SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: MH v. JH, 2013 NSSC 198

Date: 20130503
Docket: SFSNMCA-080967
Registry: Sydney

Between:

MH

Applicant

v.

JH

Respondent

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	April 2, 4, 11, 2013, in Sydney, Nova Scotia
Oral Decision:	May 3, 2013
Counsel:	David Raniseth, for the applicant Clara Gray, for the respondent

By the Court:

[1] **Introduction**

[2] On March 5, 2013, eight year old Jo became embroiled in a heated exchange with his mother, MH. Jo called his mother degrading names. Jo's conduct was appalling.

[3] This decision deals with the aftermath of Jo's shocking behaviour. Specifically, this court has been asked to make findings surrounding MH's reaction. Was MH's reaction a display of inappropriate discipline, or was MH physically abusive towards Jo? MH denies physical abuse, while Jo's father, JH, raises protection concerns.

[4] The resolution of this issue is relevant to the determination of the type of parenting arrangement which is to remain in place pending the trial scheduled for June 24, 25, and 26, 2013.

[5] **Issues**

[6] The following issues will be determined in this decision:

- Was MH's reaction on March 5, 2013 one which poses protection concerns or simply that of inappropriate discipline?

- What is the appropriate interim parenting arrangement pending the trial and decision?

[7] **Background**

[8] MH and JH separated on March 25, 2012. They have two children, namely Jo, born August 15, 2004, and Ja, born November 15, 2008. Although the separation only occurred a year ago, frequent court appearances have resulted in the issuance of several orders. They are as follows:

- A temporary, interim order issued on May 18, 2012. This order stemmed from separate emergency motions filed by each party.

Although the court refused to grant ex parte orders, the court scheduled an inter partes hearing with abbreviated notice given the urgency. A shared parenting arrangement was put into place on a temporary basis pending a full hearing scheduled later in May, 2012.

- A temporary interim variation order was granted on May 29, 2012, and issued on June 1, 2012. A revised shared parenting arrangement was detailed such that the children would be with JH every Friday until Monday, which would be extended to Tuesday in the event Monday was a holiday. The children were placed in the care of MH for the balance of the week.

- A further interim varied order issued on July 19, 2012 which granted an adjournment and scheduled the final hearing to November 2012.

- In July 2012, a consent order issued mandating the completion of a parental capacity home study assessment, with a psychological component, by a duly qualified child psychologist.

- On September 7, 2012, another interim order issued confirming Jo would be registered as a student at Glace Bay Elementary School where he had been attending school prior to separation and up to that point in time. The application of MH to change Jo's school to the Sydney area was disallowed.

- And finally, a consent order issued on November 20, 2012, which detailed holiday and vacation access including Christmas, March Break, Easter, and Ja's birthday.

[9] The trial schedule for November was adjourned because the parental capacity assessment had not been completed. Secondary trial dates were then scheduled for April, while primary trial booking dates were assigned in June. The April trial dates were adjourned by consent because the parental capacity assessment was still not completed. The parties are, however, going to proceed to trial on June 24, 25 and 26. I cannot imagine circumstances that would give rise to another adjournment.

[10] The April trial dates were used to determine the interim parenting motion which arose in the wake of the March 5 incident between MH and Jo. The interim hearing on this discrete issue was held on April 2, 4, and 11, 2013. The court heard evidence from the following individuals: Natasha Wall, Noelle Holloway-MacDonald, Dr. Landry, Constable Matthys, Constable Royal, Constable Somerton, MH, and JH. Submissions were provided; the court's oral decision was rendered on May 3, 2013.

[11] I will now move towards the analysis portion of the decision, and I will deal with each issue individually.

[12] **Analysis**

[13] **Was MH's reaction on March 5, 2013 one which poses protection concerns or simply that of inappropriate discipline?**

[14] *Position of the Parties*

[15] MH, although acknowledging that she could have handled the situation better, states that she did not intentionally harm Jo. From her perspective, nothing more than inappropriate parenting occurred on March 5, and this court must enforce its parenting order.

