SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *J.T. v. T.K.*, 2018 NSSC 42

Date: 2018-03-15
Docket: No. SFHMCA-099777
Registry: Halifax

Between:

J.T.

Applicant

v.

T.K.

Respondent

Judge:	The Honourable Justice Carole A. Beaton
Heard:	February 20, 2018, in Halifax, Nova Scotia
Written Release:	March 15, 2018
Counsel:	Damian Penny for the Applicant Ian Gray for the Respondent

By the Court:

Background

[1] The Applicant, J.T. and the Respondent, T.K. are the parents of six-year-old A. To date there is no custody order in place. In March 2016, the Applicant filed an Application pursuant to the *Maintenance and Custody Act*, now the *Parenting and Support Act* R.S.N.S. 1989, c. 160 ("the *Act*") seeking parenting time ("time") with the child. Prior to that the Applicant had regular contact with and was, by times, actively involved in parenting the child. The Respondent opposed the Application; in October 2016, she filed a Response requesting custody and seeking to deny any time for the Applicant. She also sought child support (table amount and special expenses). At a brief conference appearance in March 2016, the presiding Justice ordered the child was not to be relocated outside Halifax Regional Municipality.

[2] At an interim hearing on May 10, 2016 I assumed carriage of the file and ordered interim supervised time for the Applicant through Veith House, gradually expanding to two hours weekly. Supervised time was a temporary measure, pending a full hearing on the ultimate question of whether there should be ongoing time for the Applicant, while avoiding interruption of the historical pattern of contact for the benefit of the child.

[3] There were delays in getting the matter to a final hearing. In addition, in mid-August 2017, despite a final hearing date then pending, the Respondent filed a Motion for Interim Relief seeking authorization to relocate and enroll the child in school elsewhere in the province. At an early September 2017, pre-trial conference I directed the motion regarding relocation would be considered at and form part of the final hearing, then scheduled for November 2017.

[4] When the Respondent was still not ready to proceed to a hearing by November, the Court was concerned that the interim parenting time had been supervised by Veith House well beyond the temporary time frame intended when that order was first made. I directed that the Applicant's time with the child, which had gone well according to Veith House reports filed periodically with the Court, be moved to the community, under supervision of a candidate ultimately proposed by the Respondent. (Her representations to the Court caused me to understand the Respondent had already relocated and enrolled the child in school in another area of the province, despite that matter being a live issue, and despite the March 2016 order prohibiting relocation of the child.)

[5] A final hearing was held on February 20, 2018. The Court received the evidence of the Applicant (consisting of four Affidavits filed over the course of the proceeding) upon which he was cross-examined. The maternal grandmother W.K. filed an Affidavit in support of the Applicant's position, and was cross-examined. The Respondent was cross-examined on her Affidavit, which referenced "my earlier Affidavit". It was unclear if that was a reference to one filed in May 2016 or one filed in August 2017; neither of those formed part of the evidentiary record at the hearing.

[6] In submissions, the Applicant requested weekly unsupervised time with the child, with a gradual expansion to overnight time, but without any particulars or details as to a possible or preferred schedule, and with no request for holidays or special occasions. The Respondent argued that while contact between the Applicant and the child would be contrary to the child's best interests, any contact should be supervised, as the most recent arrangement for supervised time in the community had "worked well". There was no evidence before the Court as to whether the person conducting that supervision was willing or available to continue in that role, or how often, and if not, who else might fill that role in any prospective order the Court might make.

Issues:

1. Should the Respondent's claim for sole custody succeed?
2. Should the Applicant be denied parenting time?
3. If the answer to the second question is no, should the Applicant's parenting time be supervised?
4. What, if any, schedule for the Applicant's parenting time is appropriate?
5. Is child support payable?
6. Are costs payable?

Issue No. 1 – Custody

[7] The Applicant's pleadings and evidence did not seek custody, only parenting time for him. The Respondent's pleadings contained a claim for custody but she offered no evidence on the point. Neither party addressed the matter in submissions. At the risk of being seen to indirectly endorse the Respondent's unilateral decision to relocate the child contrary to a mobility restriction contained

in a court order, I am prepared to order custody of the child to the Respondent given:

> a. The Applicant did not suggest in pleadings or evidence that he sought to rely on the presumption in the *Act* in favor of joint custody, nor did he challenge the Respondent's claim for custody as contained in her pleadings.
>
> b. The evidence of the Applicant leads the Court to conclude the child presently has a day-to-day residence with the Respondent.

