

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: McInroy v. Saarloos, 2012 NSSC 415

Date: 20121129

Docket: SFHMCA-075272

Registry: Halifax

Between:

Rebecca Ellen McInroy

Applicant

v.

Rian Saarloos

Respondent

Judge:

The Honourable Justice Mona M. Lynch

Heard:

November 26 & 27, 2012 in Halifax, Nova Scotia

Counsel:

William Brian Smith, Q.C., for the Applicant
Cheryl Arnold, for the Respondent

By the Court:

Background:

[1] The mother and father met in 2006 and began living in a common-law relationship that same year. Their son is currently 5 years old and started school in September of 2012. The parents separated when their son was 2½ years old, in May 2010.

[2] The parents shared custody of their son until the Spring of 2011 when the mother changed the arrangement to one of her having primary care and the father having their son every second weekend.

[3] In May 2011, the mother made an application pursuant to the **Maintenance and Custody Act**, R.S.N.S. 1989, c.160, s. 37 seeking primary care of the child. A motion was made at the same time for interim custody. In July 2011, an interim hearing was held which resulted in an order placing the child in the shared custody of the parents with each of them having equal time with the child. There was also an interim order for child maintenance made at that time which required the father

to pay the set-off amount of maintenance and his proportionate share of the after-tax cost of child care.

[4] In August 2012 the mother made a further motion for interim relief with regard to where the child would attend school. The interim order, from the hearing held in August 2012, directed that the child attend school according to the arrangements made by the mother until the full hearing was held.

[5] The full hearing on the matter was heard on November 26 and 27, 2012.

Issues:

- [6]
1. What parenting arrangement is in the best interests of the child?
 2. What is the proper amount of child maintenance for the child, both table and s. 7?

Position of the Mother:

[7] The mother seeks primary care of the child and that the father have parenting time every second weekend and such other times as can be agreed by the parties. She wants final decision making authority on all major issues and decisions, after discussion with the father. The mother is seeking specified access for special occasions such as Christmas, March Break, Easter and summer vacation. She is seeking the table amount of child maintenance, equal sharing of extra-curricular activities and proportionate sharing of child care.

[8] The mother's concerns about the father's parenting include: his use of marijuana, particularly around the child; his use of spanking as discipline for the child; the child's behaviour issues; the many transitions between the homes which causes confusion for the child; the father's inability to communicate and negative responses to her suggestions about the child; the father not wanting the child to see a psychologist; the father not placing the child in proper child restraints in vehicles; the father's failure to inform her about injuries to the child; the child missing events and extra-curricular activities while in the father's care and the

father's impending trial which may result in the loss of his driver's license for 12 months.

Father's Position:

[9] The father is asking that the current shared custody arrangement be maintained with each parent having equal time with the child. He is seeking the set-off amount of child maintenance and equal sharing of child care and extra-curricular activities.

[10] His concerns with regard to the mother's parenting include: despite his disagreement, the mother has made unilateral decisions about major issues for the child; the mother's failure to provide him parenting time on Father's Day in 2011; the changes made by the mother to the child care and parenting arrangement affecting the predictability and consistency in the child's schedule and that the mother wanted the child to visit with a psychologist for issues that the parents should deal with. He does not see the behavioural issues when the child is with him that the mother complains about.

Analysis:

1. What parenting arrangement is in the best interests of the child?

[11] I heard evidence from the mother and the father. The mother filed affidavits from her parents which supported her position. The affidavits from the mother's parents contained hearsay, their understanding about the routine in the mother's home and their observations of the child which were consistent with the mother's observations. The mother's parents are not involved in the day to day care of the child and they have little recent contact with the father. Their observations are impacted by their daughter's views and I can place little weight on the affidavit evidence of the mother's parents.

[12] In deciding the best parenting arrangement for a child the paramount and only consideration is what is in the best interests of the child. Many cases including **Foley v. Foley** 124 N.S.R. (2d) 198, (NSSC), **V. (K.C.W.) v. P. (K.L.)**, 2010 NBCA 70 and **Gibney v. Conohan**, 2011 NSSC 268 provide guidance as to the factors to consider when deciding what is in the best interests of a child. I will consider the factors that are relevant to this case.