[16] In support of this position, MH relies upon the investigation completed by the Department of Community Services, as relayed to the court by Ms. Holloway-MacDonald and Natasha Wall. She also relies upon the evidence of Dr. Landry who noted that all testing confirmed that MH does not possess the characteristics typically found in individuals who abuse children.

[17] In contrast, JH states that MH physically harmed Jo by scratching him and hitting his head against the wall. He relies upon photographs which show the injuries, as well as Jo's comments made to the police and Ms. Holloway-MacDonald. These statements were entered after a *voir dire*, and after an examination of the elements of necessity and reliability. Further, JH relies upon the admissions made by MH to Jo during the course of two telephone conversations. JH wants MH to undergo education and training so that Jo will not

be physically harmed in her care again. JH seeks supervised access until this training is completed.

[18] I will now provide my decision by first reviewing the law, and then reviewing my factual findings.

[19] *Decision*

[20] All decisions involving children must be based on their best interests. In assessing the evidence related to best interests, this court must have regard to the standard of proof and make credibility determinations. In **C.(R.) v. McDougall**, 2008 SCC 53, Rothstein, J. confirmed that there is only one standard of proof in civil cases - that is proof on a balance of probabilities. In every civil case, the court must scrutinize the evidence when deciding whether it is more likely than not that an alleged event occurred. The evidence must not be considered in isolation, but must be based upon its totality. The evidence must always be clear, convincing, and cogent to satisfy the balance of probabilities test.

[21] Further, the court must assess the impact of inconsistencies on questions of credibility and reliability, which relate to the core issues. It is not necessary that every inconsistency be addressed, but rather a judge must address in a general way the arguments advanced by the parties: **C.(R.) v. McDougall**, ***supra***, paras. 40, 45 and 49.

[22] In **Baker-Warren v. Denault**, 2009 NSSC 59, as approved in **Hurst v. Gill**, 2011 NSCA 100, this court reviewed factors to be considered when making credibility determinations at paras. 18 to 20, which state as follows:

> 18 For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" R. c. Gagnon, 2006 SCC 17 (S.C.C.), para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" R. v. M. (R.E.), 2008 SCC 51 (S.C.C.), para. 49.

> 19 With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:
> a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: Novak Estate, Re, 2008 NSSC 283 (N.S. S.C.);
> b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
> c) Did the witness have a motive to deceive;
> d) Did the witness have the ability to observe the factual matters about which he/she testified;
> e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
>
> 20 I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: R. v. Norman (1993), 16 O.R. (3d) 295 (Ont. C.A.) at para. 55. In addition, I have also adopted the following rule, succinctly paraphrased by Warner J. in Novak Estate, Re, supra, at para 37:
>
> > There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See R. v. D.R., [1966] 2 S.C.R. 291 at 93 and R. v. J.H. supra).

[23] I have reviewed the totality of the evidence. I have considered the evidence that was properly before the court by way of exhibits, or elicited while a witness testified. I have considered the law and the legal submissions of the parties. I have assigned the civil burden of proof to JH as it is his application to vary, on an interim basis, the current order. I have made credibility findings given the conflict in the evidence. I will now relate my findings of what occurred on March 5, 2013.

[24] JH has discharged the burden of proof. I find, on a balance of probabilities, that MH's response to Jo's belligerent conduct was more than an example of inappropriate discipline. MH caused physical injury to Jo because she slapped, pushed, grabbed, and scratched him out of anger. MH responded in violence to an escalating and aggressive situation.

[25] In reaching this conclusion, I specifically reject the finding made by the Department of Community Services. The department's investigation was incomplete and cursory. No photographs of the injuries were available at the time and the workers were not aware of the bruise on Jo's face. I am also not certain that Ms. Wall appreciated the extent of the scratching on Jo's back. In addition, the department did not have the benefit of hearing the telephone exchanges between Jo and his mother. These exchanges were made when MH was on speaker phone. MH was also aware that the conversations were not private as she acknowledged other people were present in the room during these conversations. Further, Ms. Holloway-MacDonald fixated more on the conduct of an eight year old child, which was deplorable, rather than on the conduct of the parent who had charge over the child.