Issue No. 2 – Denial of parenting time

[8] Section 18(8) of the *Act* recognizes the "maximum contact principle": children should have as much contact with both parents as is in the child's best interests. Denial of parenting time is reserved for the most serious or egregious of circumstances. As discussed in *Doncaster v. Field*, 2014 NSCA 39 (Oland, J.A.):

> 55. Courts are hesitant to totally deny access to the non-custodial parent. As has been explained, contact between a child and each parent is seen as desirable . . . A complete denial of access has been ordered only infrequently, where the behaviours of the parent seeking access were extreme, access would place the child at risk of emotional or physical harm, or access was otherwise not in the best interests of the child. Each case is unique and driven by its specific facts.

[9] The thrust of the Respondent's objection to parenting time for the Applicant focussed on her concerns with the Applicant's criminal record and his unorthodox beliefs. While the Respondent does not have to prove harm to the child if the Applicant were to have parenting time with A., the burden of proof is on the Respondent to establish that access should be restricted or denied (*D.S. v. R.T.S.*, 2017 NSSC 155).

[10] The Applicant did not deny his criminal record, which includes more dated offences of violence and more recent property-related offences of dishonesty. He did not shy away from the fact he has served a period of federal custody since A.'s birth and has been the subject of media attention. The Applicant did not deny he holds certain controversial political, historical and world views. For example, the Applicant clarified on cross-examination that while he is not a white supremacist, he is an "Asian supremist" (*sic*) and he confirmed he has "…unorthodox views on white European pride". (Exhibit 1, Tab 9, p. 48).

[11] In response to the Respondent's concerns about the potential to negatively impact A. through exposure to such views, the Applicant maintained he would not discuss these adult topics with a six-year-old as they would not be of interest to a young child, and further he would not want the child to be exposed to the sort of ridicule he is aware such views can attract.

[12] The question is whether it is in A.'s best interests to deny parenting time to the Applicant. The best interests test is long recognized as broad and flexible, driven by the conditions, means, needs and circumstances of the particular child (*Young v. Young*, [1993] 4 S.C.R. 3). The best interests test is captured in, but not restricted to, the considerations set out in section 18(6) of the *Act*, and no one factor or circumstance takes priority. Those are:

> 18. (6) In determining the best interests of the child, the court shall consider all relevant circumstances, including
>
> > (a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;
> >
> > (b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;
> >
> > (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;
> >
> > (d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
> >
> > (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
> >
> > (f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;
> >
> > (g) the nature, strength and stability of the relationship between the child and each parent or guardian;
> >
> > (h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;
> >
> > (i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and

> (j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on
>
> (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and
>
> (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

[13] Most of the Respondent's evidence focussed on her views of the Applicant, with little to nothing about the child. That lack of information is frustrating for the Court, tasked with deciding what is in the child's best interests, but without any current detail about matters such as:

> a. the child's attendance at school and academic performance,
>
> b. any caregivers who engage with the child,
>
> c. the child's health,
>
> d. the child's daily routine and activities, likes or dislikes and preferences,
>
> e. any extra curricular activities in which the child may be involved,
>
> f. the nature and frequency of the child's interactions with extended family and/or friends,
>
> g. the child's general disposition and details of the child's socialization and development.

Therefore, I have considered the relevant provisions of s.18(6) of the *Act* to assess the child's best interests, while in some respects limited by the information put before me.

[14] In the past, the Respondent facilitated the Applicant's contact with the child, including during the period of his incarceration and subsequent release, despite his beliefs and views. The Respondent's concerns about contact between the Applicant and the child seemingly came after a breakdown in the parties' relationship, which the Respondent asserts was due, in part, to aggressive and/or violent behaviour toward her by the Applicant (which he denied in cross-examination). Those concerns can be resolved without the extreme remedy of entirely severing the

parent-child connection, as there is no evidence the Applicant has been inappropriate in such a manner with or toward the child. A parenting schedule that avoids contact between the parents can properly address any such concerns that could exist.

[15] I find it would be confusing for the child to suddenly eliminate all connection with the Applicant, with whom there is an undisputed history of contact, despite the problematic aspects of the Applicant's past and his beliefs. The Applicant's personal views are relevant to the extent they inform or attend to the question of the child's best interests; it is not for the Court to eliminate all possibility of the child forging a relationship with the Applicant only because the Applicant holds aberrant views and beliefs.