[13] The statutory direction contained in the **Maintenance and Custody Act** is contained in section 18. Subsection 18(4) provides that both parents are equally entitled to care and custody of their child unless otherwise ordered and 18(5) provides that the welfare of the child is the paramount consideration.

[14] There have been no real concerns raised about the current physical accommodations for the child while in the care of either parent. There have been no concerns raised about the ability of either parent to financially support the child. The mother has raised concerns that the child is exposed to the father's use of marijuana in the father's home. I have no direct evidence that the father uses marijuana around the child. The mother and her parents reported hearsay from the child. From the child's description of the father's actions, the mother wants me to infer that the father uses marijuana around the child. The father asserts that he does not smoke marijuana or tobacco around the child but the child may have seen him rolling a tobacco cigarette, which he does occasionally. The mother has not established that the father uses marijuana around the child or is under the influence during his parenting time. Although the mother believes that the father uses marijuana around the child, she suggests that the order contain a provision which restricts the father's use of marijuana or other drugs six hours before and

during parenting time. As the mother testified that she would be satisfied with this provision it can be inserted in an order which provides for primary care or shared custody.

[15] The mother is concerned about proper child restraint systems not being available or not being used while the child is in vehicles driven by the father or his family members. Anyone driving with the child in a vehicle is expected to follow the laws which are designed to ensure the safety of the child.

[16] The mother has raised concerns about the father spanking the child, again this comes from hearsay from the child. The father says that he does not use physical discipline and never has. The father says he uses time-outs to discipline the child. The mother says that she uses time-outs to discipline the child and the father questioned her ability to lift the child. On the evidence, I do not have concerns about the discipline used by either parent.

[17] The mother is concerned about the child's emotional and mental health. She has suggested taking the child to a psychologist. The father does not see the same issues and is opposed to the child seeing a psychologist. The father did agree to

the child seeing the school guidance counsellor. The mother is very critical of the father's refusal to allow the child to see a psychologist. The mother says that the child has had two recent incidents of aggression, one at school and one at day-care. The father's understanding of these incidents is that the child reacted in both cases in self-defence. Both parents have spoken to school and day-care officials about these incidents.

[18] The mother is also concerned about the child's behaviour before and after the father's parenting time and while the child is in the presence of both parents. The father does not see the behaviours complained of when the child is in his care. The mother says that this behaviour decreased for the three months when the father's parenting time was reduced in late 2011/early 2012. The mother connects the aggression and behavioural problems that she sees in the child with the current parenting schedule. Based on the evidence I cannot connect the child's behaviour to the parenting schedule or to the father's parenting. Both parties acknowledge that their relationship is not good and communication between them is very poor. The child may be reacting to the parents' animosity.

[19] The parents' communication is definitely a problem. They communicate very poorly. The father has failed to communicate with the mother on very important matters, such as when the child suffered an injury. That is unacceptable. The mother has been more communicative as far as providing the father with information about the child which she receives from child care providers, the school or extra-curricular activities. However the mother has not really communicated with the father in relation to major decisions. She has presented her view and if the father did not agree, she has implemented the plan she proposed.

[20] The parents seem unable to put aside their differences and see the need to communicate for their child's best interests. It is hoped that a final resolution of the parenting arrangement will help with the communication issues. The text messages and emails exchanged by the parents have been put in evidence in this hearing and the interim hearing. This does not help with communication or trust between the parents. When the couple first separated they were able to cooperate and communicate effectively. In **Godfrey-Smith v. Godfrey-Smith** (1997), 165 N.S.R., 245 (NSSC) there is a discussion about the difference between the inability to communicate and unwillingness to communicate. In this case, the parents have

shown that they can communicate although they have had problems recently. The recent problem seems to be an unwillingness to effectively communicate pending the court hearing.