[26] I also prefer the evidence of the police officers over the evidence of Ms. Holloway MacDonald as to Jo's comments. Ms. Holloway MacDonald had destroyed her original notes. Ms. Holloway MacDonald's evidence was based on her personal recollection and notes recorded by a Halifax social worker. Ms. Holloway MacDonald's recollection was likewise clouded by her strong disapproval of Jo's behaviour. In contrast, the police officers made and retained notes of their observations and provided balanced evidence.

[27] In addition, Jo's presentation and injuries are consistent with my finding that MH physically assaulted Jo on March 5. When Officers Royal and Somerton attended MH's home immediately following the argument, they were met by a distraught and crying 8 year old Jo. Jo's comments were spontaneous and his description of the events were corroborated by his physical injuries. He complained of a head ache because his mother had banged his head against the wall. He showed the officers his back, and said that his mother had hurt and scratched him. The officers saw the scratches and subsequent photographs confirm these injuries. Jo also spontaneously admitted to the officers his own wrong doing when he said that he had cursed. Jo was being truthful and at no time attempted to minimize his own conduct. He made admissions against his own interest.

[28] Jo's description of the March 5 events remained consistent when he later spoke with Ms. Holloway MacDonald in the presence of Constable Matthys while

at JH's home. Constable Matthys gave an unbiased, factual, and accurate recollection of Jo's statements. His accounts were consistent. He confirmed that his mother slapped him in the face. Photographs confirming the bruising on his face were also tendered. Constable Matthys noted that Jo stated that he was scratched when his mother grabbed him to stop him from walking away.

[29] Further, the telephone conversations between MH and Jo, which occurred on March 7 and 10 are consistent with Jo's description of the confrontation, and not of MH's version. These conversations were recorded while MH was having discussions with Jo on a speaker phone. The transcript and content of the calls were entered by consent. Admissibility was not in issue.

[30] At page 4 of exhibit 3, during the course of the March 7 conversation Jo, unsolicited, asked his mother the following: "Mom, how come you didn't say sorry yet," MH responded: "Oh baby, Mommy is sorry, honey." Jo said: "Then how come you didn't say sorry." Later in the conversation Jo asked his mother: "Then how come you purposely slapped me upside the head?" MH responded: "Because you called Mommy an f-ing bitch honey. That's why hun. And I'm sorry that I did that, I should not have done that, I shouldn't have hit you and I understand that. You and I are gonna go talk to someone, OK?"

[31] At page 5 of exhibit 3, during the conversation on March 10, Jo indicated that he didn't want to visit with MH yet because "I'm afraid it's gonna happen again." MH then responded, "You know what honey? Mommy promises on Nanny that nothing like that's every gonna happen again...Okay?" Jo's response is natural and spontaneous. He says: "Something tells me...Some part of my body's doubting that." MH responds: "You know what honey? I understand that, and that makes sense, but Mommy promises on Nanny that I will never, ever, ever do anything like that to you again...OK?" Jo's response: "I'm being dramatic but you said that to me millions of times, and you done it again, and again, and again." And then MH finally says: "Oh baby, You know what you and I are gonna talk to somebody, and we're both gonna work on, umm, our anger issues together...OK? You're gonna talk to Pauline a little bit more, then you're going to see, umm, Wendy again."

[32] These March 7 and 10 conversations are consistent with Jo's description, and not MH's version of the events.

[33] Finally, I find that MH was not credible. At times, she was evasive when testifying. She also minimized her role and attempted to deflect blame to JH. For example, she stated that some of the scratch marks were on Jo's back before his visit with her. She also opined that Jo needed counselling because JH and his girlfriend were expecting a new baby.