[16] It is trite to observe that many parents who enjoy time with their child(ren), as such is the right of the child, are parents who have criminal records, unsavoury pasts, unconventional views, "bad" habits, addiction issues, or any other of a host of negative attributes or social ills. Parents are not perfect; that reality is commonplace in decisions the Court is routinely asked to make for and concerning children. Examples of the many varieties of situations where courts have permitted parents to have access despite their own personal histories was canvassed in *Doncaster (supra).* The Applicant is not the first parent with a troublesome or unseemly past who has been granted parenting time by a court.

[17] I am unable to conclude on a balance of probabilities that the circumstances of young A. or the Applicant are such that he should be denied time with the child, or more importantly that the child should be prevented from spending time with him. The Applicant's history is not ignored, but does not lead to the conclusion that the child's best interests will be put at risk or compromised by contact between them. The Applicant shall be permitted to have parenting time with the child.

Issue No. 3 – Supervised parenting time

[18] Like the second issue discussed above, a restriction that parenting time be supervised is not a decision the Court should make easily. The burden rests with the Respondent to establish that supervision is warranted in the best interests of the child (*McIntosh v. St. Georges*, 2015 NSSC 114). Any arrangement for supervision should not be seen as a long-term measure.

[19] As with the Respondent's argument regarding denial of time for the Applicant, I am not persuaded the Respondent's concerns about the Applicant's

criminal record and/or personal beliefs present a compromise to the child's best interests such that supervised contact between the two is necessary.

[20] The evidence before me was that the Applicant routinely enjoyed time with the child until shortly before his Application was filed. Following that, the lengthy period of supervised access that preceded the hearing went well, both at Veith House and in the community. The latter is corroborated by the Respondent. The child is at this point entitled to more normalized interaction with the Applicant, without the presence of a supervisor.

[21] I am unable to conclude on the evidence before the Court that the child's safety, security or best interests would be compromised unless there was to be supervision of the Applicant's parenting time. Placing limitations on the Applicant's discussion of certain topics in the presence of the child is arguably difficult to police; clearly, if the child begins to discuss or express like views in the future, the Applicant will risk a reassessment of his parenting time. In the meantime, the Applicant testified he will not do so, and therefore related conditions imposed on his parenting time should not present any hardship to him.

Issue No. 4 – Parenting schedule

[22] I am satisfied the child's best interests are properly served by continuing contact with the Applicant. I know nothing of the child's daily schedule but infer that because the child has been attending school during the week in another area of the province, weekend contact is necessitated, as it is the only time the child has available.

[23] The move to unsupervised parenting time should be transitioned to permit the child to adjust. As discussed earlier, the Court is concerned about minimizing the potential for contact between the parents during exchanges, but hampered by a lack of information about what might be practical to assist in the execution of the parenting schedule. The only mention of details regarding pick-up and drop-off times or location was the Applicant's submission that the Veith House supervised access exchange program could be utilized. I have concluded supervision is not needed, therefore other measures to limit contact between the parties will suffice.

[24] The parenting time for the Applicant with the child shall be as follows:

a. Effective April 1, 2018 and continuing to July 1, 2018, the Applicant shall have parenting time each Saturday from 10:00 a.m. to 2:00 p.m..

b. Effective July 1, 2018, the Applicant shall have parenting time every second Saturday from 10:00 a.m. to 6:00 p.m. If Christmas Day occurs on a Saturday, parenting time shall move to the next day, December 26th, at the same time.

c. The child shall not be enrolled in any extra curricular activity that would impact the Applicant's parenting time unless the Applicant agrees, in advance of enrollment, to facilitate the child's attendance at the activity during his time.

d. (i) Unless the parties mutually agree at any time, from time to time, on a different location, the Applicant shall pick up and drop off the child in the parking lot of the Tim Horton's location at 6045 Lady Hammond Road, Halifax.

(ii) There shall be no direct contact between the Applicant and the Respondent during the transitions of A. and no need for the parties to be any closer than fifteen feet from one another.

e. The parties may, by mutual agreement, modify the day, date or duration of the Applicant's parenting time, at any time.

f. During his parenting time the Applicant shall not remove the child from Halifax Regional Municipality unless 24 hours prior notice is provided to the Respondent. In no case shall the Applicant remove the child from the Province unless by mutual agreement

g. The Applicant shall not engage in, and shall not permit anyone else to engage in, discussions of his political, geo-political or world views in the presence of the child.