[21] The mother blames the father for lack of communication. She says that she suggests a solution to a problem or issue regarding the child and the father flatly disagrees without discussion. The father says that, as the past has shown, if he disagrees with the mother's suggestion she simply does what she has proposed and ignores his views.

[22] The mother has been acting as if she has had primary care and custody of the child. The mother has unilaterally changed the child care arrangements on more than one occasion. Without the father's agreement, she changed the parenting arrangement from shared and equal to one where she had primary care of the child and the father saw the child every second weekend. The mother enrolled the child in school in her neighbourhood despite the father's objections. The mother enrolled the child in extra-curricular activities without consulting the father and then expected the father to ensure the child was present at times not convenient for the father. These things were done before and after the interim

order although the **Maintenance and Custody Act** provides that both parents are equally entitled to the care and custody prior to an order and the interim order provided for shared and equal parenting time. The mother's actions do not lead me to believe that she would be cooperative in enhancing and nourishing the relationship between the father and the child if she were given primary care of the child.

[23] The mother has scheduled events and extra-curricular activities for the child during the father's parenting time and has complained because the child has missed some of these events. One parent should not expect the other to adhere to a schedule set without consultation and agreement.

[24] Both parents have supportive families who have assisted in the past and appear willing to continue to assist. The parties have been able to cooperate and coordinate the current schedule which involves multiple transitions and mid-week transitions.

[25] The father is facing a criminal trial which, if he is convicted, will result in the suspension of his driving privileges for twelve months. The mother is

concerned that this will affect the father's ability to share parenting. The father says that he has support from his family, other relatives and friends to provide transportation for himself and the child. He says that he will be able to continue with the parenting schedule even if his license is suspended. The father's license was suspended for a number of months in the last year. At the same time, he rented out his home to friends who were building a home. During this period the parenting arrangement changed and the father had less time with the child. The father says that the mother objected to his living arrangements during this time. The mother says that the father was unable to keep the shared parenting schedule because of the loss of his license. I accept that the father's living arrangements played a role in the change of the parenting schedule and it was not solely due to his loss of license. If the father's license is suspended, I am satisfied that he can make arrangements to continue the shared parenting arrangement.

[26] The current schedule has been in place for almost half of the child's life. Prior to that time he was in the care of both parents. The status quo and norm for the child is spending equal time with both parents. The mother wants to change to her having primary care. In **Gill v. Hurst**, 2010 NSCA 98 at paragraph 5 the Court of Appeal notes that the starting point for determining custody and access is

to consider whether joint custody was appropriate, with both parents having unfettered and liberal access to their child. I find in the present case that the mother has not shown that it is in the child's best interest to move from a shared and equal parenting arrangement to one where she has primary care of the child. The child is accustomed to spending equal time with each parent. Shared and equal parenting continues to be in the child's best interests. The concerns raised by the mother can be addressed with a clear parenting order.

[27] The parents will continue to have shared parenting of the child with each parent having him in their care for equal periods of time. There have been concerns raised about the number of transitions during the week now that the child has started school. The mother testified that the child appeared confused as to in whose care he would be in on a particular day. Now that the child is older, I find that a more consistent, easier to understand parenting arrangement would be in his best interests. The child will be in the parents' care on a week on/week off basis. The transfer of the child will take place on Friday afternoon at the child care provider's, which will cut down on the necessity of the parents to interact with each other. So the child is not a full week without seeing one of the parents, the parent who does not have care of the child on a particular week will have

parenting time on Wednesday evening. The parents shall share Christmas, March Break, Easter, and summer vacation on an alternating yearly basis.

[28] If there is a holiday or a day when there is no school, the child shall remain in the care of the parent according to the regular schedule. The father shall have the child on Father's Day weekend and the mother shall have the child on Mother's Day weekend. The parents shall communicate by email. The parents shall pass on information received about the child to the other parent. Neither parent shall speak in a negative or disparaging manner about the other parent.