[34] Further, MH's version of the events, I find, are not plausible and strain the imagination in the context of the reported injuries. During cross examination, and after being presented with the transcript of the taped conversations, MH does admit to smacking Jo on the head. MH was clear in distinguishing the verb "smacking" as being distinct from the verb "slapping". Although I am unable to appreciate that fine distinction, both verbs represent actions which produce physical harm.

[35] Unfortunately, the March 5 incident was not an isolated one. On occasion, Jo acts out while in MH's presence. MH is unable to diffuse the situation; her reaction is incorrect and has caused physical harm to Jo. Protection concerns arise because of MH's inability to respond properly and safely to Jo's extreme behaviours. Although MH only responds physically when Jo presents with extreme behaviours, it must be remembered that Jo is only eight. MH is the adult and mother; Jo must not be physically harmed by angry, violent responses.

[36] In summary, I find that the March 5 incident was not a case of simple, inappropriate discipline. Rather, during the March 5 incident, Jo suffered physical injuries because he was slapped, pushed, and scratched by MH when she was angry and during an inability to mete out discipline in a safe and effective fashion. Jo clearly needs to be disciplined, but in a safe and effective manner.

[37] **What is the appropriate interim parenting arrangement pending the trial and decision?**

[38] *Position of the Parties*

[39] JH seeks supervised access, a reduction in the access pending the trial, and an order mandating MH's attendance at anger management programs and parenting programs.

[40] In contrast, MH wants the current parenting order enforced. She further confirmed that she will continue with counselling through Transition House and Family Services of Eastern Nova Scotia. In addition, she is making arrangements to participate in Child and Adolescent Services with Jo.

[41] *Law*

[42] The *Maintenance and Custody Act* confirms that all decisions affecting children must be based on their best interests. Factors which compose the best interests test are varied, as noted in case law and in the legislation itself. Recently the *Maintenance and Custody Act* has been amended to provide a list of factors which the court should consider in determining a child's best interests. I have reviewed case law, as well as the legislative factors.

[43] I further note that during the interim, the principle that gains preeminence is the preservation of the status quo. Ordinarily the status quo should be maintained unless it is contrary to the child's best interests. I have applied this principle. The status quo refers to the status quo which existed before JH stopped access. The status quo is, in fact, the current court order.

[44] In addition, I recognize the court's limited jurisdiction to vary an interim order. Ordinarily, more than one interim hearing is inappropriate in the family law context. Only in rare cases should the court vary a parenting arrangement at an interim stage. I have applied this principle.

[45] Further, case law confirms that there is no absolute right to access, although the best interests of a child is generally promoted when a child has meaningful contact with both parents. A child is ordinarily entitled to share in the daily lives of his or her parents, unless such is not in the child's best interests to do so. Access is the right of the child, and not of the parent. There is no presumption that contact with both parents is in the best interests of the child, as stated in: **Young v. Young**, [1993] 4 S.C.R. 3(S.C.C), and **Abdo v. Abdo**, 1993 NSCA 205 (C.A.).

[46] In **Abdo v. Abdo**, ***supra,*** the Nova Scotia Court of Appeal outlined three applicable legal principles, which are as follows:

- The right of the child to know and to be exposed to the influence of each parent is subordinate in principle to the best interests of the child.

- The burden of proof lies with the party who alleges that access should be denied or subject to supervision, although proof of harm need not be shown in keeping with the decision of **Young v. Young**, ***supra***.

- The court must be slow to extinguish access unless the evidence dictates that it is in the best interests of the child to do so.

[47] In **T.(M.) v. G.(M.)**, 2010 NSSC 89, this court indicated that supervised access is not a long term solution to access problems. Supervised access is only appropriate in specific situations, which include the following:

- Where there are substance abuse issues;

- Where the child requires protection from physical, sexual, or emotional abuse;

- Where there are clinical issues involving the access parent; or

- Where the child is being introduced or reintroduced into the life of a parent after a significant absence.