[25] I decline to order overnight parenting time for the Applicant at this juncture. Not enough detail about the child is available to the Court to permit an appropriate or reasonable determination regarding that type of parenting time. Furthermore, the child needs time to adapt to longer periods with the Applicant before that could be contemplated.

Issue No. 5 –Child support

[26] The Respondent did not address in evidence or submissions her claim for child support, including special or extraordinary expenses. Nonetheless the Court must consider the matter, as child support is the right of the child. The Applicant's most current financial information consisted of a dated sworn Statement of Income from April 2017 (Exhibit 1, Tab 5) showing zero income.

[27] On cross-examination, the Applicant reported he presently earns no income and is undergoing chemotherapy treatment for cancer. He reported that while the condition is "in check" at this time, he is "classified as disabled", and therefore unable to work. There is no current medical evidence before the Court regarding the Applicant's prognosis, nor his ability to work, save a physician's narrative from October 2016 confirming only that he was then diagnosed with colon cancer. It is the Applicant's burden to persuade the Court his present medical condition prevents him from earning income. That requires more than him simply stating such is the case. There is no medical evidence before the Court to permit me to conclude the Applicant is incapable of working in any income-earning capacity.

[28] The Applicant testified he lives in a home purchased by the witness W.K. through funds gifted to her by a third party, one M.T., who currently funds all the Applicant's monthly living expenses including phone, electricity, groceries and property taxes. The Court has no details or specifics of the amounts required to fund the Applicant's monthly expenses. The Applicant's brief evidence that he uses a credit card to fund his expenses and the card balances are paid by M.T. gave the Court only a limited glimpse into a financial arrangement that seems, on its face, unusual.

[29] Courts have treated free or subsidized accommodation as income for the purposes of calculating child support (Payne, J. & Payne, M.; *Child Support Guidelines in Canada, 2012*; (Toronto: Irwin Law Inc., 2012) at 213-214.) The Applicant's benefactor pays the mortgage associated with the home he occupies, which is in my view analogous to either free or wholly subsidized accommodation.

[30] An arrangement such as the one which the Applicant described is not in the manner of a gift, nor is it a trust benefit or an encroachment on capital. The arrangement is not in the nature of the underwriting of a particular expense for a fixed period or for a particular reason. Rather, the Applicant clearly has access, for an indefinite time, to funding that he treats for all intents and purposes as equivalent to an income stream; as he incurs expenses they are paid monthly on his

behalf and for his benefit. There was no suggestion the Applicant is in any way limited or fettered in what expenses he might incur or in what amount(s). He testified his benefactor has simply taken it upon herself to continue the arrangement "as long as necessary". Whatever else the arrangement might represent, while it avoids the traditional identification of income sources, it cannot justify the Applicant circumventing his child support obligation.

[31] I am satisfied it is appropriate to treat the funds of his benefactor as income to the Applicant. While the benefactor has no financial responsibility to the child, the Applicant does. The benefactor has apparently assumed responsibility for the Applicant's expenses, and going forward, one of those will be his child support obligation.

[32] Sections 15-20 of the *Provincial Child Support Guidelines*, O.I.C.: 2017-143, N.S. Reg 83-2017, direct the Court on assessment of income for child support purposes. Section 19 gives the Court authority to impute income. While the Respondent did not request it, I am satisfied this is an appropriate case in which to impute income, applying the principles set out in *MacDonald v. Pink*, 2011 NSSC 421:

> [25] In **Smith v. Helppi**, 2011 NSCA 65, Oland J.A. confirmed the factors to be balanced when assessing income earning capacity at para. 16, wherein she quotes from the decision of Wilson J. in **Gould v. Julian**, 2010 NSSC 123. Oland J.A. states as follows:
>
> > 16. Mr. Smith argues that the judge erred in imputing income as he did. What a judge is to consider in doing so was summarized in Gould v. Julian, 2010 NSSC 123 (N.S. S.C.), where Justice Darryl W. Wilson stated:
> >
> > > [27] Factors which should be considered when assessing a parent's capacity to earn an income were succinctly stated by Madam Justice Martinson of the British Columbia Supreme Court, in Hanson v. Hanson, [1999] B.C.J. No. 2532, as follows:
> > >
> > > > 1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor". ...
> > > >
> > > > 2. When imputing income on the basis of intentional under-employment, a court must consider what is

> reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.
>
> 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
>
> 4. Persistence in unremunerative employment may entitle the court to impute income.
>
> 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
>
> 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.
>
> . . .
>
> [33] In Nova Scotia, the test to be applied in determining whether a person is intentionally under-employed or unemployed is reasonableness, which does not require proof of a specific intention to undermine or avoid child maintenance obligations.