[29] The parents have not cooperated with regard to decision making in the recent past. It is in the best interests of the child that they cooperate and agree. However, if they cannot agree after discussion between the parents, the mother shall have the final say on decisions regarding the child's health care and any decision on whether the child should attend for counselling or assessment by a professional. The father will have the final say on decisions regarding the child's education and child care arrangements outside of school hours on weekdays. The parents shall agree on the extra-curricular activities for the child.

2. What is the proper amount of child maintenance for the child, both table and s. 7?

[30] Although there is not an application for child maintenance in the present case, the matter was set for a hearing on child maintenance and the parties presented evidence on child maintenance. I will exercise my discretion to grant an order for child maintenance as it is in the best interests of the child to do so.

[31] In a shared parenting arrangement child maintenance is governed by the factors set out in s. 9 of the Child Maintenance Guidelines ("Guidelines") made pursuant to s. 55 of the **Maintenance and Custody Act**. Neither party provided me with evidence and information to a proper analysis for child maintenance in a shared parenting situation as set out in **Contino v. Leonelli-Contino**, 2005 SCC 63. I do not have any evidence of any increase in the cost of the shared custody arrangement and therefore have to assume that there are no increased costs from such an arrangement. There is no evidence regarding the conditions, means, needs and circumstances of the parents and the child which would allow me to make an order different than the set-off amount.

[32] Both parents asked that I make an order for the set-off amount if a shared parenting arrangement was ordered and rather than delay the matter and hear more evidence, I will accede, reluctantly, to the parents' wishes.

[33] In order to determine the set-off amount I must determine the income for both parents. The most current income information is to be used to determine the amount of child maintenance.

[34] The mother's line 150 for 2011 is \$50,593.00. Her most recent pay stubs show gross income, up to November 03, 2012, of \$45,102.53 with union dues of \$537.89. The mother's approximate 2012 income will be \$48,600.00.

[35] The father's 2011 line 150 income was \$38,148.66. His most current pay stub shows year-to-date income of \$26,478.00 to the first of November 2012, resulting in an approximate 2012 income from employment of \$28,888.00.

[36] The father also has rental income for the lower level of his house. At the time of the interim hearing the income from the rental flat was \$1,200.00 a month. Since that time the father says that the rental income has reduced by \$400.00 a

month to \$800.00 a month. The father explained that the decrease in the rental income was due to him taking over approximately 700 square feet for his own use that was previously part of the rental unit. The father did not explain his need for this space which would be satisfactory to the court to reduce his income. Every parent has a responsibility to support his or her child to the best of his or her ability. Section 19(1)(e) of the Guidelines allows me to impute income to a parent if the parent's property is not reasonably utilized to generate income. Based on the absence of an explanation by the father as to why he needed the 700 square feet, I find that he is not using his rental property reasonably to generate income. I therefore impute the amount of \$1,200.00 a month to the father as rental income. The father's total income for child maintenance purposes is \$43,288.00 (\$28,888.00 + \$14,400.00).

[37] The table amount for the mother at an income of \$48,600.00 is \$407.00 a month and for the father at \$43,288.00 is \$363.00 a month. The mother shall pay child support to the father in the amount of \$44.00 a month commencing on the first day of December 2012.

[38] The mother shall pay 53% of the after tax cost of child care expenses and the father shall pay 47%.

[39] The parents shall share equally in the extra-curricular activities that they agree on for the child. If either parent enrolls the child in an extracurricular activity without the consent of the other parent, the enrolling parent will be responsible for all costs associated with that activity.

[40] The mother will continue to maintain the child on her medical/dental plan as long as it is available to her.

[41] The parents will exchange income tax returns and notices of assessments each year on or before June 15.

Conclusion:

[42] The child will be in the joint custody of the parents.

[43] For the regular schedule, the child will be in the care of each parent according to a weekly rotation schedule with the transfer taking place on Fridays. Commencing Friday, November 30, 2012 the father shall pick up the child from the child care provider and the child will remain in the father's care until Friday, December 7, 2012 when the mother picks up the child from the child care provider. The parent who does not have the child in their care during the week will have the child in their care on Wednesday from the time the parent picks the child up from the child care provider until 7:30 p.m. when the child is to be returned to the home of the other parent.

