attending medical/dental appointments, seeking out daycare,

meeting with teachers, arranging and attending activities for the children. She is wholly involved in all aspects of their life. The father's role, while important, has been limited. He provides childcare when the mother is not available due to work commitments, enjoys spending leisure time and activities with the children, but is less involved in other aspects of their life. His assertion that he shared equally with the mother in all parenting responsibilities has not been proven.

(3) The father's ability to meet the children's needs and provide a stable home environment for them as a primary-care parent is compromised by his alcohol and possibly drug use, which has led to criminal behaviour. The mother's assertion that father's misuse of alcohol has been a long-standing difficulty in their relationship is supported by the evidence. Alcohol played a factor in his assault on the mother in the Summer of 2010. The father continued to drink alcohol after this incident, although on conditions not to drink. His Probation Order included a condition that he not consume alcohol, which he ignored. His consumption of alcohol played a major role into his break and enter into a home in \*. During the time he was consuming alcohol, he was suppose to be attending counselling to assist him in dealing with his alcohol difficulties.

(4) The father states that he was wrong to assault the mother and that consuming alcohol is a problem for him. However, I am not at all convinced he has accepted responsibility for his actions or that he has adequate insight into the severity of his problems. He suggests the assault on the mother was understandable because he believed she was protecting her father and not their children when he told her the child's disclosure. He believes he is able to abstain from alcohol through self-control and is attending AA because he is required to do so pursuant to a court order. Although he has access to a counsellor, if needed, this has not helped him in the recent past. He will only start anger management counselling in January of 2012.

(5) I am further concerned about the father's ability to put the needs of his children ahead of his own. He does not appear to appreciate that he may have difficulty in managing children's behaviours. He did not follow up on the recommendation of Dr. MacDonald to get additional help in child management skills or not to speak ill of the mother and her parents in the presence of the children.

(6) The father's proposed parenting plan, whether classified as shared-parenting or parallel parenting, is not realistic and not in the children's best interest. Shared custody, where the parents share physical custody and decision-making on an equal basis, requires a great deal of communication and cooperation between the parties. Shared custody has been ordered in conflictual circumstances where there is good reason to believe that the relationship between the parties will improve after the court hearing. Parallel parenting orders have been granted in highly conflictual situations where both parents have something positive to offer the children and the children will benefit from the continued involvement of both parents in their lives. These types of Orders usually include very detailed terms and conditions aimed at reducing the conflict between the parties.

(7) Shared custody is not possible in this circumstance because the parties are not able to communicate with one another. The father is restricted by a Probation Order from having any contact with the mother. The mother is afraid of the father and does not want to have any contact with him. Cooperation between the parties on future childcare is not possible because the father insists the children receive additional counselling for sexual abuse by the grandfather and the mother is concerned that the father's insistence on further counselling will cause emotional harm to the children. Because of this chronic conflict, joint custody, shared custody or parallel parenting cannot work. The children would not benefit from both parents actively participating in their parenting.

(8) I am satisfied the mother's position on access by the father has been dictated by his conduct and her concern for the children's emotional health, and not by any pre-disposition to limit his time with the children. The mother's attempts to limit the father's access after he was charged with break and enter in September, 2010, was reasonable. The father did not inform the mother of his arrest and incarceration, nor did he inform her of the circumstances of the charges against him. The mother was aware of the father's problem with alcohol and was alert to mental health issues. She immediately filed an application with the court to deal with her concerns. She was unable to get a quick hearing date, which led to further conflict between herself and the father.

### **ACCESS**

[34] The parties are not able to agree on what access by the father is in the children's best interest. I share the mother's concerns that exposing the children to the father's hostility towards her family, his repeated attempts to have the children

seen by a psychologist for an assessment of trauma from sexual abuse and his use of alcohol which has led to criminal conduct is not a healthy environment in which access can occur. I am further concerned with the father's lack of respect for compliance with conditions and court orders. However, the children enjoy spending time with their father and have not been unduly affected by the conflict between them to date. Having reviewed the evidence and submissions of counsel, I find the following parenting time between the children and the father to be in the children's best interest:

(1) The father shall have the children in his care each Wednesday from 4:00 p.m. to 7:00 p.m., each Friday from 4:00 p.m. to 7:00 p.m. and each Saturday from 8:30 a.m. to 4:30 p.m.

(2) Additional parenting time will include from 4:00 p.m. to 7:00 p.m. on Easter and other holidays; from noon to 4:00 p.m. on his birthday and Father's Day; from 4:00 p.m. to 6:00 p.m. on the children's birthday.

(3) The mother is to encourage the children to speak to the father by phone on days they are not in his care.

(4) Neither party shall speak in a disparaging or negative manner about the other party or allow or encourage others to do so in the presence of the children.

(5) Neither party shall discuss with the children or with any other party in the presence of the children, present or ongoing legal proceedings or issues in dispute between the parties related to present or past legal proceedings.

(6) The father shall engage in an appropriate parenting program to improve his child management skills.

(7) The father shall absolutely refrain from consumption of alcohol or the use of illegal drugs or using prescribed drugs in a non-prescribed manner.

(8) The father shall attend for mental health treatment as directed by his physician and take medication prescribed by his physician.

(9) Neither party shall do anything to discourage the children developing relationships with both sets of their grandparents. If the mother finds the children speaking about adult matters or talking about parenting issues, which she considers to be of significant concern, she may terminate the father's access and refer the matter to court immediately for a review of the access provisions.

(10) The father's access need not be supervised, provided he complies with the conditions of access in their entirety. Facilitation of access through pick-up and drop-off shall be by the father's parent or another member of his family familiar with the children, provided appropriate notice is given to the mother.

(11) The father may apply for a review of the access provisions of this Order after six (6) months provided he has complied with all conditions of the Order during that time.

#### **MAINTENANCE**

[35] The father has not provided up-to-date financial information on his income for purposes of determining child support. There is an existing child support order issued by a conciliator. The father is to immediately file his 2010 Income Tax Assessment and documentary proof of his 2011 income. He is to pay monthly child support for two children, based on his assessed income for 2010 for the period October, November and December, 2010. The father is to pay child support from January 1, 2011 to December 31, 2011, based on his 2011 Line 150 income. He is to receive credit for any child support payments made during this period. Effective January 1, 2012, the father is to pay monthly child support for two (2) children based on his 2011 Line 150 income, new *Tables*.

[36] Each party is to provide the other with a copy of their Income Tax Returns and Notices of Assessment yearly, beginning June 1, 2012.