[48] Supervised access is inappropriate if its sole purpose is to provide comfort to the primary care parent. Access is for the benefit of the child and each application must be determined on its own merits: **Miller v. McMaster**, 2005 NSSC 259.

[49] *Decision*

[50] I have determined that this is an appropriate case to vary the interim parenting arrangement and to displace the current order. I do so because the best interests of the children, Jo and Ja, mandates the court to act. The court is concerned for the physical safety of the children while in MH's care when she reacts angrily to Jo's appalling conduct at times.

[51] MH does not know how to safely manage Jo's confrontational behaviours. Jo suffered physical and emotional injury because of MH's responses. Ja was present during a portion of this exchange. MH's responses, at times, are destructive and violent. She must acquire healthy and effective parenting and anger management skills. MH must learn to control and self-regulate her reactions.

[52] Dr. Landry noted that MH does not have the characteristics typically found in a person who abuses children. I accept that. He also noted that if aggression is not a stable trait, which he found in this particular situation, although the full report was not provided, then one must examine issues of psychological stress and depression. Dr. Landry observed MH to be a caring and loving mother.

[53] Despite these findings, it is clear that MH must make significant changes in her parenting. Until MH implements better parenting strategies the children, and in particular Jo, remains at risk of physical harm. Therefore, MH will engage in the following programs and services immediately:

- Programming designed to teach proper discipline techniques for parents whose children exhibit challenging behaviours. This is an understatement. Jo's behaviours are out of control. Saying that, MH you have to learn to control these behaviours in a way that is safe and healthy. So taking programming that is available to you to learn to effectively manage and stop this behaviour is a necessity.

- Programming designed to teach anger management skills so that a more reflective, and less reactive response is employed by MH in the face of frustrating and challenging behaviours.

- Programming on the effects of violence on children.

- A continuation of the personal counselling, which you are currently taking, which is available through Family Services of Eastern Nova Scotia, Transition House, and Child and Adolescent Services.

[54] Until MH learns these skills, and completes these courses, successfully, the children will remain at risk, particularly Jo.

[55] The matter is returning to court in June, so it's only a brief time. I am hopeful that MH will have successfully completed this programming by the June trial dates and can provide confirmation, which is why I am asking, and again not ordering, because the department is not part of these proceedings, to do everything possible to ensure quality programming. I know MH has been working with the department, on a voluntary basis, to ensure that happens now rather than later. Such is in Jo's and Ja's best interests.

[56] Until these courses are successfully completed, MH will exercise supervised access for three, three hour visits during the weekdays, and two, four hour visits on the weekends. If the parties are unable to agree on supervisors, then the court will make that determination.

[57] Absent agreement, the court will hear submissions, and then make the determination. If the parties require specific days and times because of their lack, or inability to be flexible, based upon the supervisors and childrens' needs, then the court will specify exact times. This is a temporary, interim, variation order, which will be subject to change at the time of trial.

[58] I am also ordering JH's attendance at counselling to obtain educational programming. Again, if the department can work with providing JH with counseling and services on a voluntary basis, that would be appreciated. All counseling and services are to be completed before the June hearing. The family and the children have been in an unstable state for over a year, and they need stability. JH is to improve his understanding of the importance of the mother/child relationship to Jo's development; and to learn techniques that will encourage and promote a healthy relationship between Jo and MH. Further, MH must learn techniques to help Jo acquire better conflict resolution skills.

[59] Both parties are going to cooperate in ensuring that Jo attends at all appointments at Child and Adolescent Services.

[60] **Conclusion**

[61] JH has proven on a balance of probabilities that the status quo as provided in the interim court order is no longer in the best interests of the children. As a result, the current parenting order is varied and each party is mandated to cooperate and participate in the educational programming and counselling that I have ordered.

[62] Ms. Gray will prepare the order. The court is not intending to provide a written decision unless either party requests. There may be a delay of at least four to six weeks in the written version because of the court's current work load, not only of the court, but of court staff.

[63] Thank you.

Forgeron, J.