[44] During vacations, special events and holidays the regular schedule will be replaced as follows:

- (a) The parents shall equally share the Christmas vacation. Christmas vacation is the period commencing at the end of school on the last day of school in December and ending on the first day of school in January. Commencing 2012, the father shall have the child in his care from the last day of school in December until Christmas Day at 1:00 p.m. The mother shall have the child in her care from Christmas Day at 1:00 p.m. until Boxing Day at 6:00 p.m. The mother shall

have the child in her care for the last half of the Christmas vacation including New Year's Eve and New Year's Day. In odd numbered years the mother shall have the child in her care for the first half of Christmas vacation and the father shall have the child in his care for the last half of Christmas vacation.

- (b) The father shall have the child in his care for Easter weekend in odd-numbered years and the mother shall have the child in her care for Easter weekend in even-numbered years. Easter weekend commences after school on Thursday and ends Tuesday at the start of school.
- (c) The mother shall have the child in her care for March Break in odd numbered years and the father shall have the child in his care for March Break in even numbered years. March Break commences after school on the Friday and ends at the start of school on the Monday following March Break.
- (d) Summer vacation is the period from the end of school on the last day of school in June until the day before school starts in September. Each parent will have the child in his or her care on the regular weekly rotating basis unless otherwise agreed by the parents.

- (e) The father shall have the child every Father's Day weekend and mother shall have the child every Mother's Day weekend. The weekend shall commence Friday after school and end on Monday at the start of school.
- (f) For the child's birthday, the child will remain in the care of the parent according to the regular schedule. The parent who does not have care of the child on the child's birthday will have the child in their care for a two-hour period on the child's birthday.
- (g) All other holidays and special occasions will follow the regular schedule unless the parents agree otherwise.

[45] Neither parent shall use non-prescription drugs or abuse prescription drugs while the child is in their care or six hours prior to the having the child in their care.

[46] Parenting time shall only be altered with the consent of the parents, by further court order, or on the recommendation of a medical professional in the event of medical emergency. Both parents shall discuss any medical emergency concerning the child with the professional in that event.

[47] There shall be no make-up time for missed parenting time.

[48] If the child is sick, the regular schedule is to proceed unless the child is too sick to travel between the parents' homes.

[49] Each parent shall be responsible for making day-to-day decisions for routine emergency medical care while the child is in their, and shall keep the other parent fully informed, by e-mail, of any minor illnesses, emergencies, treatments, medications administered or prescribed while the child is in their care.

[50] In the event of a serious illness, accident or other misfortune involving the child, the parent then having the child in their care shall immediately and promptly notify the other parent. During any period of illness or recovery, each parent shall have generous and reasonable contact with the child consistent with the conditions of this order and the welfare and happiness of the child.

[51] Neither parent will arrange activities for the child when the child is scheduled to be with the other parent without that parent's consent.

[52] Both parents shall be at liberty to attend scheduled school events and extracurricular activities whether or not they occur during their parenting time.

[53] Both parents shall be at liberty to attend field trips and participate in classroom events when the child is in their care and will not attend those events if the child is in the care of the other parent at the time.

[54] There shall be no restrictions placed on the child with respect to personal items, toys and gifts they wish to take with them between the residence of the parents. Should the child wish to take a gift, toy or article of clothing, he shall be permitted to do so, without the intervention of the other parent.

[55] Both parents are to provide the other, by email, with their current addresses and a phone number where they can be reached at all times.

[56] Neither parent shall speak in a disparaging or negative manner about the other parent or allow or encourage others to do so in the presence of the child.