[33] The Applicant is under-employed. He does not work and did not provide the Court with any evidence to support that he is disabled, medically limited or otherwise unable to work, or that he has been unsuccessful in securing employment. He spoke of his criminal record as being an impediment to finding work, but there is no evidence he has looked for employment since being released from incarceration several years ago.

[34] The Applicant testified he would be prepared to pay child support if and when employed, and that he would have no choice but to find work in the event his benefactor were ever to stop funding him. I infer from this he would work if he had to do so. The Applicant’s funded expenses are equivalent to income, and on that basis it is appropriate to impute income to him.

[35] The Court has no evidence to assist in calculating the proper quantum of imputed income. Such an assessment must be conducted fairly and rationally (*MacDonald, supra).* It is common practice in this Court, under circumstances where there is no other reliable detail upon which to assess a number representing the amount of imputed annual income, to extrapolate an annual income using the reasonable assumptions of full time employment at a minimum hourly wage rate. I am satisfied this is the appropriate analysis to use here. I take judicial notice that effective April 1, 2018, the minimum wage in Nova Scotia will be $11.00 per hour. Assuming a 40-hour work week, the Applicant's annualized income would be $22,880, requiring a payment of $165 per month pursuant to the *Guidelines (supra)*.

[36] Commencing April 1, 2018, the Applicant shall pay $165 per month for the support of A., payable to the Respondent through the Maintenance Enforcement Program. The Respondent's claim for child support was filed October 31, 2016, therefore it is reasonable to conclude the Applicant was put on notice of the claim by December 1, 2016. There is no evidence to mediate against a retroactive award within the framework of the four considerations set out in *D.B.S. v. S.R.G.*, 2006 SCC 37: reasons for delay in seeking support, the conduct of the payor parent, the past and present circumstances of the child, and whether the award might entail a hardship. A retroactive payment of $2,669.00 representing the period December 1, 2016 to March 31, 2018 is due pursuant to the calculations contained in Schedule "A" to this decision. It shall be payable at the rate of $100 per month (in addition to the table support amount due) effective April 1, 2018 until paid in full.

Issue No. 6 – Costs

[37] The Respondent pled costs in her Response. Neither party addressed the issue. In any event, this decision reflects the parties had mixed success – the Applicant succeeded in securing unsupervised parenting time, and the Respondent succeeded on the matter of child support. Custody was unopposed. Exercising my discretion pursuant to *Civil Procedure Rule* 77 to do justice as between the parties, I have concluded it is appropriate for each party to bear their own costs. This is in addition to my direction to the parties, at the commencement of the hearing, that each shall pay costs to the court in the token amount of $100 (for failure to file all materials directed and failure to adhere to filing deadlines imposed in preparation for the final hearing) payable by March 22, 2018.

Conclusion

[38] In summary, the Court orders:

a. the Respondent shall have custody of the child;

b. the Applicant shall have weekly parenting time with the child, pursuant to the schedule discussed in paragraph 23 of this decision;

c. the Applicant shall pay to the Respondent $165 per month for prospective support of the child effective April 1, 2018;

d. the Applicant shall pay to the Respondent $2,669.00 in retroactive child support due in monthly installments of $100 effective April 1, 2018;

e. having no evidence or submissions on the matters, the Court declines to address:

i. the Respondent's claim for mobility;

ii. the Respondent's claim for child support under the category of special expenses.

f. each party shall bear their own costs and pay costs of $100 to the Court no later than March 22, 2018.

[39] Counsel for the Applicant shall prepare the Order giving effect to this decision, consented to as to form only by Counsel for the Respondent, to be filed with the Court within 15 days of release of this decision.

Beaton, J.

SCHEDULE “A” (to paragraph 36)

Period	NS Hourly Wage Rate	Monthly Table Amount	Amount Due
December 2016	$10.70/hr ($22,256/yr.)	$166.00	$166.00
January - March 2017	$10.85/hr ($22,568/yr.)	$169.00	$507.00
April – November 2017	$10.85/hr ($22,568/yr.)	$169.00	$1,352.00
December 2017 *	$10.85/hr ($22,568/yr.)	$169.00	$161.00
January -March 2018*	$10.85/hr ($22,568/yr.)	$169.00	$483.00
		TOTAL:	**$2,669.00**

*Denotes application of 2017 tables which came into effect November 22, 2017.