[57] The parents shall communicate about the child by email. The emails shall not be read by the child. Each parent will respond promptly by return email to the email of the other. The parents shall exchange information regarding the child's care, developmental milestones, food likes and dislikes, scheduled activities and appointments (medical and otherwise) and any requests for changes in the parenting schedule. All emails between the parents regarding the child shall not be deleted nor shall they be forwarded to third parties without the other parent's consent. Emails shall be brief, respectful and related solely to the child. Absent an emergency, the parents shall not email each other more than once per day.

[58] The parents shall share all documents pertaining to the child by scanning the document and then sending it to the other parent by email. The parents shall not rely on the child to transport documents between them.

[59] Each parent is entitled to make one telephone call per day to the child on any day the child is out of their care. The telephone call will last for up to ten minutes and will not be made at a time that disrupts the other parent's schedule with the child.

[60] Major decisions regarding the child's medical care, well-being and treatment shall be made in consultation with the child's current doctor, dentist, psychologist, counsellor or other health-care providers. If the parents are unable to agree on major decisions relating to the child's medical care, well-being and treatment, the mother's decision will prevail.

[61] Major decisions affecting the child's educational programming shall be made by the parents in consultation with the child's homeroom teacher. Major decisions in relation to the child care arrangements during the weekdays will be discussed between the parents. If the parents are unable to agree on major decisions relating to the child's education or child care, the father's decision will prevail.

[62] Before making any final decision in their area of decision-making each parent shall inform the other of their intended decision. They shall consult with one another in regards to any and all major decisions and shall seek the other's input over the areas in which they have authority. It is only after this consultation process that the parent shall be able to make a decision and, upon doing so, shall immediately inform the other parent of the decision that they have made.

[63] Each parent shall be entitled to receive copies of all medical, dental, school and other reports related to the child and shall be entitled to consult with the child's teachers, physicians, psychologists, counsellors, dentists and other care givers concerning the general well being of the child. Each parent shall be listed on all documents pertaining to the child and shall be entitled to attend any of the child's scheduled appointments. Both parents are to execute consents or authorizations to all persons, including teachers, doctors, psychologists, counsellors, dentists and others involved with the child to speak fully and openly with both parents.

[64] The child's health cards shall travel with the child between the parents' households.

[65] Neither parent shall change the child's residence from the Halifax Regional Municipality without the other's consent.

[66] In the event that one parent is unable to care for the child during their parenting time for a period of more than 24 hours, the other parent shall be entitled

to first refusal to care for the child. In the event that the notified parent is unable to care for the child, the other parent will assume responsibility for arranging and paying for alternative child care.

[67] If one of the parents is required to travel outside of the Halifax Regional Municipality at a time when the child is to be in school, the child shall not be taken out of school in order to travel with that parent without 30 days' notice to the other parent and unless they have the written consent of the other parent.

[68] Should either parent desire to take the child from the Province of Nova Scotia for vacation purposes, they shall advise the other parent in writing of dates for travel, location, flight details (if applicable) along with the address and phone numbers of where the child can be reached at where they are going.

[69] Should a passport be required for the child, the parents shall cooperate with each other in providing the necessary information to make the application. The mother shall keep the child's passport at her residence and it will be made available to the father as required. Both parents shall provide necessary authorizations to allow the other parent to travel outside the country with the child.

[70] The mother shall pay child support to the father in the amount of \$44.00 a month commencing on the first day of December 2012 and continuing the first day of each month thereafter.

[71] The mother shall pay 53% of the after tax cost of child care expenses and the father shall pay 47%.

[72] The parents shall share equally in the extracurricular activities that they agree on for the child. If either parent enrolls the child in an extracurricular activity without the consent of the other parent, the enrolling parent will be responsible for all costs associated with that activity.

[73] The mother will continue to maintain the child on her medical and dental plan as long as it is available to her.

[74] The parents will exchange income tax returns and notices of assessments each year on or before June 15.

[75] If either party wishes to be heard on costs, they shall have the matter set down for a one-hour hearing. The party seeking costs shall file their written brief on costs two weeks prior to the hearing date and the responding party shall file their written brief on costs one week prior to the hearing date.

J.